

THE LEGAL REGIME FOR CUSTOMS DUTIES AND TAXES HAVING EQUIVALENT EFFECT IN THE EUROPEAN UNION

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Abstract

One of the consequences that generates direct, short, medium and long-term effects, determined by the accession of the states to the European Union, is that of valorizing also the free movement of goods. More precisely, it is about the correct knowledge (in a society of knowledge), understanding and application of the principles and rules that govern the goods, but also the appropriation, respectively the engagement in a series of complex mechanisms, which can determine the activation of exceptions, limitations, restrictions or exemptions from the freedoms concerned. For these reasons precisely, the emphasis on freedom has to fall on the norm, rule, knowledge, understanding, and above all on compliance, application. Why? Because, in the European space too, the freedom is regarded as representing what philosophers call "understood necessity", not chaos, not hazard, not disorder. Freedom is for all, not only for some, under conditions of equal chances, but also of engaging in valorization through the assimilation of a large amount of information, in a time, why not admit, relatively brief and last but not least, in terms of competence, professionalism and competition, specific conditions of a market economy, an economy in which we already find ourselves. The free movement of goods is the legal regime under which goods are not confronted at frontiers with any restrictions regulated by a State, both in the case of imports and exports. Therefore, the freedom results equally in the prohibition between the EU Member States of customs duties and charges having equivalent effect to customs duties, plus the prohibition imposed on the Member States of the Union to establish quantitative restrictions or to adopt measures having equivalent effect.

Keywords: *legal regime; customs duties; charges having equivalent effect to customs duties; the European Union; institutional treaties; amending treaties; case law of the CJEU).*

1. Historical and conceptual references

The choice of the wording of this introductory part for the analysis to which we shall proceed is based in particular, on the paradox of each of the three notions, namely: "references," "history," and "concepts". As a consequence, the choice was not a random one, but rather the opposite. Each above-mentioned notion presents the paradox of cumulation of two dimensions. On the one hand, we are talking about the precision given to us by the "references" to which we relate our existence, temporally speaking, and on the other hand, about the flexibility given by the relative character of their stability (the continuous movement of the universe, the existential space we find ourselves in, and so on). The same goes for "history" (seen and rendered subjectively, obviously in a different manner from one person to another), and also in the case of "concepts" understood, defined and accepted differently. Each concept (to which we also refer) revolves around invariable constants that are difficult or even impossible to challenge. At such constants, we shall try to refer in this approach, since the objective view is now more necessary than ever, given the extent, complexity and implications of the information that is covered by such an area of concern.

Our research starts from the time factor. When exactly do we encounter preoccupations incident to common rules referring to a uniform conduct? Who

highlights such concerns? Where do they manifest and through what are they materialized, consecrated from the point of view of the headquarters of the matter? These are questions to which we shall try to find answers.

By concentrating our interest on the European Union, the undeniable temptation would be to artificially overlap the concerns in matter, as origins, over the origins of the idea of unity at European level. Nor would we mistake much in terms of the time position of these origins. With the arguments that both historians and jurists have identified, we might end up either in antiquity or in different stages of the evolution of the European continent, or in the first half of the twentieth century, essentially marked by the two world wars.

Why are we going so far in history? It is simple. Because "for a long time, Europe's idea of union was confused with the organization of the world; it is thus related to Europe, if not the known world, at least the useful world"¹, a world that harmoniously has proposed to bring equally together both dimensions: the political one (peace, security) and the economical one, from the legal point of view.

Economists confirm such assumptions, appreciating that "the history of the union of territories (including for economic reasons), and later of European states, is found in remote periods, with reference to the expansion of the Roman Empire, to Great Carol's empire and to the Napoleonic conquests, to the

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¹ Charles Zorgbibe, *Construcția europeană. Trecut, prezent, viitor*, Trei Publishing House, Bucharest, 1998, p. 5.

establishment of the League of Nations in the interwar period"².

