

Customs infringements and sanctions

Impact Assessment ([SWD \(2013\) 513](#), [SWD \(2013\) 514](#), (summary)) of a Commission 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)

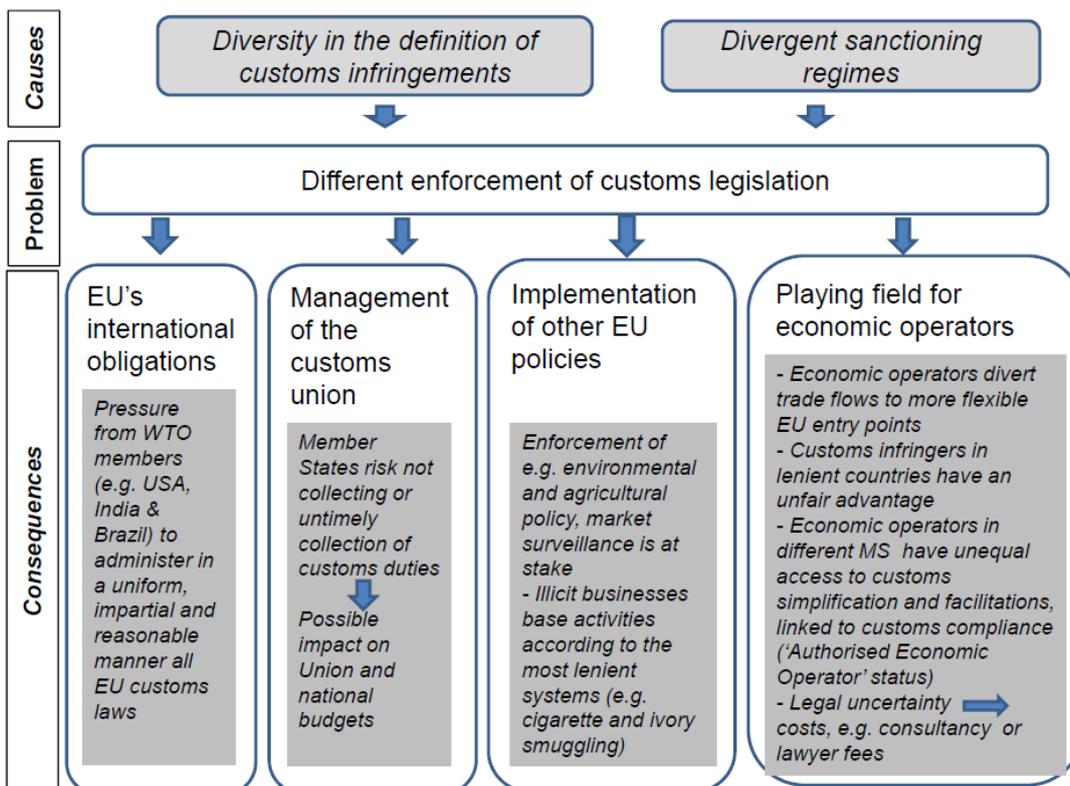
Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's Impact Assessment (IA) accompanying the above proposal, submitted to the Parliament in December 2013. Although customs legislation is fully harmonised, its enforcement follows 28 different set of rules. Therefore, infringements of harmonised obligations are punished by divergent sanctions, and this poses several problems, for instance to businesses.

Problem definition

The IA clearly identifies the problem in need of possible EU action. This diagram complements the one presented in the IA (p. 17) by including and highlighting in italics additional information drawn from the IA.

