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Reforming the enforcement of Union customs law in the light of European tax and sanctioning framework

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Abstract

The research aims to investigate the current state of play of customs legislation in the contemporary EU. When viewed in a historical perspective, customs law is a key topic in the European Union, both for the proper functioning of the Single Market and the role of customs duties as EU's own resources. Despite the plethora of EU regulations, including the Union Customs Code, the legal framework on customs law enforcement has not been adequately developed. In this regard, the role of Member States is still of crucial importance since the enforcement of EU customs law is almost entirely left to national legislation. The study explores the complexities facing the EU in its current challenges in reforming the enforcement of Union customs law, by looking at multiple levels including, *inter alia*, developments in the European tax framework and sanctioning policies.

Table of Contents

Chapter 3-**The development of EU customs law enforcement**

Chapter 4-**Comparative Analysis**

A mia madre e mio padre,
e a tutti i loro sacrifici.

"In England the monarchy was overthrown, a king beheaded, and the nation suffered through a terrible civil war, all brought about by taxation. Under the stress of six major tax revolts the great Spanish Empire collapsed. The Netherlands went into a sharp decline because of too much taxation. In France, tax revolts were everywhere. They were bloody and cruel."

Charles Adams

I am European; I love the flag which I have worn since my youth.
Ivan Turgenev

Introduction

This study explores the EU's composite architecture of customs law enforcement and illustrates the intricacies involved in it by looking at the sanctioning policy adopted in this framework. Because customs law is located at the intersection of different disciplines, the structure of this research is polyhedric for the purpose of encompassing customs debt liabilities and the other forms of liabilities resulting from the breach of customs rules. First, an overview is provided of its historical development. This places the role of the customs union at the core of the EU's integration process since the birth of its institutional system. Customs law is a seminal discipline in that it laid down the foundations for the subsequent evolution of several European legal branches. The second phase of the research aims to single out the requirements of *customs liabilities* as autonomous elements in a continuous reflection between the complexity of customs debt liability and the framework of principles applicable. Two basic features can be systematically extracted to impose customs debt liability: the subjective and the objective elements. The aim is to work out the structural choices that underlie the European regulation's provisions and the principles that guide their application. Principles are fundamental as the only yardstick to measure European public action. Having regard to the fact there is no uniform concept of tax at an European level, this research argues that customs debt liability should to some extent be mainly limited in its scope by the proportionality principle, such as has been proven by the case-law concerning VAT liability.

The third chapter will then move away from customs debt liability to dissect the main issue in the research: customs law enforcement. It will present different aspects of this issue by first reflecting on the possible future development of the customs system at the international level, with specific regard to obligations stemming from the WTO. There follows a detailed analysis of the current legal setting. Even though many areas

of customs law have undergone significant change so as to limit the level of discretion of each Member State, this discretion has not been entirely removed. This section will not only illustrate the topic of "enforcement" within the customs framework but will take a broader perspective by addressing under what conditions and scenarios might Europe as a State intervene in penalties policies. The composite character of customs legislation derives from the co-existence of two different legal frameworks albeit same fundamental objectives, which highlights the tensions affecting the customs union. On the one hand, almost all substantial structural elements regarding customs law have been legislated through the direct effect of European regulations. On the other hand, the recent Union Customs Code (UCC) remains a segmented regulatory instrument, which leaves sensitive essential areas of customs enforcement in the hands of Member States. The enforcement of customs law at an European level revolves around a weak and general legal basis built on principles that States must apply but without providing any common standards in terms of identification of both breaches of customs rules and penalties. Arguably, in this context, similar penalties cannot be secured against divergent national approaches through the mere application of principles. However, choices such as the harmonization of customs infringements and penalties might have a number of significant consequences for European action in the domain of domestic penalties. This complicates the decision-making process and can lead to tensions between the national heritages and European interests. This is of some significance as it would logically impact on sanctioning policies, which remain very much national areas owing to the sensitivity of States on the issue of national sovereignty. Theoretically, conflicts can arise as States would be obliged to integrate any potential customs penalties' regime into their sanctioning system (regulated by pre-existing rules). In fact, a common, richly-textured area of punitive law already exists. Here, the research will try to develop an ideal, coherent conceptual framework for the customs sanctioning system within inter-institutional dynamics and the proliferation of legal bases. This chapter will then speculate on the existing customs architecture which needs to be complemented by the harmonization of customs infringements and

penalties. In fact, the creation of a common regulatory corpus directly applicable to all EU Member States undoubtedly constitutes the primary measure to ensure the effectiveness of the single European market and the protection of financial interests, to secure fairness and transparency in trade relations between traders. At this point, this inquiry evaluates the legislative Proposal of the European Commission[1] and the impact it would have. In my opinion, the need to punish any conduct that could affect these values, even if peremptory, should not regress to a system of liability and sanctions untailored to the offender's degree of blameworthiness. By the systematic application of strict liabilities of a different nature, the system would serve the maximisation of the European common good but the balance would fall too heavily on the side of business. This is the reason why a theory of European customs penalties is needed as it would provide the parameters by which law in force can be measured and criticized if necessary. The aim will be to work out the principles and rights that should guide the construction of customs infringements and penalties. These should be firmly anchored in existing European punitive law. Through a detailed analysis of supranational case-law, the goal will be to pinpoint he core principles upon which customs duties and their derived sanctions should be based. Furthermore, liability for the breach of customs rules is expected to be suitable to the structure of customs debt liability and compatible with the principles set out in the regulation itself. In conclusion, the final outcome is to expound a general theory of customs sanctions which would restore proportionality by fixing a minimum level of culpability and, at the same time, to safeguard European financial interests without jeopardising foundational domestic principles, such as the principle of *nulla poena sine culpa*, which should be preserved, bolstered and elevated to a European principle of customs sanctions. The last part will briefly explore overseas customs sanctioning systems in order to examine alternative solutions with their arguments and counterarguments and capture the best other systems have to offer.

[1] Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, n. 2013/0432.

Chapter I

An imperfect customs union: The so-called "harmonisation by bits and pieces"[2]

1. The evolution of the Customs Union – A historical perspective

The first founding action for a European fiscal structure might be traced back to the abolition of customs and tariff barriers to achieve free movement of goods within the Internal Market. The establishment of an internal market in which goods, persons, services and capital move freely without any restrictions is fundamental to the objective of economic integration, for which the European Customs Union[3] has represented the substructure of the evolutionary process of the EU's genesis. Traditionally, the complexity of economic integration has been studied by analysts through the assumption of several stages of economic integration. The pioneer of this approach is Balassa[4] who postulates a sequence of stages characterised by a diverging degree of

[2] The concept of "Harmonisation by bits and pieces" has been utilised by J. H. Jans in "Towards a Draft Common Frame of Reference for Public Law'" with reference to the harmonization of general topics of administrative law, including customs law but it originally stems from the metaphor used by Curtin in "The constitutional structure of the Union: a Europe of bits and pieces".

[3] See for an exploration on the theme: L. W. Gormley, *European law of free movement of goods and customs union*, Oxford, p.2. The author argues that "The establishment of the customs union lies at the very heart of the system set up by EC treaty, and the free movement of goods is an indispensable condition for the establishment of the common market within the Community. The importance attached to the achievement of the customs union and to the concept of the free movement of goods is demonstrated by their pride of place in the structure of the Treaty. On the one hand the Community presents a single external trading face, characterized by the Common Customs Tariff and a common commercial policy and on the other hand the principle of free movement of goods is characterized by the extended concept of non-tariff barriers to trade between Member States. In terms of economic policy, the Treaty is neutral between free market and government regulation, the principle of the free movement of goods affects the behaviour of both public and private sectors". See also: C. Barnard, *The substantive law of the EU: the four freedoms*, Oxford, 2016; L. Gormley, "Inconsistencies and misconceptions in the free movement of goods", *European Law Review*, 40, 2015; P. Oliver, *Oliver on free movement of goods in the European Union*, Oxford, 2010.

[4]For an economic analysis of customs union, see generally: B. Balassa, *The theory of economic integration*, Irwin, Homewood, 1961; B. Balassa, "Trade creation and trade diversion in the European Common Market: An appraisal of the evidence", in: H. Glejser, ed., *Quantative studies of international economic relations* (North-Holland, Amsterdam), 1976; C.A. Cooper,and B.F. Massell, Towards a general theory of customs unions for developing countries, *Journal of Political Economy*, 1965; H. Johnson, "The economic theory of customs union" in: H. *Johnson, Money, trade and economic growth* (George Allen and Unwin, London); M. B. Krauss, "Recent developments in customs union theory: An interpretive

integration. Its starting point is the Free Trade Area[5] followed by the Customs Union,[6] the Common Market, the Economic Union up to the so-called total "Economic Integration". The first stage of formal European economic integration started with the creation of a customs union, deemed to be an essential instrument to ensure the first freedom set up by the EEC Treaty[7] in 1957, namely, the free movement of goods. This should not be conceived as a principle of non-discrimination but rather the expression of a fundamental right in Community law. Significantly, the Treaty establishing the European Economic Community, in bringing together 6 countries (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) to work towards integration and economic growth through trade, was divided into six parts with an unambiguous project for the EU. The crucial role played by customs law is made more evident by the structure of the contents in the EEC Treaty. The first part, entitled "Principles", provided those starting activities of the Community necessary to establish a Common Market: the dismantling, between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; and the establishment of a common customs tariff and of a common commercial policy towards third countries. At the same time, the second part, dedicated

survey", *Journal of Economic Literature*, June, 1972. R.G. Lipsey, R.G., 1960, "The theory of customs unions: A general survey", *Economic Journal*, Sept., 1960. M. Michaely, "The assumptions of Jacob Viner's theory of customs unions", *Journal of International Economics* 6, 1976.

