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Customs Sanctions: The Difficult Relationship between International Harmonisation and Nation Peculiarities through the Lens of the Proportionality Principle

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In contrast to many other areas of customs law, customs infringements are subject to few international and EU coordinating rules. Nevertheless, the EU Court of Justice has been able to establish general principles capable of guiding the legislators and jurisprudence of each Member State, as witnessed by the Italian case, in which the application of the European principle of proportionality has led to a restrictive interpretation of the domestic customs sanctions regulations.

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International principles

Customs sanctions, both in substantive and procedural terms, have traditionally been part of the legal system administered solely by each sovereign nation, in respect of which different countries have seldom managed to agree upon common principles and rules.

Whereas other areas of customs law have witnessed a gradual trend towards coordination of the reference rules, the same cannot be said of penalties, where deep differences persist amongst the legal systems of the WTO member countries and also among the Member States of the European Union.

A starting point in any appraisal of the international panorama is the Revised Kyoto Convention, which has shown how the harmonisation of the sanctions systems can help encourage growth in international trade and combat fraud.[1] Amongst

[1] In particular, the Convention defines a customs offence as "any breach, or attempted breach, of Customs law" and affirms that each party to the Convention "shall define Customs offences and specify the conditions under

its general principles, the Convention refers to gross negligence (whereby substantial penalties should not be imposed for errors that are inadvertent and do not involve fraudulent intent or gross negligence) and proportionality, whereby the penalty should be no greater than necessary to discourage a repetition of such errors (WCO, 1999).

Mention should also be made of the Nairobi Convention, adopted at the WCO and containing the first international definition of smuggling.[2] This international convention obliges countries to impose penalties both on 'extra-inspectional' and 'intra-inspectional' smuggling. The first type of smuggling involves the circumvention of customs controls when non-Union goods are imported and, in particular, the failure to present them to customs for release for free circulation. In contrast, 'intra-inspectional' smuggling takes place if goods are presented to customs as required, while engaging in fraudulent practices, leading the bodies responsible for customs controls to commit errors (e.g., through the deliberate use of invalid certificates of preferential origin).

However, the Convention does not include the creation of a common penalty system among its objectives, and so individual countries are free to apply the penalties they consider most appropriate.

The gradual realisation of the need to adopt a common sanctions framework to serve as a reference so as to reduce uncertainty for operators (who previously had to familiarise themselves with the penalties applicable in each country in which they operate) and combat trade diversion towards countries with less strict regimes led to the adoption at the WTO of a number of principles and rules, set down in the Trade Facilitation Agreement (TFA) (WTO, 2017, art. 6, para. 3.1).

The provisions incorporated into the TFA fill the gap left by international customs law. Over the years, the WTO has promoted numerous international agreements dealing with substantive rules of customs law, whereas until recently, countries have opposed consistently any regulatory framework governing the consequences of violations of such common provisions, precisely because they considered that such aspects should be directly regulated in strategic policy decisions taken at the national level.

It is only in art. VIII of the WTO Agreement (GATT, 1994) that provision is made concerning the non-imposition by member countries of substantial penalties for minor breaches of import and export regulations relating to customs documentation, stipulating that where such breaches consist of omissions or mistakes which are easily rectifiable and do not involve intent or gross negligence, the penalty should only be of a dissuasive nature.

However, it was only under the TFA that a general definition of customs sanctions was set down for the first time. The TFA also codifies the principle of penalty disciplines. According to the TFA, penalties are "those imposed by a Member's customs administration for a breach of the Member's customs laws, regulations, or procedural requirements." This is clearly a broad and generalised definition, which refers back to the national customs legislations of the WTO member countries.[3]

The TFA also provides for the application of other important principles.

These include the obligation to notify any penalty in writing, in observance of the right of defence and in accordance with the principles of le-

which they may be investigated, established and, where appropriate, dealt with by administrative settlement" (WCO, 1999, Chapter 1).

[2] Understood as referring to "fraud consisting in the movement of goods across a Customs frontier in any clandestine manner" (WCO, 1977 art. 1). The Convention is based on the idea of mutual assistance amongst customs administrations in the context of judicial or administrative proceedings. Specifically, the purpose of such assistance is to exchange information relating to goods, capital and persons for the prevention, investigation, and repression of customs offences.