Graphic 1: Problem tree



According to the Commission IA, '[s]muggling, evasion of import or export duties, tax evasion / fraud, tax receiving, importing or exporting goods illegally, receiving stolen goods, and forgery of business documents including false invoices are the most common types of customs related infringements.' (IA, Annex 1-C) Causes, problems and consequences - and the links between them - are substantiated by logical arguments and evidence. To provide just two striking examples: firstly, an infringer may be punished by criminal sanctions in a Member State, even for minor errors, and by non-criminal sanctions in a different Member State in case of an infringement involving as much as 50,000 euros (IA, p. 18, 27 and Annex 1-B). Therefore, some businesses in some Member States are disadvantaged. Secondly, if - because of the enforcement issues - a Member State does not collect custom duties, which represent 15 per cent of the Union budget, it may have to compensate this loss with its own increased contribution to the EU budget (IA, p. 21-23). All consequences seem to be initially presented as equally important in different respects, without any explicit prioritisation.

Objectives of the legislative proposal

The IA presents a hierarchy of objectives broadly coherent with the problem tree above. However, when setting objectives, more attention is given to costs and obstacles for economic operators. Costs are presented in the problem tree above as an indirect consequence of legal uncertainty. The IA introduces here an operational, i.e. more direct, objective to 'reduce costs and obstacles... for companies wishing to engage in customs formalities in other Member States' (IA, p. 32). This seems to be a signal that this problem has a higher priority than the other issues.

Range of options considered

The options considered by the IA revolve essentially around leaving the situation as it is (A); dealing only with the second cause of the problem, i.e. divergent sanctioning regimes (B); or dealing with both causes with an increasing degree of ambition, extending respectively from non-criminal sanctions (C), to criminal sanctions as well (D). In particular:

- Option B approximates non-criminal sanctions only, but without re-defining infringements;
- Option C provides a new list of infringements and approximates non-criminal sanctions only;
- Option D provides a new list of infringements and approximates both non-criminal and criminal sanctions.

Option C is the Commission's preferred option.

The detailed description of the options can be found on pp. 32 to 38 of the IA. Option B is construed in a way which makes it scarcely possible, as it is tied to a future reform of the recently recast Union Customs Code. The IA states that 'it will only be feasible in a very long term and will follow the same complex and time-consuming adoption procedure as the Recast' (IA, p. 36). One wonders whether the same option could in principle be achieved without changing the Union Customs Code, but with a new piece of legislation, as is foreseen in options C and D.

The IA states that this initiative is in line with the European Parliament's recommendations on the subject (p. 9). This appears to be the case, both for the general thrust of the initiative and for the call to have 'some flexibility... in order to enable the Member States to continue, where possible, to tailor their approach in relation to logistical speed, complexity and volume of goods handled' (T7-0546/2011; rapporteur Matteo SALVINI). This is met, for instance, by the chosen legal instrument, a Directive. However, some options mentioned in the EP reports related to the issues at hand do not seem to be explicitly analysed in this IA. This refers, for example, to the calls

- 'to consider seriously the possibility of establishing a unified EU customs service'.(T6-0247/2008; rapporteur Jean-Pierre AUDY);

- 'to propose additional concrete benefits which could be granted to traders holding AEO [Authorised Economic Operator] certificates and which would encourage businesses to apply' (T7-0546/2011); and
- to put in place 'adequate training for customs officers and economic operators' (T7-0546/2011).

Scope of the Impact Assessment

The IA assesses all options mainly for their economic impacts, notably on the European internal market, on international trade, on competitiveness of businesses, including compliance costs and administrative burden. It also analyses fundamental rights and the impact on the enforcement of the EU environmental policy and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). To some extent, the analysis seems to be worded to justify the Commission's preferred option, rather than to present a balanced overview of pros and cons of various options. For instance, the IA mentions that compliance costs may be higher in Member States with only criminal sanctions exclusively for Options B and D (IA, p. 43, 52), although this should apply to the retained option C as well (IA, p. 47).

- **SME test / Competitiveness**

The IA analyses the impact on businesses, including SMEs and micro-enterprises, quoting the savings and costs stated by the businesses which took part in the Commission's stakeholder consultation. This targeted survey revealed also somewhat mixed opinions on the course of action to be followed (see 'Stakeholder consultation' below for further information).