[5] According to J. Pelkmans, *European Integration Methods and Economic Analysis*, Longman, 2006, p.9: "FTA and CU are recognised in international economic law since centuries (See Viner, 1950) and codified in the WTO as article 24 GATT. The common market and economic union are not specified in international economic law; the terms are widely used but the definition of economic union in particular varies greatly. Total economic integration is a phrase fallen into disuse; however, of the "partial" unions beyond an economic union mentioned above, the monetary union is often considered as a stage by itself- its essential characteristics are clearly defined, although the desirable budgetary and other policy integration is somewhat controversial; terms such as a social union (applied in the German Unification in 1990), a tax union and political union seem to be more arbitrary."

[6] J. Pelkmans, *European Integration Methods and Economic Analysis*, Longman, 2006, p.101: "European Integration Methods and Economic Analysis": "A customs union can be defined as a group of countries eliminating tariffs for intra-group trade and unifying their national tariffs into a common external tariff for trade with third country. A customs union differs from a free trade area in the way it prevents trade deflection: in the free trade are, the national tariff disparities remain but their exploitation is outlawed with enforcement based on certificates of area origin, whereas in the customs union, tariff disparities are simply eliminated by erecting a common external tariff". See also: Hartley, The foundations of European Community Law, Oxford, 1994; J. Pelkmans and Heller, "The institutional economics of European Integration" in Capelletti, Seccombe and Weiler, *Integration through law: volume 1: Methods, Tools and Institutions*, 1986, Berlin.

to "Foundations of the Community", sets out the basis of the European Community which rests on a customs union[8] covering all trade in goods and involving the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries. In order to pursue these goals, the ancient Community had to be given legal personality and capacity, its own legislative, administrative and judicial institutions, and a source of income, currently known as "own resources".[9] This points to customs law at the dawn of modern EU. Despite its pivotal role in shaping a supranational Common Market,[10] now known as the Internal Market, very little research has been conducted on it up to now. For several years, customs law has been conceived[11] as a separate monad rather than an evolving compartment of fiscal law. This approach probably derives from the fact that customs law embraces a wide area of law, such as tax law, European law and administrative law. Mostly, despite their original fiscal purpose, customs duties are frequently considered a common instrument of commercial policy.[12] Regrettably, it being located at the intersection of many disciplines has discouraged rather than encouraged research

[8] As observed by T. Lyons, *EC Customs Law*, Oxford, 2008: "The new form of article 23 ECT deserves particular attention. Only the introductory words are changed. There is no more statement that the Community is based upon a Customs Union, but instead we are told: the Union shall comprise a Customs Union. Customs law becomes, not the foundation of a developing structure, but the Union within an Union, the heart of the matter. But it is a heart in a body engaged with the world, as the Union declares." P.87

[9] T.C. Fischer, *The US, the European Union and the globalization of the World Trade*, London, 2000, p.103.

[10] The Treaty of Rome of 1957 established the "common market". In *Gaston Schul* C-15/81, the Court established that "The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market". Currently, article 3 (3) TEU provides: "The Union shall establish an internal market". The internal market is defined in Article 26 (2) TFEU as comprising an area without internal frontiers in which the free movement of goods, persons, service and capital is ensured in accoardance with the provision of treaties. Although the term "common market" has been replaced by internal market, the European Court of Justice has used the concept interchangeably (Gaston Schul). On the contrary, a school of thoughts lean towards the diversity of the concepts. See eg L.W. Gormley, "Competition and Free Movement: Is the internal market the Same as a Common Market?", *European Business Law review*, 2002. Additionally, as to the difference between the concepts of a common market and an internal market, see: Kapteyn and Verloren van Themaat*, Introduction to the Law of the European Communities*, Deventer/London, 1989, p. 78-79. The remaining element of difference is that a common market requires no artificial distortions of competition.

[11] For a complete research on the nature of customs law, see: Czyżowicz, W., And Merski, J. *Customs law in the system of law*, Warsaw, 2005. G. Ardizzone*, Il presupposto del tributo ed utilizzazione della merce nel diritto doganale*, Rimini, 1984; U. Calderoni, *I cento anni della politica doganale*, Padova, 1961.

[12] J. Viner*, The Customs Union Issue (1950)*, Oxford, p.95: "Originally customs duties were levied for purely fiscal purposes and it was only as they began to be used as instruments on national commercial policy that there was any marked tendency to unify them nationally and to confine them to political frontiers."

activity. From an academic standpoint, this is a lacuna because most of the legislation and case-law regarding customs represent, in this regard, further development of policy and jurisprudence on European legal affairs. Customs law of the EU has undergone too many drastic changes to conclude that there is no precedent within the history of European law. The outcomes have gone further than the mere renunciation of the Member States to their own customs legislation, which early on became the prerogative of European law. The most significant result was the creation and development of the first fully-harmonised European tax model by laying down common customs legislation which defines the essence and the structure of the European customs law, including, for instance, the incurrence of customs debt, customs procedures and proceedings, and customs debtors.

In historical terms, the launch of the Customs Union represented the initial step in the legal process of Europeanisation.[13] The prospect of a customs union in Western Europe[14] emerged at the end of World War II up to become the pay-off of the American program of the European aid, the European Recovery Program.[15] The end of the war exposed all the weaknesses of Western Europe. The call for a strong upturn was thus answered and followed by a recovery programme based on four points: (i) a strong production effort by each of the participating countries, especially in agriculture, fuel and power, transport, and the modernisation of equipment; (ii) the creation and maintenance of internal financial stability as an essential condition for securing the full use of Europe's productive and financial resources; (iii) the development of economic co-operation between the participating countries; and (iv) a solution to the problem of the participating countries' deficit with the American Continent articularly through exports.[16]

[13] A. Sweet Stone, "Integration and the Europeanization of the Law" In P. Craig and R. Rawlings, eds., Law and Administration in Europe, 2003.
[14] J. Viner, *The Customs Union Issue (1950)*, Oxford, 2010, p.128.
[15] Charles P. Kindleberger, *Marshall Plan Days*, 1987.
[16] Committee of European Economic Co-operation General Report, September 21, 1947, Paris, p.11.

Additionally, the Economic Committee delineated some guidelines which were then in the form of core principles and organizational pillars of the European Community. The aim of this was to achieve the freer movement of goods by providing that participating countries were resolved: i) to abolish as soon as possible the abnormal restrictions which at present hamper their mutual trade; and (ii) to aim, between themselves and the rest of the world, at a sound and balanced multilateral trading system based on the principles which have guided the framers of the Draft Charter for an international trade organisation.

However, there were a number of critical factors that needed to be taken into consideration when deciding on these measures. Although the result could be remarkable, the process initially was very difficult. As a result of this difficulty, in the aftermath of World War II, the abovementioned project was too ambitious to realise and therein lay the seeds of its failure.

The reluctance to formally and explicitly recognize and take actions for the preferential removal of trade obstacles motivated Paul G. Hoffman to show his discontent during the official pronouncement to the Council of the Organization of European Economic Cooperation on 21 October 1949. In this context, he presented Western European economic integration as a necessary objective through "the formation of a single large market within which quantitative restrictions on the movements of goods, monetary barriers to the flow of payments and, eventually, all tariffs are permanently swept away".

Despite the initial failure of the Marshall Plan, the EU quickly became far more than that and by far surpassed all the targets. There are, nevertheless, several administrative obstacles which hamper the effective merger of customs systems. Currently, the decentralisation of customs administration[17] collides both with the proper functioning

[17] See: K. Limbach, *Uniformity of Customs Administration in the European Union*, Bloomsbury, Publishing London 2015., p. 4 on the effects of decentralisation. The author importantly argues that "The decentralised approach to EU customs administration raises for the non-uniform application of EU customs law, since the national customs administrations in the different EU member States are organised autonomously to some extent can act independently from each other. The European Commissioni is not a supervisory authority for the national customs administration and thus cannot give

of the European Customs Union and the ongoing process of European administrative integration. To mention the metaphor used by public law academics but applicable to several branches of public law including customs law, the legislation results in a "harmonization by bits and pieces".[18]

However, despite the criticism of the fragmentation which has cast doubt on the efficiency of the Customs Union, customs scholarship has expressed the function of the Customs Union as that of a pioneering role when it comes to the Europeanisation of national administrative law, owing to the most extensive harmonized codification of law on the European level. In fact, the creation of a perfect customs union[19] appears to have been achieved if considering those classical criteria to establish the existence of a customs union:

- The complete elimination of tariffs between the member territories;
- The establishment of uniform tariffs on imports from outside the union;
- Apportionment of customs revenue between the members in accordance with an agreed formula.

These were considered the traditional parameters for qualification as a customs union. However, customs unions have changed and developed over the years. This thesis will move from debates about the theoretical or conceptual foundations to focus on the technical terms of the customs union in international and European law. In fact, it has

instruction. EU customs law is open to interpretation because many provisions contain undefined legal terms, while other provisions provide for a margin of discretion when making certain customs decisions. Therefore, customs procedures can differ significantly in different EU member States, especially in paper-based environment, without common criteria and standards, the conditions for uniform customs administration are noti deal. Nonetheless, uniform administratin of EU customs law is of great importance for the EU and the competitiveness of EU business global trade. Non uniform customs administrationlimits effectiveness and efficiency, giving rise to duplication, incosistency and mismatches of resources. Moreover, non uniform customs administration has the potential to weaken the strong economic position of the EU by producing legal uncertainty, expensive and drawn out judicial proceedings and loss of revenue".

[18] The concept of "Harmonisation by bits and pieces" has been used by J. Hans in "Towards a Draft Common Frame of Reference for Public Law'" with reference to the harmonization of general topics of administrative law, including customs law but stems from the metaphor used by Curtin in "The constitutional structure of the Union: a Europe of bits and pieces".