[3] Hence this rule reflects a consolidated international principle whereby infringements of customs regulations are punished as set out in the provisions of the legislation of the country where such infringements occur. This means that the concept of sanction under the TFA is non-specific and includes any type of violation. In particular, the provision includes both substantive violations, i.e., those resulting in a loss of tax revenues and formal violations involving infringements of procedural rules not entailing any loss of revenues.

gality and transparency, adequately setting out the grounds.[4]

The principles whereby a penalty should refer specifically to a person[5] and be proportional[6] are also recognised and hence a penalty must depend on the facts and circumstances of the case and must be commensurate with the degree and severity of the breach. It follows that the provisions of each country – in order to comply with the legal criteria laid down in the TFA – must ensure that the infringer is one and the same person as the addressee of the penalty and that the penalty is commensurate with the severity of the violation committed.[7]

The importance of customs compliance is particularly emphasised. In this regard, the TFA expressly states that "When a person voluntarily discloses to a Member's customs administration the circumstances of a breach of a customs law, regulation, or procedural requirement prior to the discovery of the breach by the customs administration, the Member is encouraged to, where appropriate, consider this fact as a potential mitigating factor when establishing a penalty for that person" (TFA, art. 6, para. 3.6). On the other hand, "Members agree on the importance of ensuring that traders are aware of their compliance obligations, encouraging voluntary compliance to allow importers to self-correct without penalty in appropriate circumstances, and applying compliance measures to initiate stronger measures for non-compliant traders" (TFA, art. 12, para. 1.1).

Provision is made internationally for incentives to encourage the correction of errors by operators themselves.

Finally, in view of encouraging cooperation between customs authorities and traders, provision is also made for consideration by member countries of voluntary disclosure of breaches as a mitigating factor when establishing a penalty (TFA, art. 6, para. 3.6). In fact, WTO members are agreed on the importance of ensuring that traders are aware of their compliance obligations and encourage voluntary compliance, thus enabling traders to rectify breaches of their own accord and not incur any penalties (TFA, art. 12, para. 1.1).

The European panorama

The fragmentation at the international level of sanctions systems is something that also characterises EU law, although the latter is the first example worldwide of a fully-implemented customs union.

However, although substantive customs law has been fully harmonised, EU legislators have left the punishment of infringements of customs regulations to be dealt with according to the provisions of each Member State, with the result that the sanction for any given violation may differ notably from one EU country to another.

The adoption of a shared sanctions platform is regarded by the European Parliament as the missing element that would enable the effective application of common customs law (European Parliament, 2007; European Parliament, 2011).

Currently, in fact, whereas 16 Member States[8] (out of a total of 24 states examined in a comparative study) stipulate both administrative and criminal sanctions depending on the seriousness of the

[4] The penalty notice must indicate "the nature of the breach and the applicable law, regulation, or procedure under which the amount or range of penalty for the breach has been prescribed" (WTO, 2017, art. 6 para. 3.5).

[5] "Penalties for a breach of a customs law, regulation, or procedural requirement are imposed only on the person(s) responsible for the breach under its laws" (WTO, 2017, art. 6, para. 3.2).

[6] "The penalty imposed shall depend on the facts and circumstances of the case and shall be commensurate with the degree and severity of the breach" (WTO, 2017, art. 6, para. 3.3).

[7] It follows that where a penalty envisaged under a national law is disproportionate or fails to take into account the principle whereby penalties must be specific to the offender, it runs contrary to art. 6, para. 3, TFA.

[8] Cf. a study conducted by the project group set up by the European Commission under the 'Customs 2013' programme. For more information on the differences between European sanctions systems, please refer to the Report drafted for the Proposal for a Directive 13 December 2013, No. 2013/0432, p. 2. For literature on this subject: Willems & Theodorakis (2016), p. 292.

infringement, in eight of these countries such violations[9] are always handled as criminal offences.

Wide-ranging differences can also be discerned in respect of the attribution of culpability, since 11 Member States provide for the possibility of punishing the offender based merely on his objective liability, i.e., regardless of the existence of any intent or negligence on the part of the infringer, whereas no penalties are applicable under other legal systems unless intentional or negligent conduct can be proven.