- **Relations with third countries**

The IA informs that there is strong international pressure toward the Union to solve this issue in the framework of the World Trade Organisation. USA, India and Brazil are mentioned, but the analysis does not extensively expand on this, quoting confidentiality reasons (IA, p. 17-18).

The Trade Facilitation Agreement, which was under negotiation at the time of the Commission IA, has now been signed. Although a legal analysis of this Agreement is beyond the scope of this initial appraisal, it is worth noting that the agreement contains provisions on penalty disciplines (Article 6.3). Moreover, Members of a customs union, such as the EU one, may establish or maintain common enquiry points at the regional level to answer enquiries of governments, traders and other interested parties on various matters, including appeal procedures, relevant for sanctions (Article 3.2).

For further information: http://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm

- **Budgetary or public finance implications**

The IA claims that implementing the chosen option would not lead to higher costs for Member States, essentially because obligations, sanctions and procedural rules would not be new for them (IA, p. 47-48).

Simplification and other regulatory implications

The Commission states that this initiative is consistent with, and complementary to, the proposal on the *Fight against fraud to the Union's financial interests by means of criminal law* (COM (2012)363). It clarifies that the latter covers 'only partially the scope of customs infringements and sanctions as [it is] limited to the field of the Union's financial interests which in this case refer to customs duties' (IA, p. 38). This appraisal has the benefit of being able to expand on this, as that proposal has in the meantime passed the first reading stage in Parliament.

According to that proposal's Article 3, which was not amended by the Parliament:

'Member States shall take the necessary measures to ensure that the following conduct, when committed intentionally, is punishable as a criminal offence: [...]

(b) in respect of revenue, any act or omission relating to:

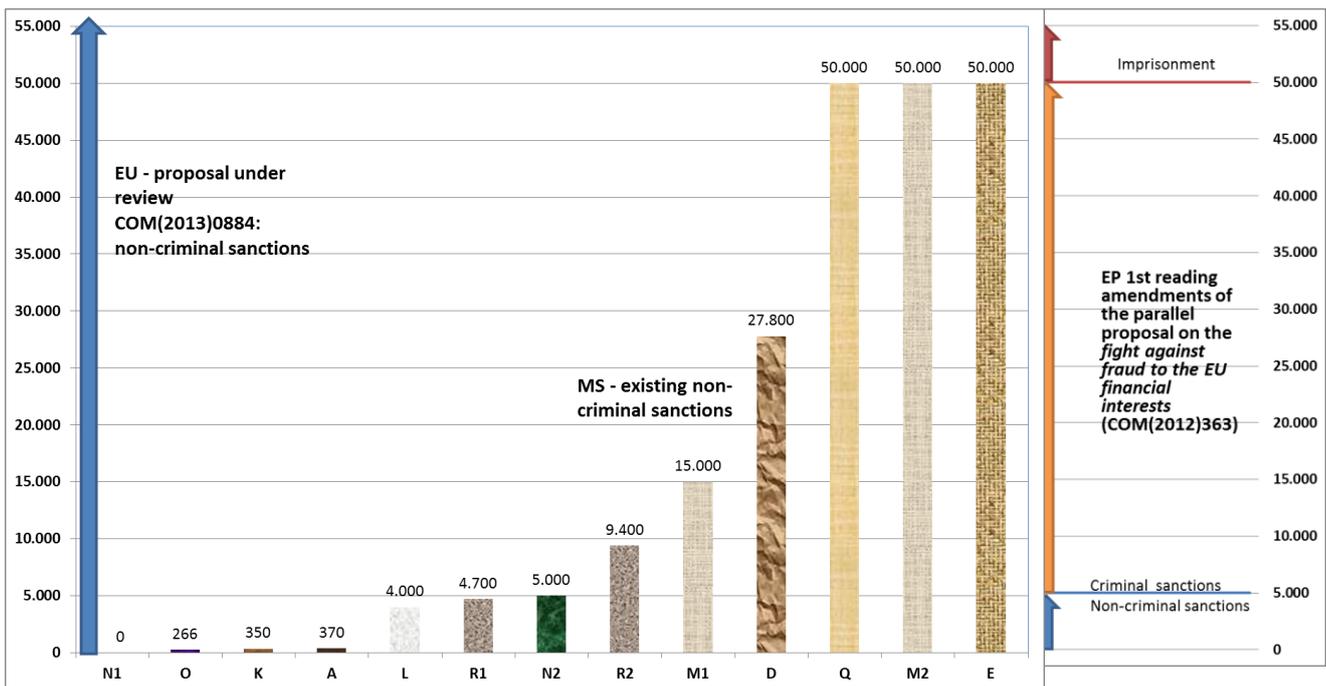
- (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf,
- (ii) non-disclosure of information in violation of a specific obligation, with the same effect, or
- (iii) misapplication of a legally obtained benefit, with the same effect.