[19] This is specifically alluded to the reconstruction according to: J. Viner*, The Customs Union Issue (1950)*, Oxford, 2010.

been noted[20] that the European Customs Union can be technically regarded as an autonomous notion of European treaties, distinct from the concept that, for instance, GATT implies. Futhermore, existing customs unions are very different from each other. This is not to say that the concept of the customs union is legally irrelevant or cannot play an important role for understanding the implications of a customs union. Or maybe the answer lies in the fact that the establishment of any customs union should always be perceived as a gradual and continuous phenomenon rather than a one-off event, as highlighted by Mr. Peter Kiguta, Director General, EAC Customs and Trade.[21] A fortiori, this seems to be proved by the fact that one of the enduring peculiarities[22] of the nation-state is that a national government insists on the right to mantain some form of restriction over the movement of goods, persons and money into and out of its territory. Within this picture, the evolutionary process of creating a customs union affects sovereignty in all its ramifications by determining the conditions on which goods enter and leave their territories and by involving customs administration in the application of supranational rules. Hence, the initial critics were moved by the earlier sceptical scholarly literature[23] and a sense of unreliability around the creation of a customs union. Thus, it is hardly surprising that the European Customs Union was considered an ambitious project that was unlikely to materialize, especially at a time of great instability across Europe.

2. The European customs system: Nature and purposes

It is this point which raises the most difficult questions. As a matter of legal policy, the ambiguity of customs law[24] should give commentators reasons to speculate on the

[20] J. Usher, "Consequences of the customs union", in E. Emiliou and D. O Keefe*, The European Union and World trade law after the Gatt Uruguay round,* Chichester, 1996.
[21] T. Lyons*,* "A Customs Union without Harmonized Sanctions: Time for Change?", *Global trade and Customs Journal,* Volume 10, Issue 4, 2015.
[22] B. Bernard, J. Malbon, *Australian Export: A Guide to Law and Practice*, Cambridge, 2006.
[23] J. Viner*, The Customs Union Issue (1950)*, Oxford, 2010.
[24] The difficulty in grading customs law seems to be a common and shared issue within overseas customs systems. For instance, see: Óscar Bernardo Reyes Leal**,** *Manual de derecho aduanero***,** Oxford, "La determinaciòn de la naturaleza juridica del derecho aduanero consiste en identificar a que categoria juridica pertenece. Debido a que la normas

nature and purposes of customs law. However, few scholars[25] have ascribed a special significance to customs law. There has been some heated debate among those who attribute a merely commercial or fiscal nature to it. Some[26] magnify customs law as a unique example of harmonization at both the regional level of the EU and the global level of GATT/WTO. Others[27] recognize certain similarities between customs and tax laws, by perceiving them as revenue-raising measures. The tax literature does not deny the fiscal nature to the extent that it identifies customs law as the best example of harmonized tax law[28] in the international context. Significantly, according to leading tax scholars,[29] the most basic idea behind the EU is a fiscal idea on account of the customs union. However, the connection between customs and tax law remains cryptic, becoming even more enigmatic due to the fact that customs law rarely receives attention from a theoretical point of view even though it is a reference point for both the development of European indirect and direct taxation. As such, the first question that requires intense reflection is: what is the relationship between customs law and tax law? Answering this question is not without legal implications from both a practical and an academic perspective. Assuming the answer is a genus-species relationship, this would allow us to transfer the characteristics of the thing classified as genus to the thing classified as species. Despite the existence of different trends and difficulties in finding a coherent line to approach this sector, the analysis here will presume this relationship as an axiom within the reconstruction of the structure of customs duties from a legal point of view.

constitutivas de esta disciplina son ejecutadas sobre todo per entes administrativos como las autodoridades aduaneras, cuyas facultades son materia de la potestad tributaria del Estado, se puede decir que la naturaleza del derecho auduanero tiene come orige nel derecho publico; sin embargo, esto ocasiona una nueva disyuntiva; determinar si el derecho aduanero es una rama con caracteristicas y elementos que la hacen autonoma o si se coloca dentro alguna otra ramas del derecho". See also: Germán Alfonso Pardo Carrero, Ramiro Ignacio Araújo Segovia, *El derecho aduanero en el siglo XXI,* 2009.

[25] One of the main research on this topic has been conducted by Wieslaw Czyzowicz and Robert Verrue in: (edited by J. Merski and W. Czyzowicz*), Customs law in the system of law*, Warsaw, 2005, p. 13 and 55.

[26] M. Fabio, *Customs law of the European Union*, Alphen Aan Den Rijn, 2001.

[27] L. Alan Glick, *Guide to United States Customs Law and Trade laws*

[28] M. Fabio, *Customs law of the European Union*, Alphen Aan Den Rijn, 2001.

[29] See: Ben Terra, *European Tax Law*, p. 10 where the author notes that "Elimination of trade barriers within Community began with the abolition of customs duties an other import restriction and the harmonization of indirect taxes"

What is certain is that customs law not only goes much further than tax law in terms of *europeanisation* due to a set of legal factors decisive to this process. Starting in the 1960s, customs became one of the main vehicles for developing European law in the rapidly growing EU. Doubtless it contributed greatly to mould the European tax order. However, in order to provide a clear picture of its impact, it is necessary to examine several related aspects which render the branch of customs a catalyzer for the development of European tax law. Firstly, the complete loss of sovereignty from the Member States' perspective within customs policy. This is a fundamental point if we reflect on the fact that the branch of direct taxation is intricately anchored to the concept of national tax sovereignty owing to the piecemeal approach adopted within this sphere whereas customs sovereignty overlaps with European sovereignty. Broadly speaking, European case-law about direct taxation has been evolving thanks to interpretations of the European Court of Justice (ECJ) which has stemmed the tide of fiscal policy of the Member States. According to international literature, the concept of sovereignty[30] implies the existence of a "State" within a society and, thus, public powers guarded jealously by the State itself. As observed, tax sovereignty is a fundamental part of national sovereignty[31] through which States can exercise taxing rights and monitor their budgetary policy. As such, the allocation of customs revenues[32] between Member States is a non-existent debate since customs duties are the "own resources"[33] wholly accruing to the central European budget. Indeed, the transfer of

[30] See: M. Isenbaert, "Chapter 2. The concepts of Sovereignty and of Income tax Sovereignty" in *EC Law and the Sovereignty of the Member States in Direct Taxation*, (Last Reviewed: 1 October 2009), IBFD: "Firstly, the development of the attribute of sovereignty presupposes the existence of a "state" within a society. The notion of "state" implies the distinctive political institution or the particular means of organizing political power which societies have developed at a particular stage of their evolution. Although in many 21st century modern societies the functions of the state have increased so drastically that "state" and "society" have become practically interchangeable terms, the political organization of society should not be confused with society itself. This can be demonstrated by the fact that the state is never the sole source of rules that regulate the conduct of its citizens. Besides the laws laid down by the political system, other rules control the conduct of citizens, including, for example, religion, morality or professional codes."

[31] Ben Terra, *European Tax Law*, p. 7.

[32] On methods of allocating customs revenues in customs union, see (T.E.Gregory, 1947) (T.E.Gregory, 1947)

[33] On the role of fiscal resources within the commencement and creation of the States: K. Hopkins, "Taxes and trade in the Roman Empire" (200 BC – AD 400)', *Journal of Roman Studies* 70: 101–125, 1980; K. Hopkins, "Rents, taxes, trade and the city of Rome", in E. Lo Cascio (ed.*), Mercati permanenti e mercati periodici nel mondo romano. Atti degli Incontri capresi di storia dell'economia antica* (Capri 13–15 ottobre 1997) (Pragmateiai, 2). Bari; A. Lintott, *Imperium Romanum: Politics and Administration*, p.70**;** Goffart Walter, Caput and colonate : towards a history of late roman taxation, 1974; Webber, Carolyn, *A history of taxation and expenditure in the Western world*, 1986; Seligman, Edwin Robert Anderson,

goods across borders no longer constitutes a source that generates own revenue for each Member State since the prohibition of internal customs duties was established by Article 30 TFEU: "Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature". Moreover, the EU, *iure imperii*, obtains its revenue from four main sources: 1) traditional own resources, comprising customs duties on imports from outside the EU and sugar levies; 2) VAT-based resources, comprising a percentage (around 0.3%) of each Member State's standardised (VAT) rate; 3) GNI-based resources, comprising a percentage (around 0.7%) of each Member State's gross national income (GNI); and 4) other resources, including deductions from EU staff salaries, bank interest, fines and contributions from non-EU countries.

This income is now referred to as the Union's own resources. In this regard, the European Union cannot increase its revenue except as a result of market forces without a unanimous vote of the Council. Within the framework of the Customs Union, Article 3 of the Treaty of Lisbon gave sole authority to the EU to legislate on customs matters. Consequently, the EU has been empowered to adopt an unified customs legislation, originally contained by the Community Customs Code and its implementing provisions.

By equipping itself with own resources, it is possible to state that the EU laid the groundwork to "create, protect and increase the sovereignty"[34], its own authentic sovereignty.