Elsewhere, as regards the addressee of the penalty, in many Member States (9 of the 24 countries examined) sanctions may only be imposed on natural persons, excluding the liability of legal entities for customs violations.

Finally, other important differences are (also) found in respect of the limitation period applicable to sanctions. This may vary – according to the legislation examined – from a minimum of one year up to thirty years.[10]

Given that this fragmentation is an obstacle to the proper application of the common substantive provisions, the European Commission drafted a Proposal for a Directive, 13 December 2013, No. 2013/0432 on a common sanctions system, applicable in the entire territory of the Union.

The rationale behind this proposal was based on the idea that the disparity of treatment in customs-related matters negatively affects the conditions of free competition within the EU market, since it favours traders operating in Member States that have customs legislations that are less strict in their treatment of customs violations.

This situation has also an impact on access to customs facilitation measures and, in particular, on the process for obtaining the status of AEO, since the requirement that must be met before this status is granted (the absence of any serious infringements) differs from one Member State to another (European Commission, 2013, recital 3).

Moreover, from an international perspective, the existence of different sanctions systems has given rise to concerns in some WTO member countries regarding observance by the European Union of its international obligations.[11]

The Proposal for a Directive 2013/0432 was once again being examined by the European Commission and substantially amended by the European Parliament.[12] The proposal provided for an exhaustive list of infringements of the regulations contained in the EU body of customs law together with the applicable administrative penalties.

Following the amendments made by the European Parliament, violations of customs regulations would have been punishable only if a subjective element was involved, i.e., if the offender has committed the infringement through his or her negligent or intentional conduct, whereas any objective liability is excluded.[13]

The Proposal for a Directive also provided for different types of sanction – in recognition of the principle of proportionality – depending on the seriousness of the infringement, distinguishing between minor and serious infringements of customs regulations.[14]

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[9] Member States whose systems foresee both criminal and non-criminal infringements and sanctions have different financial thresholds before the infringement is classified as an offence: in particular, the threshold triggering a criminal sanction, as explained, varies between EUR 266.00 and EUR 50,000.00 (European Commission, 2013).

[10] In fact, one EU country does not even contemplate any limitation period for imposing customs sanctions. Report on the Proposal for a Directive, 13 December 2013, p. 3. For a more in-depth analysis of the differences between European sanctions systems, please refer to Willems & Theodorakis (2016), p. 292.

[11] At the WTO level, the possible inconsistencies in view of the fragmentary nature of penalties for infringements of EU customs regulations (Limbach, 2015, p. 53).

[12] See: European Parliament (2016).

[13] However, in the version presented by the European Commission, the proposal for a directive envisaged numerous cases of objective liability that were set aside following the amendments made by the European Parliament, which pointed out that "Strict liability provisions ..., in addition to questioning some basic legal principles such as the presumption of innocence, as it does not require an element of fault to sanction" (European Parliament, 2017).

[14] In relation to minor infringements of customs regulations, art. 9 of the proposal provides that national leg-

In view of eliminating the differences in treatment due to the different limitation periods for investigating infringements, the proposal also introduced a single limitation period of four years, running from the day on which the customs infringement is committed or, in the case of continuous or repeated customs infringements, running from the day on which the act or omission constituting the customs infringement ceases (art. 13).

Furthermore, provision was made for a mechanism to suspend administrative proceedings concerning a customs infringement if criminal proceedings have been initiated in respect of the same facts and against the same person so as to avoid the existence of overlapping proceedings (art. 14).

Finally, the power to impose sanctions by Member States should have been applied in accordance with the principle of proportionality, i.e., it should take into account the specific circumstances under which the infringement has arisen and, in particular, the following facts: whether the infringement was committed through negligence or intentionally; the amount of the evaded import or export duty; the level of cooperation with the competent authority in the proceedings or the voluntary disclosure of the infringement by the operator; the fact that the person responsible for the infringement is a small or medium-sized enterprise, with no prior experience in customs-related matters and so on.[15]

Although this proposal was in line with recent trends of harmonisation of customs legislation in each Member State, there has been no lack of dissenting voices in the doctrine since its publication (Lyons, 2018, p. 76), emphasising a possible breach of the principles of subsidiarity and proportionality of EU intervention, which would have gone too far in relation to the needs mentioned.