In April 2014, the Parliament adopted at first reading a legislative resolution on this proposal by a 90 per cent majority. On that occasion, Parliament adopted amendments to the effect that in cases of offences involving damages and advantages of less than 5,000 euros, and not involving aggravating circumstances, Member States may provide instead for the imposition of sanctions other than criminal penalties.

Secondly, criminal offences involving an advantage or damage of at least 50,000 euros should be punishable by imprisonment. The Parliament has extended the scope for imprisonment, which had in the Commission's proposal a 100,000 euros threshold, and restricted the scope for non-criminal sanctions (10,000 euros in the Commission's proposal).

It is useful to compare these thresholds with the ones presented in the IA. Presenting graphically the wealth of available statistical information might have improved the usefulness of the IA for policy-makers.

Graphic 2: Comparison of existing and proposed sanctions for customs duties' infringements



In the graph above, the various columns refer to anonymised Member States which have thresholds in duty and tax terms, as presented in the IA under review (IA, Annex 1-B). These thresholds are only one of the elements taken into account to decide on the procedure to follow. However, as a general rule, if the amount of the avoided or jeopardized duties and taxes exceeds the threshold, criminal proceedings shall be initiated, otherwise non-criminal sanctions are applied. Some Member States are shown twice, as they have more than one threshold. Other Member States do not feature in this graph, either because they only have criminal sanctions in place (eight MS), because they base their thresholds on other elements, for instance the value of the goods, or because data is not available in the IA. Once the proposal under review is adopted, these regimes would be replaced by non-criminal sanctions applicable in all Member States for a list of selected

infringements (blue arrow on the far left). The arrows on the far right refer to the thresholds in the parallel proposal COM(2012)363, as it was amended at first reading by the Parliament in April 2014.

Subsidiarity / proportionality

The Commission had initially stated, in the IA and in the Explanatory Memorandum, that this is an area of exclusive competence of the Union. The Swedish Parliament issued a reasoned opinion, contesting the legal basis chosen (Article 33 of the TFEU) and considering certain parts of the proposal not to be compatible with the principle of subsidiarity. Interestingly, on 5th June 2014, the Commission corrected the initial proposal replacing some paragraphs in the subsidiarity section and, *de facto*, also updating the Impact Assessment in this respect. In the latest version of the proposal, there is no longer any mention of the exclusive competence of the Union in this area. The Commission states that action by the EU is necessary, in accordance with the principle of subsidiarity, as the objective of this directive cannot be sufficiently achieved by Member States alone. The deadline for the subsidiarity check is now 31st of July 2014.

As far as proportionality is concerned, the option to approximate criminal sanctions was discarded, *inter alia*, on proportionality grounds, as 'it would be considered intrusive and not very well accepted by Member States' (IA, p. 52).