The income tax : a study of the history, theory, and practice of income taxation at home and abroad, 1911; Coffield, James, *A popular history of taxation: from ancient to modern times* 1970; Ellis, Maria deJong, *Taxation in ancient Mesopotamia : the history of the term miksru*, 1974; P. C. Witt, *Wealth and taxation in Central Europe : the history and sociology of public finance,* 1987*;* C. Adams*, For good and evil: The Impact of Taxes on the Course of Civilization*; M Sbarbaro, *I dazi di Gemona del Friuli : per la storia delle imposte indirette nel Medioevo*, 2010; A. Lymer and J. Hasseldine, *The International Taxation System*; Scheidel, W. and Friesen, S. J., "The size of the economy and the distribution of income in the Roman Empire", *Journal of Roman Studies* 99, 2009; N. S. B. Gras Source, "The Origin of the National Customs-Revenue of England", *The Quarterly Journal of Economics*, Vol. 27, No. 1 (Nov., 1912), Oxford University Press; G. Castellano, "Porto franco, fiere, manifatture e dazi doganali nelle due Sicilie durante la prima restaurazione borbonica", in *Studi in onore di Riccardo Filangieri*, III, Napoli, 1959; M. Cian, *Le antiche leggi del commercio. Produzione, scambi, regole*; E. Varese and F. Caruso, *Commercio internazionale e dogane. Le dogane negli scambi internazionali.*

[34] As mentioned by S. Günther in *Taxation in the Greco-Roman World: The Roman Principate:* "τό τε σύμπαν εἰπεῖν, χρηματοποιὸς ἀνὴρ ἐγένετο, δύο τε εἶναι λέγων τὰ τὰς δυναστείας παρασκευάζοντα καὶ φυλάσσοντα καὶ ἐπαύξοντα,

Furthermore, customs law, as the unique tax model[35] laid down in a regulatory source, has continuously impacted the axiomatic structure of European tax law. Indeed, it is undisputed that European customs law has proved to be a "test bench" for the crystallization of many principles of European tax law.[36] All these principles do not constitute the outcomes of a legislative epiphany but the result of a connection and synthesis between the States and the ECJ, which has incorporated and re-shaped national principles to subsequently render them the core principles of the EU. In other words,[37] the European legal system borrows the principles and then returns them, manipulated, to all the Member States. Frequently, this cross-fertilisation process, described by a leading academic as "a reverberation of principles development progressively spreading outward throughout the EU and national legal orders", has often stopped once the principle is set in stone by customs law. As it is characterized by the highest level of harmonization and regulatory legislation, customs regulation has often absorbed the ECJ trends to render those principles of general application throughout national tax legislation. For instance, it is worth mentioning Article 42 of the UCC is aimed at ensuring that national sanctioning systems are consistent with

στρατιώτας καὶ χρήματα, καὶ ταῦτα δι᾽ ἀλλήλων συνεστηκέναι: τῇ τε γὰρ τροφῇ τὰ στρατεύματα συνέχεσθαι, καὶ ἐκείνην ἐκ τῶν ὅπλων συλλέγεσθαι: κἂν θάτερον ὁποτερονοῦν αὐτῶν ἐνδεὲς ᾖ, καὶ τὸ ἕτερον συγκαταλυθήσεσθαι." Cassio Dione, In short, he [sc. Caesar] showed himself a money-getter, declaring that there were two things which created, protected, and increased sovereignties, soldiers and money, and that these two were dependent upon each other. For it was by proper maintenance, he said, that armies were kept together, and this maintenance was secured by arms; and in case either one of them were lacking, the other also would be overthrown at the same time." (D.C. 42.49.4sq., transl. E. Cary, 1916, Dio's Roman History, Vol. 4 [LCL], Londonand New York)."

[35] See B. Terra, *European Tax Law*, p. 7. Although the author argues that "A genuine European tax dos not exist since also customs duties are levied and collected by the national tax administrations, and as the revenue transmitted to the EU is small compared to the percentage of GDP of the Member States taken by national taxation", this proposition does not seem in total conformity with the fact that the European Union has taken over the Customs policy and its legislation.

[36] R. De la Feria, "Introducing the Principle of Prohibition of Abuse of Law", in *Prohibition of Abuse of Law. A New General Principle of EU Law?*, a cura Di R. De La Feria, S. Vogenauer, Oxford and Portland, Oregon, 2011, p. XXI: "Like a sound wave, the reverberation of principle development progressively spreads outward throughout the EU and national legal orders. And like the motion of a wave, there is not only radiating movement, but multidirectional movement back and forth, which for our purposes, means both between the EU judicial arm and the courts and legislatures if the Member States amongst themselves (horizontally)". See generally: J. Nerghelius, "The role of general principles of law within EU law: some theoretical and pratical reflection, in La forza normativa dei principi. Il contributo del diritto ambientale alla teoria generale", edited by D. Amirante, Padova, 2006; K. Lenaerts, J.A. Gutiérrez-Fons, "The role of general principles of EU Law", In A. Arnull, C. Barnard, M. Dougan, E. Spaventa*, A constitutional order of States? Essays in honour of Alan Dashwood*, Oxford, 2011; T. Tridimas, *The General Principles of EU Law*, Oxford University Press, 2006; C. Semmelmann, "General Principles in EU Law between a Compensatory Role and an Intrinsic Value", *European Law Journal*, 2013; R. Schütze, *European Constitutional Law*, Cambridge University Press, 2012.

[37] J.H. Jans, R. de Lange, S. Prenchal, R.J.G.M. Widdershoven*, The Europeanisation of public law*, 2007, p.116

certain common requirements. By stating that each Member State shall provide for effective, proportionate, dissuasive penalties for failure to comply with the customs legislation, it introduces not only a common legal basis but, in essence, legitimates the ECJ judicial review on the sanctioning measures for the purpose of evaluating that their implementation is enforced and monitored. When taking a step backwards, the principle of proportionality[38] of sanctions[39] has germinated in the context of national measures,[40] derogating from the fundamental principles of the common market to define the limit beyond which, during the exercise of that function, the State would no longer be justified in interfering with the exercise of the individual rights to freedom guaranteed by the Treaty. Likewise, the right of defence, within tax proceedings, was not initially conceived as a parameter for evaluating the legitimacy of tax assessment. The ECJ's reasoning in *Sopropè* acted, once again, as a gateway to provide legal protection for a taxpayer besides being a cornerstone principle of Community law applicable during auditing procedures by the tax authorities whereby the legitimacy of

[38] On the principle of proportionality of customs penalties, see: C-210/91 Commission VS Greece (p.19), Siesse p.20 C-36/94, Loulodakis C-262/99, C-213/99 De Andrade. The earlier case-law regarding customs offences does not refer to the principle of proportionality to steer Member States towards the establishment of measures but to a general concept of appropriateness, as proved here: "in the absence of any provision in the Community rules providing for specific sanctions to be imposed on individuals for a failure to observe those rules, the Member States are competent to adopt such sanctions as appear to them to be appropriate" case 50/76, Amsterdam Bulb, Race para 33 and 26 ottobre 1982, causa 240/81, Einberger, Race. para 17.

[39] Siesse C-36/94, para 20: "It is settled case-law, confirmed in Case C-3 82/92 Commission v United Kingdom [1994] ECR 1-2435, paragraph 55, and Case C-383/92 Commission v United Kingdom [1994] ECR 1-2479, paragraph 40, that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national legislation, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized 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."

[40] The first ECJ judgement concerning the proportionality of penalties is attribuible to the Case 118/75 Lynne Watson, whereby a legal precedent is stated, inspiring the following case law. See para 21 whereas it is established that "Member States are not justified in imposing a penalty so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of persons". According to the case-law mentioned by General Avocaut Trabucchi the proportionality should be seen as functional in relation to the protection of freedoms: "Special importance attaches to the principle that the obligation imposed should be proportionate to the legal objective sought by public authorities. Indeed, the principle is not confined to cases of derogation from such rights but is of general application and constitutes one of the principles which must govern action by public authorities, Community or national, within the Community legal order. This follows clearly from the precedents established by the court, in particular by the judgments in Case 19/61, Mannesmann v High Authority, [1962] ECR 357, Case 8/74, Dassonville, [1974) ECR 852; Case 33/74 Van Binsbergen, [1974] ECR 1310 (Ground of judgment No 16) and Case 39/75, Coenen, [1975] ECR 1555 (Grounds of judgment Nos 9 and 10)"

public powers could be assessed.[41] Hence, Article 22(6) of the new Customs Code reproduced the ECJ's argument[42] in favour of the right to a hearing by establishing that, before taking a decision which would adversely affect the applicant, the customs authorities shall communicate the grounds on which they intend to base their decision to the applicant, who shall be given the opportunity to express his or her point of view within a period prescribed from the date on which he or she receives that communication or is deemed to have received it. Also, the principle of legitimate expectation[43] must be appended to the set of principles pushed by customs law since it has been given regulatory recognition by the European Customs Code under Article 220[44]. This article is regarded as the first codified version of the principle of legitimate expectation according to which the customs debt will not be recovered where the amount of duty legally owed failed to be entered in the accounts a) as a result of an error on the part of customs authorities themselves, b) which could not reasonably have been detected by the person liable for payment, c) the latter for his part having acted in good faith and complied with all the provisions laid down in the legislation in force as regards the customs declaration. Clearly, these examples demonstrate that most European principles applicable to tax law are, to a great extent, governed by precepts that originate in customs law. Through a gradual, sequential process, from their supply by the case-law, they first become general principles to be applied in future cases, and then pass through their regulatory codification until their re-expansion throughout domestic fiscal legislation. Seen in this light, it is not surprising that the first income

[41] Sopropè C – 349/07

[42]See: case Sopropè, p.36 e 37: "Observance of the rights of the defence is a general principle of Community law which applies where the authorities are minded to adopt a measure which will adversely affect an individual. In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. They must be given a sufficient period of time in which to do so (see, inter alia, *Commission* v *Lisrestal and Others*, paragraph 21, and *Mediocurso* v *Commission*, paragraph 36)".

[43]On the Doctrine of Legitimate Expectations, see: *Europeanisation of Public Law*, J.H. Hans, R. de Lange, S. Prechal and R. J. G. M Widdershowen p.172.; H.J. Blanke, Vertrauensschutz im deutschen und europäischen Verwaltungsrecht, 2000; M.P Chiti, The Role of the European Courts of Justice in the Development of the General Principles and Their Possible Codification, in Riv. it. dir. pubbl. com. 1995, 661 ss; M. Greggi, *Collaborazione e buona fede tra contribuente e agenzia delle entrate nel processo tributario,* 2008.

[44] This article has been replaced by art. 119 UCC.

tax case that reached the ECJ in recent history required an interpretation of the free movement of goods.[45]

2.1 The customs legal framework: Between harmonization and national autonomy

The persistence of peculiarities[46] and of a presumed "remoteness" from traditional branches of law have led to academics taking little interest in customs law. At the same time, however, it is recognized that there is no doubt that customs law, with its formal style heavily influenced by the different European doctrines and traditions, has played an important role within European law. The ubiquity of customs law[47] is not immediately evident and it is the main cause of its obscurity. This standpoint has often been an excuse to regard customs as an autonomous set of self-contained rules. Rather, when asserting its structure, it is of crucial importance to recognize that there cannot be a single autonomous perspective colouring its legal formulation. In this regard, customs law emerges as a seminal discipline in that it lays down the foundations for the subsequent evolution of European legal branches.