Indirect confirmation of this observation is provided by the European Commission's withdrawal of the proposal Directive,[16] which, following the dissenting opinion of the European Parliament and harmonisation of criminal offences obtained with the PIF Directive, probably considered the standardisation of common customs infringements to be excessively intrusive on the freedom of the Member States.

ECJ interpretive guidance

With the withdrawal of a common sanctions platform for customs infringements, there remain profound differences between EU legal systems on customs-related infringements.

The CCC favoured the traditional arrangement whereby rules governing customs-related infringements were the prerogative of Member States exercising their national sovereignty. Nevertheless, the Court of Justice intervened on many occasions when the customs code of 1992 was in force, arguing that, despite the absence of common rules on sanctions, Member States were obliged to abide by EU law and its general principles.[17] Based on this criterion, the Court of Justice carefully examined the conformity of sanctions envisaged by national legislators with Community principles and affirmed that, in order to decide whether a national sanction conformed to this principle, "account must be taken, inter alia, of the nature and the degree of seriousness of the infringement which the penalty seeks to sanction and of the means of establishing the amount of the penalty."[18]

islation may impose a pecuniary fine equal to 70% of the duty or, if the infringement is not related to the evasion of customs duties, a pecuniary fine of up to EUR 7,500. Elsewhere, serious infringements of customs regulations should be punishable with a pecuniary fine of between 70% and 140% of the duty or, if the customs infringement is related to the value of the goods, between 15% and 30% of the value of the goods.

[15] Articles 8-*bis* and 8-*ter* of the proposal for a directive referred to, in the rewording of the text following the amendments by the European Parliament (European Parliament, 2017).

[16] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0929%2802%29

[17] Court of Justice, 26 October 1995, C-36/94, Siesse; Court of Justice, 16 December 1992, C-210/91, Commission v. Greece, at curia.eu.

[18] Court of Justice, 20 June 2013, C-259/12, Rodopi-M 91, at curia.eu, p. 38.

In fact, the Court of Justice has reiterated on many occasions[19] that although Member States, pending harmonisation of EU rules, are free to choose to apply the sanctions they deem most appropriate, they must, nevertheless, exercise their powers in observance of Community law and its general principles, which represent a necessary limit to the Member States' right to legislate. In this regard, the Court of Justice has recently reiterated that in the absence of harmonisation of EU legislation in the field of penalties, Member States "must, however, exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principle of proportionality."[20] Hence it falls to the national courts to assess, in any given case, whether the fine imposed by the customs administration exceeds what is required to achieve the objective of ensuring the correct collection of tax.[21]

The principles whereby penalties must be effective, proportional and dissuasive, now an integral part of the UCC (art. 42), were established and expressed by the Court of Justice, together with the principles whereby penalties must be equivalent, defined by law, and provide legal certainty.

In relation to the principle whereby penalties must be defined in law and provide legal certainty, the Court affirmed that the wording of the offence and the penalty should be precise and certain so as to enable a trader to familiarise himself/herself with a sufficient degree of clarity with the content of the provision.[22] In addition, it should not be possible to apply retroactively any amendment to the provision on sanctions if this might have a negative impact on the operator.[23]

Mention has already been made of the fact that the notion of an operator acting in good faith under Union rules is especially important, so much as where certain objective conditions are met – legitimate expectations on the part of the trader (UCC, art. 119) or special circumstances (UCC, art. 120) – this may constitute grounds not only for exemption from penalties but also from payment of customs duties.

The concept of negligence is also widely found in EU case law. This concept, in particular, excludes the imposition of sanctions[24] in the absence of negligent conduct by a trader.

The protection of an operator's legitimate expectations in relation to sanctions is in line with the consistent case-law generated by the Court of Justice and with principles that have been enshrined at the international level, prohibiting Member States from imposing heavy sanctions for minor infringements of customs regulations concerning documentation. Furthermore, in the case of omissions or mistakes that are easily rectifiable and which occur without fraudulent intent or

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[19] Court of Justice, 6 February 2014, C-242/12, Belgian Shell; Court of Justice, 20 June 2013, C-259/12, Rodopi-M 91; Court of Justice, 19 July 2012, C-263/11, Ainārs Rēdlihs; Court of Justice 12 July 2001, C-262/99, Louloudakis, all of which can be found at curia.eu.