Quality of data, research and analysis

This IA presents publicly, in some cases for the first time, the large amount of information that has gone into the preparation of the proposal, including legal and economic studies. In some cases, the IA fails, however, to answer some questions which would move the analysis from a theoretical level to a more practical one, for example: which are the entry points used in practice by legal and illegal economic operators? Does this show that there is an actual link with the more lenient regimes? There are, moreover, some presentation issues. Annexes make up over 600 pages and they are hard to navigate, as pages are not numbered. The largest annex is the Final Report of the Project Group on Customs Penalties (Annex 1-B), for which an executive summary is available (Annex 1-C). This Final Report seems to have been drafted by Member States' representatives and reveals an astonishing level of complexity. An effort at least to improve the layout could nevertheless have helped to improve its readability. Finally, more graphics would have facilitated comparison among Member States and would have helped political decision-makers in drawing conclusions.

Stakeholder consultation

Economic operators are identified as the main stakeholders affected by the problem. They were consulted, together with other stakeholders, most notably Member States, with four targeted consultations. The input of Member States appears appropriate. The Commission made a considerable effort to reach out to businesses. The response rate of a first consultation sent to trade associations was rather limited, as only five responses were received, which however encompassed several relevant industry sectors. A second consultation targeting enterprises received around 170 responses, mostly from SMEs. The results of this second consultation can be interpreted in different ways. It is indeed correct to state that 26 per cent of the respondents backed the Commission's retained option (C), and that 21 per cent favoured an even more ambitious approach (B). However, it should not be underestimated that 36 per cent preferred option B) and that 12 per cent deemed that no approximation was needed (the remaining 5 per cent did not answer).

Monitoring and evaluation

The IA presents simple and, at first sight, effective monitoring arrangements. For instance, Member States will be asked to provide information on case studies where information is currently available, to allow comparison. An indicator to be monitored is the number of companies applying for and being granted

Authorised Economic Operator status (IA, p. 56). The implementation plan accompanying the proposal (SWD(2013) 515) acknowledges the implementation challenges this proposal faces. It indicates a single contact point and officials in charge of this task at the Commission. This can be considered a good practice.

Commission Impact Assessment Board

The first opinion of the Commission's Impact Assessment Board was negative. At the second scrutiny of the IA, the Board issued a positive opinion, available here:

http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/sec_2013_0659_en.pdf

Not all comments expressed in the opinion seem to have been followed up, for instance the one in the section below regarding details on sanctioning fines.

Coherence between the Commission's legislative proposal and IA

The legislative proposal of the Commission follows the recommendations expressed in the IA to approximate non-criminal sanctions (option C). However, the IA remains at a fairly high level of generalisation, probably because of the complexity and the sensitivity of the matter. The details of 'how the range of applicable sanctioning rules will be decided' - to use the Commission's Impact Assessment Board's words - are not clearly spelled out. For instance, in the Commission proposal, Member States must ensure that customs infringements are sanctioned by pecuniary fines ranging, depending on the nature and seriousness of the infringement, from 1 per cent to 30 per cent of the value of the goods or, if the infringement is not related to specific goods, from 150 to 45,000 euros (Articles 9 to 11). Annexe 1-B contains information about the amount of pecuniary fines in various Member States. However, the values in the proposal do not seem to result from any analysis in the IA.

Conclusions

The Commission's impact assessment tries to tread carefully in a highly complex and sensitive area, where Member States have widely different legal traditions. The IA argues that there is a problem to be solved at EU level, something which is confirmed by stakeholder consultations and by the analysis presented. It remains at a fairly high level of generalisation, comparing broad options. The assessment seems to take into account the general thrust of EP adopted positions in the field. However, some options proposed therein, which could potentially contribute to solving the problem, do not seem to have been considered. Moreover, it is not clear from the IA how the values of some of the sanctions in the legislative proposal have been established.

This note, prepared by the Ex-Ante Impact Assessment Unit for the Committee on Internal Market and Consumer Protection (IMCO) of the European Parliament, analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at: www.europarl.europa.eu/committees/en/studies.html

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