Through considering the steps taken towards the development of a customs union, it will become apparent that the European legislator has consistently responded by codifying the European customs legislation. This reorganization has been praised by leading scholarship[48] for the ways it has consolidated, codified and created transparency. In fact, the codification of customs legislation has meant to be both the tool to clarify and make more transparent commercial relations with third countries and to make effective the requirement of Article 29(a) EEC that the Commission be driven by the need to promote trade between Member States and third countries. Council

[45] EC Law and the Sovereignty of the Member States in Direct Taxation - Online Books - Chapter 2. The Concepts of Sovereignty and of Income Tax Sovereignty (Last Reviewed: 1 October 2009). IBFD

[46] G. Ardizzone*, Il presupposto del tributo ed utilizzazione della merce nel diritto doganale*, Rimini, 1984

[47] Fundamental is the research conducted in: *Customs law in the system of law*, Warsaw, 2005.

[48] E. Emiliou and D. O Keefe*, The European Union and World trade law after the Gatt Uruguay round,* Chichester, 1996, p. 128

Regulation No 2913/1992 establishing the Community Customs Code repealed 28 regulations and directives adopted by the Council over the years while Regulation No 2913/1992 repealed 77 regulations and directives. Despite initially extolling its potential to put an end to the fragmentation of Community provisions in the customs field, the room left to national provisions remains significant. For instance, with specific regard to customs controls,[49] the elimination of customs formalities at the internal frontiers was supposed to be set out alongside a set of harmonized external measures. However, the regulation of the customs controls depends on the domestic choices of customs policy given that a single European customs administration has not been established. Discretionary legislative powers[50] have been kept for the purpose of designating free zones or free warehouses and strategic simplification measures. In fact, experimental simplified procedures were authorized by Article 97 CDC[51] which provides that each Member State has the power to establish simplified procedures, applicable in certain circumstances for goods not intended to be used in the territory of another Member State. This approach fails to fully address the sphere of European customs law, omitting sensitive matters of procedural laws. At present, the UCC, its implementing provisions and domestic rules co-exist in the Customs Union. The Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and of the Council) entered into force on 9 October 2013 and was fully applicable from 1 May 2016. The related Commission acts, delegated and implementing acts, which replace the Customs Code Implementing Provisions and allow a full application of the Code, were published on 29 December 2015. Under the new UCC,[52] the means of the "guarantee" becomes the ordinary rule rather than the exception. There is some concern

[49] On the customs controls, see: *The Effects of Greater Economic Integration Within the European Community on The United States: fifth followup report*, Investigation No. 332-267, April 1993, p. 101

[51] (a) Member States shall have the right, by bi-lateral or multilateral arrangement, to establish between themselves simplified procedures consistent with criteria to be set according to the circumstances and applying to certain types of goods traffic or specific undertakings;
(b) each Member State shall have the right to establish simplified procedures in certain circumstances for goods not required to move on the territory of another Member State.

[52] See: deferred payment (Art. 110 UCC) ¬ release of goods (Art. 195 UCC) ¬ most special procedures (Art. 211 UCC) ¬ operation of temporary storage facilities (Art. 148 UCC)

over the use of the breadth of the "guarantee for a potential or existing customs debt to be provided"[53] to cover the amount of import or export duty and the other charges due in connection with the import or export of the goods. Of course, the strenghthening of guarantees appears to be a further step in optimising the application of customs law to the financial objectives that would be potentially undermined.

2.2 Challenging the current status of customs legal order

As stated, customs law has outpaced most of the other legal branches in integrating the European legal system. However, the European customs system is unique in the sense that, despite the highest grade of harmonization, the European legislator keeps certain substantive limitations since it does not exercise its competences in the fields of customs administration, inspections, customs and administrative penalties, nor over the right to appeal against the domestic customs authorities' assessment of customs duties even if the competence of the EU falls under the exclusive one, as set out by Article 3 of the Treaty on the Functioning of the European Union (TFEU) according to which:

> 1. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.

Therefore, the current legal customs system is structured along the delimitation of competences and a double legal basis, namely European and domestic. This has naturally resulted in the existing fragmented framework that does not facilitate the creation of a cohesive and uniform legal system. In order to ensure the effectiveness of European customs law, Member States autonomously establish domestic rules concerning the customs audit and they impose and provide for sanctions that seem appropriate to them as penalties for infringements of certain obligations stemming from the fully-regulated European Union customs legislation.[54] From the perspective of

[53] The reference is to art. 89 UCC

[54] On the harmonization techniques within European customs law, see: Dominik Lasok, *The Trade and Customs Law of the European Union*, 1997.

international trade law, this situation renders the current structure extremely composite and inherently fragmented. Revealingly, as observed by international trade law scholarship,[55] customs issues in the EU are run in a peculiar way since:

> The EC as a supranational body has "exclusive competence" over the administration of customs matters in respect of all goods entering the EC customs union. That much can be expected from a Customs union. Yet, when it comes to the execution of EC customs law, that is the day-to-day implementation of EC customs law including product-classification decisions and decisions on audits or penalties for breach, this task remains in the hands of the administration and courts of individual EC member states.

At the core of the EU there is one of the most advanced forms of customs union, but characteristically with both a great deal of internal legislation and an external tariff. Customs duties are allocated to own resources for the financing of European common expenditure but the provisions regulating wrongdoing that impacts their recovery, including the censure they deserve, is left to the full discretion of Member States.

Within this discontinuous legal picture, logic would dictate the harmonisation of infractions and penalties systems into a single supreme instrument to be an essential objective to rationalise the complexity and to create a genuine customs union, in accordance with both the unicity of the customs territory and the uniformity of the common commercial policy. Again, customs law strives to move forward in leaps and bounds, despite the braking forces of Member States.

To conclude, customs law remains a peculiar field[56] due to its inherently polihedric nature which naturally requires to direct the structure of a customs union towards a complete harmonisation. This area, as an integral part of the Union's sphere of activity, displays a natural *vis expansiva*, whereas consistency and uniformity of penalties and

[55] Henrik Horn, Petros C. Mavroidis, *The WTO Case Law of 2006-7,* Cambridge, p.45.

[56] G. Radu in "L'Union douanière européenne: bilan et perspectives d'avenir", *Revue internationale de droit économique*, 2014/4 (t. XXVIII). The author notes that "Il'est unanimement admis que la matière douanière est complexe et difficile, réservée aux initiés seulement. Pour la comprendre, il convient de manier avec beaucoup d'attention et de prudence un certain nombre de notions qui touchent à lafois au commerce international des marchandises, aux préoccupations des États en matière fiscale, de protection et de défense commerciale, sans oublier la lutte contre la contrefaçon, le terrorisme et autres phénomènes en lien avec le franchissement de la frontière douanière. Il s'agit sans doute d'une discipline transversale qui demande une excellente maîtrise de la réglementation internationale, européenne et nationale relevant de la douane et dont la complexité est légendaire. Parmi les notions employées par cette discipline, celle portant sur «l'union douanière» présente une grande importance, ce qui pourrait s'expliquer par la formation de plus en plus fréquente de blocs régionaux interétatiques un peu partout dans le monde. L'union douanière apparaît donc comme une réponse des États aux changements considérables qui se sont produits ces dernières décennies dans les échanges commerciaux internationaux".

administrations are the logical consequences of its existence. This wish was partially taken into account by the Proposal[57] for a directive of the European Parliament and of the Council on the union legal framework for customs infringements and sanctions n. 2013/0432, albeit not without its problems. Such a proposal is still in the transition stage. Hopefully, this opens up a challenging scenario, encouraging intense debate on the appropriate structure for customs and infringements, but perhaps without effective results since it has not culminated in any radical revamping of the framework for customs penalties and infractions.

[57] C.J. Berr, "L'harmonisation européenne des sanctions douanières. Observations sur un projet de directive du 13 décembre 2013", *Observatoire des réglementations douanières et fiscales* (ORDF), 2 avril 2014, p. 5. http://www.ordf.eu/actualites-de-l-ordf/.

Chapter II

Customs debt liability within the Union Customs Code: A systematic analysis

3. Introduction

In principle, customs duties play a pivotal role from a financial point of view because they represent, under Article 311 of the TFEU, the EU's "own resources".[58]

In this field, it must be observed that one trend is shaping and dominating the evolution of customs law: a proliferation of liabilities, of different natures, all taken as appropriate measures to ensure recovery of the customs debt arising out of the customs rules. Against this backdrop, there is a gradual and increasing expansion of the scope of customs liability in the light of the ECJ's settled case law. Furthermore, there is a growing attention to the creation of an efficient system of sanctions and tools for ensuring compliance of customs regimes so as to guarantee both the effectiveness of the single market and the equilibrium of the European Union's budget. For instance, there is not only a systematic use of third-parties (in the form of joint customs liabilities) but also an increasingly compulsory use of guarantees[59] in order to ensure the customs payment, introduced as an administrative measure to prevent potential revenue losses. Indeed, compliance in areas involving the EU's financial interests is often deficient, as regularly reported in official publications such as the Annual Reports of the European Court of Auditors.[60] From an academic perspective, it seems crucial to reflect upon how the structure of customs duty and its interpretation has been

[58] On the customs duties within financial framework, see: T. Lyons*, EC Customs Law*, Oxford, p. 56; M. Scuffi - G. Albenzio - M. Miccinesi, *Diritto doganale, delle accise e dei tributi ambientali*, Milano, 2013, p.355.