[20] Court of justice, 4 March 2020, C-655/18, Schenker EOOD, at curia.eu.

[21] Court of Justice, 15 April 2021, C-935/19, Grupa Warzywna Sp. z o.o, at curia eu.

[22] In particular, the Court has affirmed that "the principle that offences and penalties must be defined by law requires the law to give a clear definition of offences and the penalties which they attract. That requirement is satisfied where the individual concerned is in a position to ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable" (Court of Justice, 22 October 2015, C-194/14, AC-Treuhand v. Commission, p. 40, at curia.eu). The Advocate General of the Court of Justice, in his 'view' of 26 January 2016 in relation to the case of 15 February 2016, C-601/15, J. N. v. Staatssecretaris van Veiligheid en Justitie, at curia.eu, recognised the need for "every law to be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen — if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail".

[23] The principles of the legality and the non-retroactive nature of penalties for criminal offences are recognised in the Charter of Fundamental Rights of the European Union (art. 49).

[24] Court of Justice, 15 July 2010, C-234/09, Skatteministeriet v. DSV Road A/S, in ECR, 2010, 7333; Court of Justice, 21 December 2011, Vlaamse Oliemaatschappij NV, in ECR, 2011, 14191; Court of Justice, 8 May 2008, joined Cases c95/07 and C96/07, Ecotrade, all of which can be found at curia.eu.

gross negligence, the sanctions should only be of a dissuasive nature.[25]

In addition, in order to be effective, the provision must be dissuasive, i.e., it should serve to dissuade the person from committing the infringement.[26]

The provisions of the UCC

The UCC has set down the essential principles to which reference should be made when harmonising sanctions legislation in EU countries for the first time. The rationale behind this move is that the disparity of treatment stemming from the differences among the various sanctions systems within the EU detracts from the proper application of substantive customs provisions and that the fact that customs sanctions have not been harmonised is one of the reasons for the existence of trade distortions and trade diversion within the single market.[27]

The previous customs code made no provision for sanctions for infringements of customs regulations, with the result that each Member State has maintained a high degree of autonomy when laying down sanctions. It was explained above how the Court of Justice, over the years, has established certain essential 'common principles' which, albeit not codified, have nevertheless been binding on legislators and courts in EU countries.

For the first time, the new customs code introduces a specific provision on sanctions. The UCC, Art. 42 provides that sanctions must[28] be 'effective, proportionate and dissuasive', thus incorporating certain fundamental principles developed and found in ECJ case law.

The principle of proportionality[29] requires that customs sanctions should be commensurate to the seriousness of the infringement and to the *mens rea* of the infringer and that the penalty should not exceed what is required to prevent the evasion of the duties, the correct collection of the tax and compliance by the taxpayer with his/her formal obligations. In other words, in order for the sanction to be legitimate, it must be commensurate to the nature and seriousness of the infringement.[30]

This is a principle that is already recognised at the international level and is also enshrined in the

[25] WTO Agreement, Art. VIII (GATT, 1994).

[26] This principle reflects the provision contained in the Revised Kyoto Convention, which provides for the imposition of a penalty wherever it is considered that this is necessary to discourage a repetition of errors but that such penalties should not be greater than is necessary for this purpose (WCO, 1997, chapter 3, art. 3.39).

[27] The report of the European Parliament on the modernisation of customs contains an express request for "increased cooperation and exchange of best practice in relation to the collection of VAT on imported goods, the opening hours of customs services, and fees and penalties for non-compliance with the Community Customs Code, as existing differences are resulting in trade distortions" (European Parliament, 2011).

[28] Moreover, the obligation incumbent on national legislators to abide by these principles is more than just a formal stipulation given that the UCC expressly requires Member States to notify the Commission of any national provisions in force and to notify it of any subsequent amendments affecting those provisions (UCC, art. 42, para. 3).