Everything is done in the context of the globalization trend of international relations, including from an economical and financial perspective, because "globalization is the process of internationally interdependent expansion of international economic flows. Current globalization is a new way of life for the international community (...). Globalization is not new. It has been observed from the beginning of the 16th century, recognized until the end of the 19th century and characteristic of the 20th century"³. Among the entities identified as being involved in this process, the World Trade Organization, for example, occupies an important place. Europe has assumed, through a process of integration very well thought and followed, a special role as an actor with global responsibilities, including from an economic perspective. The Common Market is an enlightening example for the above finding.

"The Community objective of the founding members of the [European Economic Community] was (...) a **Community market**, which subsequently became an **internal market**, namely an **economic and monetary Union**"⁴.

Briefly, the historical references to such developments point to the following institutional and amending Treaties: the Treaty establishing the European Economic Community; the Treaty establishing the Atomic Energy (as institutional treaties), namely the Single European Act, the Maastricht Treaty, the Treaty of Nice and the Treaty of Lisbon (as amending Treaties).

In art. 3 par. (1) of the Treaty establishing the European Community (ECT), in its consolidated form of 1992⁵, it is stated that "in order to achieve the objectives set out in art. 2⁶, the activities of the Community shall include, subject to and in accordance with the deadlines laid down in (...) the Treaty: (a) the prohibition between Member States of customs duties and quantitative restrictions on imports and exports of goods and all other measures having equivalent effect; (b) a common commercial policy; (c) an internal market characterized by the elimination, between Member States, of obstacles to the free movement of goods, persons, services and capital".

The provisions of art. 14 par. (2) TEC, the consolidated version of 1997, according to which "The

internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured", are edifying.

Impressive is the speech by former British Prime Minister Margaret Thatcher (The Bruges Speech⁷), which, in its debut, shows: "You have invited me to talk about the UK and Europe. I should congratulate you for your courage. If you believe certain things that are being told or written about my view of Europe, it's almost like inviting Genghis Khan to talk about the virtues of peaceful coexistence!". However, the same person, within the framework of the Third Idea-Force ("A Europe open to entrepreneurship") insists on appreciating that "the goal of a Europe open to the entrepreneurial spirit was the driving force behind the creation of the Single European Market until 1992. By deploying barriers and enabling businesses to operate on a European scale, we shall be able to better compete with the United States, Japan and other economic powers that are emerging in Asia or elsewhere". This is the essence of Britain's concerns, including now under the Brexit conditions. Worthy to add, it is also the statement made by the same British Prime Minister on the occasion of her speech, namely: "The UK has provided an example by opening its markets to the others. The city of London has for a long time been home to financial institutions around the world. This is why, it is the biggest financial centre in Europe and the one that has prospered the best". There are assertions that currently stimulate the deepest reflections in the context of an important stage of the EU-UK negotiations that the Brexit has generated.

Article 131 TEC has a particular consistency in terms of building the common commercial policy, stating that "by establishing a customs union among themselves, the Member States understand to contribute, for the common interest, to the harmonious development of world trade, to the progressive elimination of restrictions on international trade and to the reduction of customs barriers. The common commercial policy (being within the exclusive competence of the European Community / EU) takes into account the favourable effect that the elimination of duties between Member States can entail in increasing the competitive power of enterprises in these States". This is the reason why, gradually, a genuine customs duty of the European Community / European Union has emerged and developed. Next, following the

² Maria Bărsan, *Integrarea economică europeană*, vol. I – Introducere în teorie și practică, Carpatica Publishing House, Cluj-Napoca, 1995, p. 7.

³ Petre Tănăsie, *România, globalizarea și cerințele regândirii guvernării globale. Oportunități și vulnerabilitate*, in *Studii Juridices*, "N. Titulescu" University of Bucharest, Economic Publishing House, Bucharest, 2001, p. 155.

⁴ Andrei Popescu, *Reglementări ale relațiilor de muncă – practică europeană*, under the aegis of the Legislative Council, Tribuna Economică Publishing House, Bucharest, 1998, p. 104.