[59] Article 89 of the UCC shall apply to guarantees both for customs debts which have been incurred and for those which may be incurred, unless otherwise specified (the compulsory use of guarantees applies to all special procedures). On this point, see the interpretation by Agenzia delle Dogane e dei Monopoli (19th of April 2016): "E' obbligatoriamente prevista la costituzione di una garanzia per tutti i regimi speciali doganali soggetti ad autorizzazione e per la custodia temporanea. Viene, pertanto, rovesciato il principio stabilito nel Reg. (CEE) n. 2913/92 che aveva individuato come facoltativa la garanzia per i regimi sospensivi, eccezione fatta per il transito e l'ammissione temporanea (quando gestita con dichiarazione scritta) ove era prevista come obbligatoria."

[60] J.H. Jans, R. de Lange, S. Prenchal, R.J.G.M. Widdershoven*, The Europeanisation of public law*, 2007, p. 199.

influenced by its core role of being the major part of European resources. It is argued here that without keeping in mind the relationship of the concepts of "tax" and "customs duties" we cannot hope to obtain a complete picture of this model of tax liability. Arguably, the customs debt's design has resulted in a deviation from those common and shared principles of taxation, for instance, the ability to pay.[61]The debate on direct taxation is firmly intended to identify the substantive taxpayer whilst, on the other hand, the European VAT structure can better guarantee, through fiscal neutrality, the tax liability to the final consumers. In contrast, the customs debt's design, as regulated at the European level, does not provide any mechanism to allocate the tax burden on the effective importer. Thus, the purpose of this chapter is to introduce the legal rules related to the European customs debtors by examining the origins, structure and content of the customs debt liability. One of the prime characteristics is that the

[61] On the ability to pay, as a principle enshrined in the Italian Constitution, within customs law, see: M. Scuffi - G. Albenzio - M. Miccinesi, *Diritto doganale, delle accise e dei tributi ambientali*, Milano, 2013, p. 203 whereas P. Puri empasizes that "Il legislatore comunitario non è tenuto a giustificare le proprie opzioni impositive in chiave con un criterio di riparto delle pubbliche spese assimilabile a quello di cui all'art. 53 della Costituzione; criterio che impone la redistribuzione dell'onere dell'imposta fra soggetti coobbligati, in ragione della capacità contributiva espressa da ognuno. Cosicché, rispetto all'individuazione di un unico soggetto passivo, cui l'onere d'imposta dovesse necessariamente addebitato anche nel caso di pagamento avvenuto da parte di terzi (come ad esempio accade nelle ipotesi di responsabilità d'imposta), il legislatore europeo ha preferito selezionare una "platea qualificata" di soggetti che, pur rapportandosi a diverso titolo con il presupposto d'imposta, sono tutti ugualmente obbligati agli occhi dell'Erario. Sempre alla luce del criterio di capacità contributiva - "stella polare" per il legislatore interno- appare possibile spiegare l'asimmetria, prima estremizzata e poi stemperata da alcuni arresti gurisprudenziali interni, tra la disciplina italiana e quella comunitaria dei soggetti passivi delle imposte doganali. Asimmetria da risolvere, naturalmente, a vantaggio della normativa europea ogniqualvolta tra le due si prospetti un contrasto ermeneutico, stante la c.d. *primauté* del diritto comunitario e la necessità di un'interpretazione comunitariamente orientata della norma domestica"; See also: C. Corrado Oliva, "Dazi doganali e accise sui prodotti energetici e sugli olii minerali", in V. Uckmar (a cura di*), Intrecci fra mare e fisco*, 2015, pag. 60 emphasizing that "le peculiarità del presupposto dei dazi doganali per il rilievo più ai meccanismi di importazione e circolazione delle merci che non ai concreti indici di capacità contributiva che sono classico riferimento del nostro sistema impositivo".

On the ability to pay within European tax framework: J. Englisch, "Ability to Pay in European Tax Law" (Brokelind (ed.*), Principles of Law: Function, Status and Impact in EU Tax Law*, 2014, 439-464, who argues that "The Treaties of the European Union contain only a few tax-specific provisions, and none of them make any explicit reference to the concept of ability-to-pay. Nor is this principle enshrined in the EU Charter of Fundamental Rights (ChFR), which forms an integral part of primary Union law25. It has also never been invoked by the Court of Justice of the European Union (ECJ) as an unwritten general principle of Union law. One might therefore wonder how the ability-to-pay principle could have any constitutional status under Union law".

For a shared definition of ability to pay, see IBFD's database: "Principle of tax economics, based on the theory that taxes should be equitable, that a taxpayer's burden should reflect his economic capacity to bear that burden relative to other taxpayers. Income is traditionally considered to be the best measure of a person's ability to pay. However, alternative measures of economic position, such as consumption and net worth, may also be used for these purposes. The principle is used, inter alia, as an argument for progressive tax rates, for the imposition of taxes on capital and for various allowances such as age and disability allowances. Although it may appear inconsistent with the benefit principle, the two may arguably be reconciled."

allocation of customs debt liability is, usually, spread amongst multiple economic operators. It constitutes a model aimed at widening and expanding the customs debt liability and might end up affecting the construction of infractions. There follows an analysis of the application of this purely European model of customs debt liability, its interpretation given by the national courts and the ECJ, and how this allocation is altered and shaped. In fact, an initial examination of the UCC reveals a broad range[62] of persons capable of being regarded as customs debtors: in this regard, the person liable for the payment of the customs duty is not limited to a concept of a debtor who has a direct linkage with the chargeable event but comprises every person who is, on the grounds of graded objective and subjective requirements, involved in the realization of the chargeable event.

3.1 The theoretical structure of customs debt liability within the Union Customs Code

The difficulties in defining the structure of European customs duties are more Europe-centric than one may presume. There is one aspect that, above all, whether directly or indirectly, is fundamental to understanding the evolution of the customs arena: customs constitute the most vital and conspicuous part of the European budget. Indeed, its function, its being part of the European common good, is likely to have important consequences for the structure of customs debt liability. Interestingly, there are different schools of thought and conceptual studies on the customs debt liability but, despite their diversity, there is also some consensus. Common to the theories proposed is the understanding that the purpose of customs law is inextricably linked to the protection of own resources.

[62] M. Scuffi, G. Albenzio, M. Miccinesi, *Diritto doganale, delle accise e dei tributi ambientali*, Milano, 2013, p. 203 whereas P. Puri affirms that "Fin da un primo esame della disciplina emerge che l'obbligazione daziaria non gravita in capo al soggetto che esprime una relazione qualificata con il presupposto d'imposta, ma- indistintamente e solidalmente-in capo a tutti coloro che intervengono nella realizzazione del presupposto medesimo, quale che sia il titolo giuridico in forza del quale agiscono e il grado di prossimità all'indice di capacità contributiva colpita dal prelievo."

However, the different theories on customs law that were conceptualised by academic studies[63] might be portrayed as the result of different legal traditions. Naturally, the approaches offer slightly different perspectives in reconstructing customs liability. Although there is a constellation of different ways of conceiving and reconstructing customs debt liability, what emerges is the idea of a unitarian and purely European concept of customs debt. Academics move on both two fronts of a single model. A comparison of the different language versions reveals that not only do some languages employ the technical term obligation (for instance, obligación aduanera, obbligazione doganale, obligation douanier) but also the English version defines the customs debt as an obligation on a person to pay the amount of import, evoking the character of the latin concept of "*obligatio*". The use of this term, especially in those Member States with a civilian tradition, reflects those studies carried out by a line of scholarship[64] focused on the linkage of the following concepts: "customs debt", "tax" and "obligation". The roots of *obligatio* lie in Roman legal history and can be traced back to Cicero.[65] By looking at the Roman term, the term *obligatio* might refer to the debtor's duty as well as the whole *vinculum iuris*.[66] Modern tax literature of Roman

[63]S. Armella, *Diritto doganale*, Milano, 2015; C.J. Berr - H. Tremeau, *Le droit douanier: communautaire et national*, 2006; M. Carvajal Contreras, *Derecho aduanero*, 1995**;** D. Desiderio, M. Giffoni, "Legislazione doganale comunitaria e nuovo codice doganale", Giappichelli E., Torino, 2009; M. Fabio, *Customs law of the European Union*, Alphen Aan Den Rijn, 2001; M. Fabio, "Manuale di diritto e pratica doganale", Ipsoa, 2014; M. Favaro, *Manuale delle operazioni con l'estero*, IPSOA, 2011; E. Frixione, "Problemi doganali", in *Dir. prat. trib*., n. 5/2002, pag. 21097; S. Ibanez Marsillia, "Los tributos aduaneros" in *Manual de Derecho Tributario. Parte Especial*, Dirigido por Juan Martín Queralt, José Manuel Tejerizo López y Antonio Cayón Galiardo, Aranzadi, 1ª edición, 2004; Dominik Lasok, *The Trade and Customs Law of the European Union*, 1997; T. Lyons, *EC Customs Law*, Oxford, 2008; F. Mancuso, *Le regole doganali e il commercio internazionale*, Roma, 2016; B. Santacroce*, Dogane 2014*, Milano, 2014; M. Scuffi - G. Albenzio - M. Miccinesi, *Diritto doganale, delle accise e dei tributi ambientali*, Milano, 2013; B.J.M. Terra, C*ommunity Customs Law: A Guide to the Customs Rules on Trade Between the (Enlarged) Eu and Third Countries*, 1995; F. Vismara, *Lineamenti di diritto doganale dell'Unione Europea*, Torino, 2016; P. Witte - H.M. Wolffgang*, Lehrbuch des Europäischen Zollrechts*, 2016; E. Varese, *Dazi e regimi doganali nell'Unione Europea*, Giappichelli editore, Torino, 2012; A. Pezzinga, *La legge doganale comunitaria e nazionale coordinata e commentata*, Giuffrè, Milano, 2000; A. De Cicco, *Legislazione e tecnica doganale*, Giappichelli editore, Torino, 1999; J. L. Albert, *Douane et Droit Douanier*; C. Soulard*, Guide pratique du contentieux douanier*, 2015; A. Ayessa *Elements de Droit Douanier,des Procédures et des Techniques Douanieres Dans les Etats Membres,* 2012; K. Lasinski-Suleski, *Prawo Celne*, 2009; W. F. van Haaften, *Douanewetgeving: Overige internationale regelgeving*, Kluwer, 2003; F. Snyder*, International Trade and. Customs Law of the European Union*, Butterworths, 1998.