[29] The principle of the proportionality of penalties was not explicitly enshrined in the previous customs code, although the Court of Justice has clarified on many occasions that "the Member States must comply with EU law and its general principles and, consequently, the principle of proportionality" (Court of Justice, 17 July 2014, C-272/13, Equoland, at curia.eu; of the same tenor, Court of Justice, Belgian Shell, *op.cit.*; Court of Justice, Rodopi M-91, *op.cit.*; Court of Justice, Ainārs Rēdlihs, op.cit., all of which can be found at curia.eu).

[30] It follows, for example, that a formal infringement of the provision cannot be equated, in terms of the sanction applicable, to cases involving fraud, since the subjective element informing the offender's behaviour differs, and so "such belated payment cannot be equated with evasion" (Court of Justice, 2014, Equoland, op.cit.). Proportionality of the sanction also means that if alternative measures may be imposed on traders, the customs authorities (or the judge during appeal proceedings) must adopt the measure that is less onerous or, at the very least, less restrictive from the operator's point of view. Court of Justice, 9 November 1995, C-426/93, Germany v. Council, in ECR, 1995, 3723. With regard to the principle of the proportionality of sanctions, see also Court of Justice, Rodopi M-91, op.cit., pp. 31, 38 and 39, at curia.eu; Court of Justice, Ainārs Rēdlihs, op.cit., p. 44; Court of Justice, 16 October 1991, C-24/96, Werner Faust, p. 12, at curia.eu.

Revised Kyoto Convention, which states that substantial sanctions should not be imposed for inadvertent errors, i.e., those committed in the absence of any fraudulent intent or gross negligence (WCO, 1997, Chapter 3, art. 3.39).

This important affirmation links up with the principle of proportionality and with the requirement that due regard should be given when deciding on the amount of the fine between the minimum and maximum limits, not only to the seriousness of the detriment caused but also to the existence of any subjective elements informing the infringer's actions.

With regard to the fundamental principles established by the Court of Justice, the new UCC draws a distinction between intentional conduct and merely negligent infringements of customs regulations.

In fact, recital 38 UCC affirms that "it is appropriate to take account of the good faith of the person concerned in cases where a customs debt is incurred through non-compliance with the customs legislation and to minimise the impact of the negligence on the part of the debtor" In this way, the principle whereby when assessing the facts the infringement *per se* does not suffice but, rather, the customs authorities should establish and evaluate the subjective elements informing the agent's behaviour, is rendered explicit. Hence in the case of good faith conduct, the sanction imposed should be 'kept to a minimum'.

The principles of the effectiveness and dissuasive nature of sanctions are the logical corollaries of the principle of proportionality. The principle whereby sanctions should be effective means that Member States must take every measure in their power to guarantee the scope and effectiveness of EU law. Accordingly, national provisions on sanctions should be capable of protecting the legal interest protected by supranational provisions, and such protection should at the very least be equal to the protection afforded to similar interests at the national level.[31]

The Italian perspective on customs sanctions; the proportionality issue

Due to the absence of harmonisation of European legislation in the field of customs infringements, it is necessary to consider each national regulation, in the light of the limits provided for by the European Union principles. Those limitations require that the sanctions allowed by national legislation must not exceed what is necessary to attain the objectives legitimately pursued by the legislation, nor must they be disproportionate to those objectives.[32]

Italian legislation and practice relating to administrative penalties are not free from criticism precisely in relation to compliance with the principle of proportionality. In that regard, on several occasions national case-law has affirmed the need to reconsider domestic legislation in the light of that principle, in line with what has been expressed by the Court of Justice.

According to the European courts, the principle of proportionality requires that the customs penalty must be proportionate to the seriousness of the infringement committed and to the psychological attitude of the offender and that the penalty must not exceed what is necessary to prevent tax evasion.[33] In order to assess whether a national penalty complies with that principle, it is thus-

[31] In this respect, the Court has held that where a Union provision does not stipulate a specific penalty in the event of an infringement, the Member States, notwithstanding their discretionary power as regards the penalty they are entitled to impose, must guarantee that "infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive" (Court of Justice, 8 June 1994, C-382/92, Commission v. United Kingdom, in ECR, 1994, 2435; in the same sense, Court of Justice, 16 October 2003, C-91/02, Hannl-Hofstetter, in ECR, 2003, 12077; Court of Justice, 7 December 2000, C-213/99, De Andrade, in ECR, 2000, 11083).