⁵ The Treaty was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. Subsequently, the Treaty has been amended several times.

⁶ Article 2 TEC, consolidated form of 1992: "The Community's task is to establish a common market and economic and monetary union and to implement the common policies and actions referred to in Art. 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of convergence of economic performance, a high level of protection and improvement of the quality of the environment, raising the standard of living and quality of life, economic and social cohesion and solidarity between Member States".

⁷ Charles Zorgbibe, *op. cit.*, pp. 336-342.

same logical thread, art. 135 TEC states that "within the scope of [the Treaty], the Council (...) shall take steps to intensify customs cooperation between the Member States and between them and the Commission".

Even though sometimes the regulations subsequent to the Maastricht Treaty have helped not directly, but only implicitly, to enshrine the principle of the free movement of goods, including through the prohibition of customs duties and charges having equivalent effect between Member States. The Treaties of Amsterdam and Nice have maintained a constant evolutionary nature of the matter, however, emphasized by the Treaty of Lisbon.

2. Grounds for the appearance of the Common Market)

The common market "is essentially a customs union which, in addition to the freedom of trade in goods and services, also implies the freedom of movement of the main factors of production (capital and labour force) among the member countries"⁸. Customs Union "is an even closer form of economic integration. In such a union, [the Member States] are obliged to use common tariffs and rules on imports [and exports] from [to] non-member States"⁹. Moreover, the same authors add that the economic union "involves all the features of a common market"¹⁰.

Our concern is precisely the first component, namely that of import and export customs duties and charges having equivalent effect, at the level of Member States of the European Community, respectively of the European Union, later.

From the point of view of stages crossed, within the framework of the economic integration, "the European Economic Community started with a customs union"¹¹. This is because the ECSC [similar CEEA] is a special case of sectoral integration for coal and steel" as it is the "1965 US-Canada Automobile Agreement"¹². Because "for developed countries [as in the case above], these sectoral initiatives require a so-called removal of obligations, i.e. a derogation from the General Agreement on Tariffs and Trade"¹³.

"Like the World Trade Organization, the European Union apparently seeks to establish free trade among nations. As in the case of the World Trade Organization, this requires not only the elimination of taxes, but also the criticism of any attempt by a government or national authority¹⁴ to place its own

producers unfairly to those in other states"¹⁵. In other words, what it is not allowed to be practiced in the relations between the Member States in terms of customs duties and charges having equivalent effect, that should also be the case in the relations between these States and third States, with reference to the Lisbon Agenda 2000, according to which the EU wanted to become the most dynamic and performing knowledge-based economy in the world by 2010, an objective which has subsequently been carried forward.

From a conceptual point of view, there are substantial differences between the "internal market" and the "common market", as stated in the doctrine, as follows: "the transition from the "common market" to "the internal market" is not a mere terminological change. As it also results from the Commission White Paper of 1985, it was an ambitious objective, the completion of which involved the adoption of 310 directives to approximate the laws of [the Member States]"¹⁶. Regulatory developments have been so conspicuous that, over time, a genuine European Union customs law has emerged, which is based on the 1993 Community Customs Code, which has produced legal effects, in terms of rights and obligations, from January 1st, 1994 as a generally accepted rule for the entire customs territory of the European Union.

3. Current grounds for the prohibition of customs duties and charges having equivalent effect, between Member States

The primary and fundamental element of the matter is art. 28-37 of the Treaty on the Functioning of the European Union (TFEU)¹⁷.

From the very beginning, art. 28 par. (1) TFEU states that the Union, this time as subject of international law, on the basis of the legal personality acquired under Art. 47 of the Treaty on European Union (TEU), "is made up of a customs union which regulates the entire trade of goods and which involves a prohibition between Member States of customs duties on imports and exports and any charges having equivalent effect, such as the adoption of a common customs tariff in relations with third countries".