[64] G. Ardizzone*, Il presupposto del tributo ed utilizzazione della merce nel diritto doganale*, Rimini, 1984, pag. 33; U. Calderoni, *I cento anni della politica doganale*, Padova, 1961, pag. 13.

[65] According to Zimmermann the oldest source in which the world "obligare"is used in Plautus's play *Truculentus* (at 214) "*Nam fundi et aedes obligatae sunt ab Amoris Praedium*" while the substantive obligatio is mentioned in Epistulae ad M. Brutum 1, 18, 3.

[66] See R. Zimmermann, *The Law of obligations*, whereas he says that "The carving out of the concept of an obligatio and the development of a law of obligations was one of the great contributions of classical Roman Jurisprudence to the

provenance tends to interpret the tax *obligatio* according to its historical roots but emphasizing its part in public law, intended as system of rules regarding the protection of collective interests. By subsuming a legal relationship under the category of the so-called fiscal *obligatio*, it is possible to frame it within tax law and its principles. Historically, the debate stimulated by Italian and Spanish tax literature[67] has been symptomatic of the complexity of the nature of customs law. In fact, whilst recognizing the fiscal nature of customs debt, tax scholars[68] have been confronted with a discrepancy between the general theory of tax law and the customs legal structure. Thus, the concern about the diversity of customs law can be traced back many years, and the debate remains unresolved.

Of course, the last 30 years has seen a overhaul in the way customs liability is investigated but some current concerns are far more similar than imagined. Nowadays, the element of importance that characterizes customs liability is its source flowing from an European public *obligatio*, which is intended to serve uniquely European objectives. For this reason, a theoretical critique must not limit itself to making the customs rules an objective and descriptive contribution. Yet, there is no doubt that within customs

science of law. Fritz Schulz refers to it as a unique achievement in the history of human civilisation". On the topic, see further: Emilio Betti, *La struttura dell'obbligazione romana e il problema della sua genesi* (1955); Okko Behrends, *Der Zwolftafelprozess-Zur Geschichte des romischen Obligationesrecht* (1974); Mario Talamanca, "Obbligazioni", in: ED, vol. 29 (1979).

[67] Actually, this issue can be traced back to the debate sorrounding the publication of G. Ardizzone*, Il presupposto del tributo ed utilizzazione della merce nel diritto doganale*, Rimini, 1984. P.53 "La costruzione di ogni istituto secondo il concetto di obbligazione, infatti rende possibile inquadrare la materia intera nell'ambito di diritto tributario, in ragione della concessione di tributo accolta dalla dottrina. Cfr. Cutrera, *Principi di diritto e politica doganale*, Padova 1941, per il quale l'imposta di confine è una prestazione dovuta allo Stato in seguito alla nascita di una obbligazione di diritto pubblico; Di Lorenzo*, Istituzioni di diritto doganale*, Roma, 1954, p.151 per il quale l'imposta doganale, come ogni altra imposta, è una obbligazione ex lege". See also: Fiorenza, Diritti doganali e diritti di confine, in Riv. Dir. Fin. 1976; Guerra, *La riforma dell'ordinamento doganale italiano*, Milano, 1970. See also: T. Benito Fernandez, *Fuentes Y Practicas Del Derecho Aduanero Internacional,* arguing that: "En el studio de este derecho, autores italianos y espanoles niegan la existencia de un derecho aduanero y lo insertan en el derecho tributario y en el derecho penal. Como tambien hay han quienes han sostenido la indipendencia del derecho aduanero (…).

[68] G. Ardizzone*, Il presupposto del tributo ed utilizzazione della merce nel diritto doganale*, Rimini, 1984, pag. 53. "Il concetto di obbligazione tributaria, introdotto nell'esame degli istuti doganali, sembra favorire una migliore comprensione giuridica della materia, poiché tendenzialmente è volto a eliminare la rilevanza giuridica degli interessi di natura non fiscale (…) Sotto un profilo eminentemente teorico la più evidente conseguenza dell'incertezza dell'analisi è costituita da uno sfasamento che tocca i concetti e gli schemi di teoria generale del tributo rispetto alla legislazione doganale. Rispetto a quest'ultima infatti la dichiarazione, la fattispecie imponibile, e lo stesso concetto di obbligazione tributaria assumono connotati particolari, per molti versi divergenti da quelli originariamente concepiti in sede di dogmatica generale."

law certain particularities remain more pronounced. However, only by adopting traditional theoretical tools and schemes for the purpose of analyis and comprehension of tax structures can one become aware that traditional categories and concepts used as convenient descriptive labels come upon against the originality of the system of customs debt liability. A similar effort of comparison and conciliation is extremely relevant to understanding the nature of customs liability. Before this issue is considered, it is important to tie down the features of the so-called *jural relationships*[69] in the customs law and its extent in detail. Starting from the description of the customs debt as the obligation on a person to pay the amount of the import duties (and export duties) that apply to specific goods under the provisions in force, the customs scholarship[70] first identifies the persons involved in the jural relationship regulated according to customs law. Following this approach, they are not only the "person" holder in a jural relationship but also the customs authorities[71] responsible for applying customs rules. From a legal perspective, this reconstruction of the meaning of the customs jural relationship is pivotal but it risks giving only a partial picture because it does not draw further attention to the fiscal dimension of customs law. Even if, in the light of diverging institutional dimensions, customs liability is characterised by certain peculiarities which make it seem like a new breed of liability, it is necessary to proceed on the basis of the axiomatic, fiscal nature of customs law. This statement, however, incites a deep reflection. In doing so, the rules and theories of fiscal studies, based on constitutional guarantees or universal effectiveness and efficiency criteria, are consequently required to be implemented in customs system. For the assessment of the customs model of liability, it would be necessary to take into account the traditional

[69] According to the terminology adopted by M. Fabio, *Customs law of the European Union*, Alphen Aan Den Rijn, 2001.
[70] For a more detailed analysis, see: M. Fabio, *Customs law of the European Union*, Alphen Aan Den Rijn, 2001: "The Community Customs Code identifies the players that may be involved in a jural relationship governed by customs law. It also lists the scenario in which goods may cross the borders and be placed under a customs procedure".
[71] On the role of customs authorities, see: M. Fabio, *Customs law of the European Union*, Alphen Aan Den Rijn, 2001. "Customs authorities shall put in place measures, in particular, aimed at the following: a) Protecting the financial interests of the Community and its Member States; b) protecting the Community from unfair and illegal trade while supporting legitimate business activity; c) ensuring the security and safety of the Community and its residents and the protection of the environment, where appropariate in close cooperation with other authorities; d) mantaining a proper balance between customs controls and facilitation of legitimate trade".

categories adopted within the institutional setting of tax law in the legal systems. Therefore, only by having a typical pattern to follow and accepting the complex but axiomatic species-genus relationship between customs and tax will we be in the position to consider the detailed anatomy of the European customs debt liability and which principles apply to it.

However, as a result of this technical difficulty, a further issue arises: which model to be taken as an European tax paradigm? This question derives from the fact that, at the European level, there is no uniform[72] concept of tax. Moreover, the ECJ has always interpreted the concept of tax by a functional approach[73] to include charges for the purpose of their legislation. This makes it more complex to explore the relationship between customs duties and taxes in order to apply common principles and values but it does not seem to prove its non-fiscal nature. In contrast, at the international level, some authors[74] have concluded that tax treaties (the existence of other agreements on customs duties or of broader EU norms on exchange of information) may attribute a special, limited meaning to the word "taxes". Thus, an explicit exclusion of customs duties might imply its nature as a subcategory of taxes. Indeed, the role of GATT 94

[72] See: W.B. Barker in *The concept of tax: a normative approach,* IBFD. In the same publication *The Concept of Tax in EU Law* (Part II, infra), see also the arguments of Pedro Herrera, Gerald Meussen and Pietro Selicato. The authors found that there is no general concept of tax in the European Union because the EC concept of tax is a functional one. Their study found that the "boundaries of the concept of tax vary depending on the law in question" because the European Court of Justice approach to tax depends on the context of the legislation. Thus, the importance of function to the understanding of tax is obvious in the European context."

[73] See: case C-56/98

[74] See Jimenez, p.290, *The Concept of Tax in EU Law*: "Customs duties and charges having an equivalent effect, as well as taxes on goods, have their own international framework and non-discrimination principles (the GATT, included in the WTO system). In this regard, the Technical Explanation of the 1996 US Model (Para. 362) explains that "customs duties are not considered to be taxes" for purposes of the non-discrimination article; customs duties are also excluded from the scope of some income tax treaties (e.g. Para. 7 of the protocol to the 1998 Spain-Russia income tax treaty). This is even clearer in the EU, where the EC Treaty regulates the principles applicable to customs duties and charges having an equivalent effect (Arts. 23 and 25) and to taxes on products (Art. 90) and where the competence of the Member States in regulating customs duties is very limited (see Regulation 2913/1992). It may be concluded that if customs duties or taxes on foreign products were within the scope of Art. 24, this would deprive the GATT/WTO system and Arts. 23, 25 and 90 of the EC Treaty of much of their effect. Of course, it can be argued that the GATT/WTO system may coexist with other more favourable non-discrimination clauses in income tax treaties but, in this author's view, it is not easy to conclude that a discriminatory tax on foreign products is affected by the principles and clauses of Art. 24 of the OECD Model. Therefore, in this author's opinion, customs duties and charges having an equivalent effect should be excluded from the scope of Art. 24; as a consequence, the word "taxes" in Art. 24(6) does not cover customs duties or taxes on products"

as a multilateral indirect tax treaty has been put forward[75], despite the fact that customs duties are usually perceived as a protective trade measure rather than a form of revenue or any raising measure normally associated with the concept of a tax.

