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from: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 13 December 2013

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European  
Union

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Assessment, *Accompanying the document* Proposal for a Directive of the  
European Parliament and of the Council on the Union legal framework for  
customs infringements and sanctions

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Delegations will find attached Commission document SWD(2013) 513 final.

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**COMMISSION STAFF WORKING DOCUMENT**  
**EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT**

*Accompanying the document*

**Proposal for a Directive of the European Parliament and of the Council  
on the Union legal framework for customs infringements and sanctions**

{ COM(2013) 884 final }  
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{ SWD(2013) 515 final }

# COMMISSION STAFF WORKING DOCUMENT

## EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

### *Accompanying the document*

#### **Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions**

#### **1. THE PROBLEM**

Customs legislation referring to the trade in goods between the customs territory of the Union and third countries is completely harmonized and has been assembled in a Community Customs Code (CCC) since 1992. A major overhaul of this Code was carried out in Regulation (EC) No 450/2008 of the European Parliament and of the Council of April 2008 laying down the Community Customs Code (Modernised Customs Code), now to be recast as "Union Customs Code" (UCC), aiming at the adaptation of customs legislation to the electronic environment of customs and trade, to promote further the harmonization and uniform application of customs legislation, and to provide Union economic operators with the appropriate tools for developing their activity in a global business context.

However, despite the fact that customs legislation is fully harmonised, its enforcement, which ensures the compliance with the customs rules and the lawful imposition of sanctions, lies within Member States' national legislation. Consequently, customs legislation enforcement obeys to 27 different legal sets of sanctioning rules and different administrative or judicial traditions. This means that infringements to certain obligations stemming from the harmonised EU customs legislation are punished by sanctions which differ by nature and severity according to the Member States that is competent for it.

The effective management of the Customs Union, the achievement of a levelled playing field for economic operators acting in the Internal Market and the appropriate implementation of certain Union policies (environmental, agricultural, etc.) depend to a great extent on the homogeneous enforcement of the customs legislation by the Member States. Today, this implementation relies in a complex structure of 27 different legal orders and administrative or judicial traditions.

At international level this has in the past created some issues concerning the compliance of the Union with WTO rules with regard to the uniform implementation of customs rules.

Moreover, common implementation and enforcement of customs legislation is important with regard to the equal treatment between economic operators. This has a practical impact on the access of customs simplifications through the Authorised Economic Operator status and equivalent simplifications, as they highly depend on the "compliance" profile of the economic operator. If this profile is different only because of national customs legislation, the equal access to these simplifications may be jeopardised.

## 2. WHO IS AFFECTED BY THE IDENTIFIED PROBLEM?

The Union economic operators who deal with customs in their daily business are the main affected by the existence of 27 different systems enforcing Union customs law. They are the ones confronted with the lack of legal certainty that arises from the differences on Member States' legal systems concerning the treatment that is given to Union customs law infringements.

The Member States' customs administrations might be prevented from "acting as if they were one" because of the absence of a Union approach regarding the treatment of customs infringements and sanctions. This difference is able to create a lack of confidence between these customs administrations

## 3. SUBSIDIARITY

As far as the Union has exclusive competence, the principle of subsidiarity does not apply in accordance with Article 5(3) TEU.

In case a legislative action in the criminal field is proposed, following the results of the impact assessment, it will fall under Article 83 (2) of the TFEU. As this article concerns a shared competence (according to Article 4(2) (j) of the TFEU), special attention must be given to the subsidiarity principle, according to which the Union should only legislate when the scale or effects of the proposed measure can be better achieved at Union level. . Since the aim of the action proposed is the approximation of customs sanctioning legislation throughout the Member States, only the Union is in a position to develop it through binding legislation. Moreover, in the specific case we are in a fully harmonised policy area (customs union) with fully harmonised rules, whose effective implementation determines the mere existence of the customs union.

## 4. OBJECTIVES

The **general objective** of this initiative is to ensure the effective implementation and law enforcement in the Union customs union. In particular, the initiative has the following **specific objectives**:

- (1) Ensure further compliance with the Union's international obligations.
- (2) Provide for a Union framework for uniform enforcement of customs legislation in terms of infringements and sanctions.
- (3) Enhance the level playing field for economic operators in the customs Union.

The specific objectives listed under (2) and (3) above require the attainment of the following **operational objectives**:

- Uniformity regarding the elements that trigger a sanction across the Customs Union (ensure that the same type of behaviour which constitutes a breach of one or more customs rules, qualifies for the same type of infringement).
- Achieve a common scale of sanctions per type of infringement across EU Member States.
- Reduce costs and obstacles associated with the existence of different customs infringements and sanctions regimes for companies to engage in customs formalities in other Member States.

## 5. POLICY OPTIONS

### Policy option A – Baseline scenario (do nothing)

In the current situation, Union customs legislation is completely harmonized. However, each Member State has its own Union customs sanctioning system. Member States will continue to ensure the enforcement of customs obligations through national rules and the AEO guidelines will provide some guidance on interpretation of the criteria allowing the access to the AEO status but without any binding effect.

### Policy option B – A legislative measure within the EU legal framework in force

In this option the Commission would propose amending the Union customs legislation in force through:

- the enumeration of the types of administrative (non-criminal) sanction,
- an extended definition of the criterion of 'record of compliance with customs requirements' to be fulfilled by persons applying for an AEO status and/or various customs simplifications

### Policy option C – A legislative measure on the approximation of the types of customs infringements and non-criminal sanctions

This legislative measure would set a common nomenclature of non-criminal customs infringements based on the obligations from customs Union legislation and a list of sanctions within a common scale related to each particular infringement.