Par. (2) of the same art. 28 TFEU states that "the provisions (...) shall apply to products originating in the Member States as well as to products coming from third countries which are in free circulation in the Member States".

⁸ Dan Drosu Şaguna, Mihail Romeo Nicolescu, *Societăți Comerciale Europene*, Oscar Print Publishing House, Bucharest, 1995, p. 15.

⁹ *Idem*.

¹⁰ *Idem*.

¹¹ Jacques Pelkmars, *Integrare europeană. Metode și analiză economică*, second edition, IER, R.A. Official Gazette, Bucharest, 2003, p. 7.

¹² *Idem*.

¹³ *Idem*.

¹⁴ Concerning the concept of public authority into national law, see Elena-Emilia Ştefan, *Disputed matters on the concept of public authority*, LESIJ no.1/2015, pp. 132-139.

¹⁵ Steven P. McGiffen, *Uniunea Europeană. Ghid critic*, New Edition, R.A. Monitorul Oficial Publishing House, Bucharest, 2007, p. 76-77.

¹⁶ Sergiu Deleanu, *Drept comunitar al afacerilor*, Servo-Sat Publishing House, Arad, 2002, p. 9.

¹⁷ For more information on the legal basis, see Mihaela-Augustina Dumitraşcu (coord.), *Legislația privind libertățile de circulație în Uniunea Europeană*, C.H. Beck Publishing House, Bucharest, 2015, in particular *Fișă sintetică*, pag. 1-8.

With value of interpreting the provisions of art. 28 par. (2) of the TFEU, the following article (Article 29 TFEU) is added: "Products originating in third countries for which import formalities have been completed are considered to be in free circulation in a Member State and for which the customs duties and charges having equivalent effect which were due and which did not benefit from a full or partial refund of those taxes and charges were levied in that Member State".

The European Union legislature expresses unequivocally, in Art. 30 TFEU which provides that "customs duties on imports and exports or charges having equivalent effect shall be prohibited between Member States". The article invoked "concerns any kind of customs duties or charges having equivalent effect, irrespective of whether they relate to imports or exports, without making any distinction according to the time when those taxes are levied"¹⁸. According to the doctrine¹⁹, the prohibition referring to customs duties on imports and exports or on charges having equivalent effect "also applies to customs duties of fiscal nature".

By analyzing, conceptually, from the fund perspective, we find the fact that customs duties and charges having equivalent effect are "the most often used ways to obstruct the free movement of goods. These forms of protectionism are reflected in the increase in prices of imported goods compared to domestic similar products, thus favouring domestic products. The removal of such taxes is particularly important for the idea of a customs union and the single market, as the European Commission emphasizes in its policy on customs strategy²⁰: the Customs Union is at the heart of the European Union and is an essential element in the functioning of the Single Market, a market which can only function normally when properly applying common rules at its external borders. This implies that the 28 customs administrations of the European Union must act²¹ as if they were one"²².

For a proper understanding, we distinguish in our research, between customs duties, charges which do not involve too much documentation, unlike charges

having equivalent effect, which make it necessary to resort to the case-law of the Court of Justice of the European Union²³ (CJEU). Thus, customs duties, in the strict sense of the word, "are one of the oldest forms of protection of national trade, until it has had a deterrent effect on trade. It was estimated that around the 18th century there were about 1,800 customs frontiers on the territory of today's Germany. Merchants who wanted to transport goods along the Rhine, from Strasbourg to the Dutch border, had to pay 30 charges"²⁴.

The legislator of the European Economic Community directly banned customs duties by sanctioning the violation of such permissive conduct for the development of trade by banning barriers to it, tax barriers²⁵ and not only. From a conceptual point of view, customs duties are indirect taxes which the State levies on goods when they cross the frontier of a country for import, export or transit²⁶. In other words, customs duties are financial burdens affecting goods crossing a border. At European Union level, this type of tax applies to goods coming from third countries and not to exports or imports between Member States of the Union.