[32] Court of Justice, 22 March 2017, Euro Team e Spiràl – Gèp C-497/15 e C-498/15.

[33] Court of Justice, 4 March 2020, C-655/18, Schenker EOOD, at curia.eu.

necessary to analyse the nature and gravity of the infringement committed and the manner in which its amount is determined.

The answer given by the Italian legal system on that specific point is particularly explanatory.[34]

The reference point of the administrative sanctions is art. 303, Presidential Decree of 23 January 1973 No. 43, i.e., the TULD, which provides for the fundamental distinction between formal and substantial breaches relating to the quality, quantity, and value of the goods subject to customs operations.

Formal violations do not affect the determination of the tax nor do they prejudice the assessment activity. These breaches do not cause any damage to the Treasury, but are subject to an administrative sanction from 103 to 516 euros.

Substantial infringements are regulated differently. In these cases, the declaration of quality, quantity, or value does not correspond to the assessment and the border duties are more than five per cent higher than those calculated on the basis of the declaration. In such circumstances, the administrative penalty is determined according to value thresholds, with a minimum and a maximum amount of border duties being set for each threshold.[35]

With regard to the imputation of liability to the agent, the Italian legislation prescribes the need for conduct that is at least negligent, consisting in the omission to perform the checks imposed by the law, since they relate to circumstances or facts within the agent's sphere of control.

The administrative penalty system described above generates critical issues in relation to the compliance with the principle of proportionality of penalties established by EU case law. Suffice it to consider the application of an administrative penalty ranging from 30,000 euros to ten times the amount of the border duties, envisaged in case the amount claimed by the Treasury is equal to or greater than 4,000 euros.

The Court of Cassation has recognised explicitly the possibility of redetermining the imposed sanctions after an analysis of the degree of fault of the operator, and therefore, it has even overcome the sanctioning discipline of the TULD.[36]

The sanctioning system described above also contrasts with the Italian regulations which aim to recognise the principle of proportionality. In this regard, it is worth noting that to solve this misalignment between national customs penalties and European law, the Italian legislator issued the enabling law for the reform of Italian customs law and the adjustment to the UCC (law of 4 October 2019, No. 117). This law delegated the government to introduce a reform within a period of 18 months. However, given the lack of a regulatory intervention on this point, the question of the reform of Italian customs law is still open.

In customs matters, the general principles provided for by the TULD concerning administrative sanctions for violations of tax regulations are applicable. The Italian legislator has envisaged the principle of proportionality in Article 7, Legislative Decree of 18 December 1997, No. 472, by establishing that "for the determination of the penalties, the gravity of the violations must be considered." It follows that the sanction can be reduced by up to half of the minimum edictal amount in case of manifested disproportion between the violation committed and the sanction.[37]

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[34] The Italian system provides for both administrative and criminal offences, these customs offences are contained in Articles 282 et seq. Tuld: it includes criminal offences of smuggling and common rules for all cases with reference to the institutions of attempt, recidivism, and habitual and professional smuggling.

[35] Specifically, a) for customs duties up to 500 euros, the sanction from 103 to 500 euros shall apply; b) for customs duties from 500.1 euros to 1,000 euros, the sanction from 1,000 to 5,000 euros shall apply; c) for customs duties from 1,000.1 to 2,000 euros, the sanction from 5,000 to 15,000 euros shall apply; for customs duties from 2,000.1 to 3,999.99 euros, the sanction from 15,000 to 30,000 euros shall apply; for customs duties equal to or exceeding 4,000 euros, the sanction from 30,000 euros to ten times the amount of the duties shall apply.

[36] Cass., sez. V, 12 November 2020, No. 25509; Cass. civ., sez. VI, 9 June 2016, No. 11832; Cass. civ., sez. V, 17 October 2014, No. 21985.

[37] See: Legislative Decree of 18 December 1997, No. 472, Article 7, IV.