### Policy Option D – Two separate legislative measures aiming at approximation of both criminal and non-criminal customs infringements and sanctions.

This option would go further than Option C to the extent that it would comprise both Option C's legislative measure as well as another legislative measure for the approximation of customs offences and penalties in the criminal field, thus expanding the scope of action. Therefore, it would encompass all possible customs infringements and offences and would provide for an approximation of both non-criminal and criminal sanctions.

### Discarded option – "soft law" scenario: To issue guidelines on the interpretation of customs compliance concept

The guidelines on AEO have been issued in April 2012 and are part of the implementing measures of the current customs legislation. Therefore they became part of the baseline scenario and this is the reason why this option has been finally discarded.

## 6. ASSESSMENT OF IMPACTS

### 6.1. Policy option A – Baseline Scenario

Each Member State would continue to have its own system for sanctioning customs infringements. The differences in customs law enforcement throughout the customs territory of the Union would not be reduced and the risk of limitation for economic operators' equal treatment irrespective of the Member State where they are established would continue to be a reality.

## **6.2. Policy option B – A modification of the current legislation within the EU legal framework in force**

The differences among Member States' sanctioning customs systems would be mitigated as non-criminal sanctions for customs infringements would be the same throughout the Union. Likewise the limitations on economic operators' equal treatment in acceding customs simplifications would also tend to be much more attenuated because the qualification of "serious and repeated infringements of customs rules", as well as "infringements of negligible importance", as elements of the "record of compliance with customs requirements", would no longer be left to the Member States but rather defined at Union level. Nevertheless, the decision on which type of behaviour are considered to be infringements to customs legislation and be sanctioned with the non-criminal customs sanctions would still remain in the competence of the Member States thus still differentiating the treatment of economic operators depending on the competent Member State, which means that with this option not all the identified problems would be addressed (international obligations, implementation of other policies, etc.).

## **6.3. Policy Option C – A legislative measure on the approximation of the types of customs non-criminal infringements and sanctions**

This option would ensure common and simpler legislation, (insofar the main obligations and list of infringements will be common and the type and scale of customs sanctions will also be common) easier implementation by Member States and improved enforcement of customs law. A further clarification of the "proportionality" of the sanction will be achieved in the sense that a series of infringements will be sanctioned by non-criminal sanctions.

The timely collection of revenue (own resources) will be improved as direct result of the preceding (infringement detection) also because of the improved compliance rates in declarations, as the risk of loopholes created by divergent national legislation will be limited.

Union's compliance with obligations under WTO would be enhanced with the existence of a legal instrument where a common range of sanctions for violation of EU customs rules would be established.

Equal treatment of the economic operators with regard to their access to the AEO status and to customs simplifications will be ensured because there would be fewer differences between the Member States with regard to the treatment of serious infringements. In this way the interpretation of the "compliance with customs legislation" criterion will be more uniform.

## **6.4. Policy Option D – Two separate legislative measures aiming at approximation of non-criminal infringements and sanctions on one side and criminal offences and penalties on the other side**

This option builds, partially, on the previous one, thus maintaining all the benefits already outlined for Option C to which can be added the advantage of having an EU action in the two sanctioning fields: the non-criminal and the criminal.

However, if Union action is required, the Union legislator needs to decide whether criminal sanctions are necessary or whether common administrative sanctions are sufficient. The legal basis for the legislative measure in the criminal field -Article 83(2) TFEU - builds on the notion of criminal law as an *ultima ratio* tool. As such, criminal law proposals based on this legal article will be usually addressing areas

where non-criminal Union sanction regimes already exist. At this stage and in this particular case, we are in an area where no sanctions at all have yet been established at EU level. Therefore, there is not enough evidence for the conclusion that criminal law is necessary. Moreover, the recent proposal on a directive of the EP and the Council on the protection of the Union's financial interests by criminal law<sup>1</sup> partially covers some of the customs infringements having an impact on the collection of own resources. Consequently the right time to assess whether a legislative action is needed for customs infringements in the criminal field will be after the legislative measure in the noncriminal field is in place and after the application of the directive on the protection of the Union's financial interests by criminal law.

## 7. COMPARATIVE ASSESSMENT OF OPTIONS

The table below has been drawn in order to show the effectiveness of each option, thus contributing to the analysis of the most preferred one

Options	Economic impacts	Environmental impacts	Additional administrative costs for Member States	Policy Coherence	Fundamental Rights	Overall Assessment
<b>A</b>	0	0	0	0	0	0
<b>B</b>	+	+	++	0	0	+
<b>C</b>	+++	++	++	+++	++	+++
<b>D</b>	++	++	+	+	++	++

Magnitude of impact as compared with the baseline scenario (the baseline is indicated as 0): 0, no expected change from that of baseline scenario; + to +++, expected positive effect which intensity is reflected by the number of pluses.

## 8. MONITORING AND EVALUATION

- The Member States

will provide the Commission with answers to the same cases presented in the Project Group on customs penalties in order to evaluate the effectiveness of this initiative. In addition, Member States will provide some information on how they are dealing with the compliance record of economic operators when granting access to customs simplifications and the AEO status, and other general data as for example regarding the number of declarations lodged, the number of sanctions imposed and their average amount.

- The economic operators

will reply to a questionnaire including the same questions than the second questionnaire used to produce this report and some additional questions to evaluate how this initiative may have impacted in potential improvements of competitiveness.

<sup>1</sup> COM (2012)363/3