"The concept of charges having equivalent effect comprises all pecuniary taxes other than customs duties in the strict sense, imposed on goods which are in free circulation in the Community, by crossing borders between States and which are not permitted under the specific rules of the Treaty"²⁷. This is the definition established in the doctrine of the field, with references to the jurisprudence of the matter²⁸, in the 1962s. Later in 1976, another case, *Bauhuis*²⁹, is likely to complete the above definition of charges having equivalent effect. In this case, "the Court has held that any monetary charge, whatever the destination and manner of its application, unilaterally imposed on goods on the ground that they cross a border (but not crossing the border) and which are not customs duties, strictly speaking, constitutes a charge having equivalent effect in the case where it is not linked to a general system of systematic internal taxation applied according to the same criteria and the same stages in the marketing of

¹⁸ Paul Craig, Grainne de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, 6th edition, Hamangiu Publishing House, Bucharest, 2017, p. 715.

¹⁹ *Idem*.

²⁰ http://ec.europa.eu/taxation_customs/customs/policy_issues/customs_strategy/index_fr.htm.

²¹ *Idem*.

²² Roxana-Mariana Popescu, *Influența jurisprudenței Curții de Justiție de la Luxemburg asupra dreptului Uniunii Europene – studiu de caz: noțiunea de „taxă cu efect echivalent taxelor vamale*, Public Law Review, no. 4/2013, Universul Juridic Publishing House, Bucharest, p. 73.

²³ On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182- 188; Laura-Cristiana Spătaru-Negura, *Dreptul Uniunii Europene – o nouă tipologie juridic*, Hamangiu Publishing House, Bucharest, 2016, pp. 156-165; Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, pp. 96-98.

²⁴ Walter Cains, *Introducere în legislația Uniunii Europene*, Universal Dalsi Publishing House, Bucharest, 2001, p. 163.

²⁵ "In tax matters, the unanimity rule of decision-making prevented the harmonisation of the laws in the Member States of the European Union, the States not being willing to cede their sovereignty in this matter" –Viorel Roș, *Drept financiar și fiscal*, Universul Juridic Publishing House, Bucharest, 2016, p. 57.

²⁶ Aurel Teodor Moldovan, *Drept vamal*, C.H. Beck, Bucharest, 2006, p. 118.

²⁷ Walter Cairns, *op.cit.*, p. 166.

²⁸ Judgment Commission of the European Economic Community v. the Grand Duchy of Luxembourg and the Kingdom of Belgium, Joined cases 2-3 / 62, ECLI:EU:C:1962:45.

²⁹ Judgment in W.J.G. Bauhuis v. The Netherlands, 46/76, ECLI:EU:C:1977:6.

similar domestic products"³⁰. There has been a very rich jurisprudence in the field, according to the doctrine of the field³¹, even since the 1990s³².

Of particular importance are also the problems concerning the avoidance of confusion between taxes with equivalent effect (forbidden) and other (permitted) taxes, such as the following types of taxes: internal taxes; the fees charged for services rendered to economic agents and the fees charged under provisions of European Union law.

What happens if these fees have been collected in breach of the provisions of the Treaty on the Functioning of the European Union? Naturally, there is a sanction that, in terms of finality, leads to their recovery and return to those from whom they have been unlawfully received, including through the initiation

and conduct of an infringement proceeding against States that are guilty of breaches of the European Union law, in the light of their obligations.

4. Conclusions

Concluding, we appreciate that the regime of customs duties and charges having equivalent effect in the European Union is of particular interest, recording significant developments that are likely to strengthen relations between Member States as subjects of international law, but also between individuals (individuals and legal entities) as genuine beneficiaries of all the freedoms of movement, taken as a whole.

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³⁰ Walter Cairns, op.cit., p. 166.

³¹ Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, pp. 161-170.

³² Judgement Kapniki Michailidis AE v. Idryma Koinonikon Asfaliseon (IKA), Joined Cases C-441 and 442/98, ECLI:EU:C:2000:479.