Indeed, the Italian legislator expressly excludes the application of sanctions in the case of merely formal violations.[38] This principle is provided for in the Statute of Taxpayers' Rights, a regulation that, even if it lacks of constitutional value, envisages, according to the consolidated orientation of the Court of Cassation, general principles of the tax legal system.[39]

It is worth noting that Directive (EU) 2017/1371 (hereinafter referred to as the Directive) on combating fraud affecting the EU financial interests had a significant impact on the Italian legal system. Indeed, this disruptive legislative intervention represented an effort to standardise the regulation of customs sanctions, through the lens of the principle of proportionality.

In general, the Directive has established minimum standards in relation to the definition of offences and penalties in case of fraud and other illegal activities affecting the financial interests of the EU, thus also intervening in the regulation of the offence of smuggling. This offence protects the financial resources of the EU. As is well known, it is committed when a subject does not pay border duties on foreign goods. The necessary prerequisites of this crime are willful conduct, i.e., the voluntary nature of the behaviour in committing the offence, the causal link between the event carried out and the conduct and finally the offensiveness of the latter towards the protected legal asset, which is, as mentioned, the EU financial resources.

In this context, it is important to note that the Directive, in modifying the discipline of penalty rules, reaffirms the centrality of the principle of proportionality in the EU system. The principle is referred to several times by the legislator, informing the entire discipline.[40] In particular, Member States are required to apply "effective, proportionate and dissuasive criminal sanctions."[41]

In accordance with the principle of proportionality, the Directive provides for an important contribution to the harmonisation of sanctions envisaged in relation to the crime of smuggling.

The scope of this intervention can be appreciated considering the Italian regulatory framework, in which smuggling is regulated by articles 282 and following of the TULD.

The Italian legislation on smuggling covers the movement of goods across the land border in violation of customs supervision in the customs areas, the movement of goods across border lakes, by air, or by sea in the absence of compulsory authorisations, or the case of goods moved in non-customs areas. The legislation also punishes the conduct related to the movement of goods admitted to special regimes, such as goods imported with customs facilities, goods held in customs warehouses, goods admitted to temporary imports or exports.

Before the EU reform, the Italian legislator had introduced the decriminalisation of customs offenses punished only with a fine, transforming them into administrative offences, with the exception of certain crimes such as smuggling.[42] Without prejudice to this exception, the offence of smuggling was punished by an administrative fine of a minimum of 5,000 euros and a maximum of 50,000 euros.[43]

Therefore, this was a choice of legal policy very different from the one adopted at the EU level. The Directive has, in fact, tightened the punitive framework. After the implementation of the Directive,[44] customs offenses became again autonomous offences, limiting the application of decriminalisation to the hypothesis of smuggling in which the amount of border duties does not exceed the amount provided by law. In particular, by supplementing art. 2, para. 4, Legislative De-

[38] See: Legislative Decree of 18 December 1997, No. 472, Article 6, V *bis*.

[39] See: Law 27 July 2000, No. 212, Article 10.

[40] European Parliament, European Council, 2017. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. Strasburg, Brussels, consideranda 15, 28 & 35, articles 7&9.

[41] European Parliament, European Council, *op.cit.*, 2017, art. 7 & 9.

[42] Legislative Decree of 15 January 2016, No. 8.

[43] Legislative Decree of 15 January 2016, No. 8, Art. 1.

[44] Legislative Decree of 14 July 2020, No. 75.

cree of 15 January 2016, No. 8, it has been envisaged that the decriminalisation of penalties does not apply in case the amount of border duties due exceeds 10,000 euros.

Moreover, in addition to the re-criminalisation of smuggling, as specified above, the national legislator has provided for the inclusion of the smuggling offences among the crimes from which the administrative responsibility derives.

In this regard, it should be noted that in the Italian legal system Legislative Decree of 8 June 2001, No. 231, governs the responsibility of entities for administrative offences and provides for a series of measures to limit the involvement of the entity in the event that unlawful conduct is committed by the company employees.

Therefore, the introduction of customs offences among the offences submitted to the application of Legislative Decree of 8 June 2001, No. 231, has determined the need to limit possible legal risks and to carry out more in-depth corporate compliance activities.

In light of the above, the crime of smuggling has represented an opportunity for the dialogue between the EU and the national law, through the lens of the principle of proportionality.

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