In the author's view, there is no argument to affirm that customs duties should not be considered as taxes. This assumption is partly confirmed by their role as one of the main financial source aimed at funding the European budget. Starting from this consideration as a corollary, there are traditionally several approaches to describing the anatomy of taxes but they do not seem to diverge substantially. Some authors[76] describe the task of tax law as to define when taxes shall be charged in terms of a series of elements: tax base, the incidence (including the rate) of the tax and the taxpayer or the person liable to pay. According to another general theoretical reconstruction, the main components are the chargeable event, the tax base and the taxpayer. According to the first approach, the tax base is commonly intended as the asset, the transaction or the profit which is liable to tax so it ends up including both the amount on which the tax is calculated and the chargeable event (when the legal conditions for a tax to become chargeable are met). Keeping in mind this thricotomy of components, despite the fact that it does not reflect an European "typical pattern for taxes", one might extrapolate the features of European customs debt.

[75]Jennifer E. Farrell, The concept of tax in the World Trade Organisation Agreements – a brief overview, p.301: "The GATT 1947, the predecessor of the WTO, contains no normative definition of a 'tax'. The GATT 1994, enacted at the Uruguay Round of trade negotiations, adopted the original GATT 1947 text and no attempt was made to incorporate new tax provisions. This absence of a definition has resulted in a fundamental failure to delimitate the scope and application of the GATT upon a Member State's tax policy. Traditionally, trade agreements have commonly been associated with indirect taxes in the form of custom duties: i.e., tariffs or other border taxes, and internal indirect taxes: i.e., VAT, general sales taxes, excise duties and transactional taxes. The common element to these taxes is the direct applicability to imported, exported or domestic products. Adopting the assumption that customs duties fall under the concept of a 'tax', one may view the GATT as a multilateral indirect tax treaty. On the other hand, one may argue that customs duties are not a bona fide tax as they are used primarily as protective trade measures and not a revenue raising exercise normally associated with the concept of a tax. Reference to customs duties and internal taxes are found in the GATT's key non-discrimination principles: most favoured nation (MFN) and national treatment."

[76] G. Morse, D. Williams, S. Eden*, Davies: Principles of tax law*, Sweet and Maxwell, p. 13.

3.2 The incurrence of customs debt from a compliant introduction of goods: The customs debtors

Traditionally, academics and commentators[77] proposed a bifurcation when analysing the legislation regarding European customs debt liability. Indeed, a distinction[78] is drawn between the incurrence of customs debt from a compliant and non-compliant introduction of goods into circulation on the territory of the European Union. From a practical point of view, the introduction of goods into circulation embodies the final stage of a complex legal process aimed at the full identification and recognition of goods within the European market. However, the scheme of classification which has been proposed is in truth simplistic because it only approximately describes particular characteristics, which might be mistakenly adopted as complete descriptions of all the features of the category in question. Additionally, while the customs legislation's conceptual structure has very often been analysed as a set of technical procedural rules, a more meaningful way to comprehend it is to capture the different roles of customs actors within the interrelation of obligations. Customs legislation relies on a myriad of interconnected obligations whose breach affects the determination of who shall be considered the customs debtor and what kind of customs debt shall be incurred. Delving into the operational structure of customs law, a regular and compliant introduction of goods typically comprises three main inter-related stages. Providing an oversimplified summary, it starts with an entry summary declaration being lodged at the customs office of first entry within a specific time-limit before the goods are brought into the customs territory of the European Union. A presentation of goods to customs follows immediately upon their arrival at the designated customs office or any other place designated or approved by the customs authorities or in the free zone. Finally, in case of regular importation, characterized by the rituality of the presentation

[77] See generally: S. Armella, *Diritto doganale*, Milano, 2015; T. Lyons, *EC Customs Law*, Oxford, 2008; D. Modonesi, Tesi di Dottorato di ricerca in Diritto Tributario Europeo, *L'obbligazione doganale*, 2011.

[78] T. Lyons, *EC Customs Law*, Oxford, 2008 whereas the author addresses the incurrence of customs debt, distinguishing between the debt arising from the importation and the debt arising from breach of customs law (Unlawful introduction of goods into the customs territory, unlawful removal of goods from customs supervision, failure to fulfil obligations or comply with conditions, unauthorized consumption or use of goods).

of the declaration by the holder of the goods or by the declarant, a customs debt shall be incurred at the time of acceptance of the customs declaration in question. The acceptance constitutes the objective and formal requirement alongside the substantial one which might be, according to Article 77 UCC: (a) the release for free circulation of goods liable to import duties, or (b) the placing of such goods under temporary importation procedure with partial relief from import duties. While focusing upon the main legal provisions of customs debt liability, it is necessary to dwell upon a further feature of the customs regulation, which usually does not occur in the case of tax legislation. From a fiscal point of view, neither the previous Customs Code nor the new UCC contain any explicit and specific reference to the "chargeable event". Furthermore, Article 77 of the UCC specifies that the customs debt shall be incurred at the time of acceptance of the customs declaration, linking the arising of the customs duty to the release of goods which allows their entering into the economic network of the EU. The literature[79] infers that the chargeable event can be traced to the concept of "release of free circulation" by which the customs status of Union goods is attributed to non-Union goods. However, it is necessary to acknowledge the existence of concurrent "misconducts" that, alongside this concept, have been typified[80] as autonomous chargeable events because of their specific nature of being breaches of customs rules. The analysis of this theme, which will be conducted in the next paragraph, will demonstrate that, despite the recognition of the release of goods in the internal market as the chargeable event, these misconducts that are able to "generate the customs debt" do not necessarily imply the entrance of non-European goods in the Internal Market.

With regard to the persons qualified as customs debtors, the first reference might be extrapolated from Article 5 of UCC. It provides a definition of "customs debt" as the obligation on a person to pay the amount of import or export duty which applies to specific goods under the customs legislation in force. First of all, the person or

[79] : S. Armella, *Diritto doganale*, Milano, 2015.
[80] : S. Armella, *Diritto doganale*, Milano, 2015.

organisation who made the customs declaration relating to the goods being imported is liable for the customs debt so-called "customs debtor"). The concept of person includes a natural person, a legal person or an association of persons recognized as having the capacity to perform legal acts but lacking the legal status of a legal person.

If the declarant uses an agent or representative to make a customs declaration on their behalf, they may be liable depending on the type of representation.[81] If an agent acts as a direct representative of the principal, the principal is solely liable for the customs debt. However, if the agent is the holder of the authorisation for a customs procedure (such as inward processing or a customs warehouse) that the goods have been placed under, they will be responsible for any debt arising as a result of any irregularities in compliance with customs requirements. If an agent makes a customs declaration as an indirect representative of the principal, the agent and principal will be jointly liable for any customs debt. If an agent delegates the task of making a customs declaration to a sub-agent, then the sub-agent and principal will both be liable for any customs debt. If the sub-agent is an employee of the agent, the agent may also be liable.

It is worth noting that an additional source of customs law arises from international agreements entered into by the EU on behalf of the Member States or those where the EU has taken over the competence. Indeed, the role of customs brokers as an intermediary between traders and customs in customs clearance processes is addressed in sources of international law. According to the World Customs Organization (WCO) Revised Kyoto Convention (RKC), under Article 8.1. General Annex, national legislations have the choice of transacting business with customs either directly or by designating a third party to act on their behalf.

[81] For a detailed analysis, see: A. García Heredia, "La representación aduanera en el Derecho de la Unión Europea: funciones de representación y responsabilidad aduanera y tributaria del representante", in *Revista española de Derecho Financier,* Issue 176, 2017; S. Armella, L. Ugolini, "Rappresentanza diretta in dogana anche per la procedura domiciliata", *Corriere Tributario*, 2015, 10,751; B. Santacroce, E. Sbandi, "Rappresentanza diretta estesa alle procedure di domiciliazione", Il fisco, 2015, 9, 853. 53 N. Al Najjari, "La rappresentanza in dogana dopo la riforma del Codice doganale comunitario", *Commercio internazionale*, 2010,15; S. Ibanez Marsilla, "Novedades en la regulación del derecho a efectuar declaraciones en aduana y en la figura del representante aduanero", *Tribuna Fiscal*, nº 237, julio 2010, p. 21-24.

On the other hand, Article 10.6 of the World Trade Organization's (WTO) Trade Facilitation Agreement (TFA) regulates the use of customs brokers by providing that, without prejudice to the important policy concerns of some Members that currently maintain a special role for customs brokers, Members shall not introduce the mandatory use of customs brokers.

In spite of the fact that international standards render the broker services "optional" for the importer and exporter, the use of customs brokers is widespread[82] although they vary in terms of the differences in regulations on licensing of customs brokers. In accordance with Article 5 UCC, the meaning of "customs representative" includes any person appointed by another person to carry out the acts and formalities required under the customs legislation in his or her dealings with customs authorities. However, it should be noted that customs representatives, in case of indirect representation, become part of this ideal fiscal relationship between the substantial importer and the EU by assuming the customs liability. This extension of customs liability, in line with other relevant customs union legislation, such as the American or Australian one,[83] does not seem to be supplemented by further mechanisms or obligations at the public law level.

[82] According to *WCO Study report on Customs Brokers*, 2016: "95 Members (96%) stated that their country has Customs brokers/agents/ representatives/third parties who act on behalf of traders to handle Customs clearance and related activities. Only 4 Members stated to have no Customs brokers."

[83]For a comparative perspective see generally: The United States' 19 CFR 141.1: "Liability of importer for duties. (b)*Payment of duties* - (1) *Personal debt of importer.* The liability for duties, both regular and additional, attaching on importation, constitutes a personal debt due from the importer to the United States which can be discharged only by payment in full of all duties legally accruing, unless relieved by law or regulation. Payment to a broker covering duties does not relieve the importer of liability if the duties are not paid by the broker. The liability may be enforced notwithstanding the fact that an erroneous construction of law or regulation may have enabled the importer to pass his goods through the customhouse without payment. Delivery of a Customs bond with an entry is solely to protect the revenue of the United States and does not relieve the importer of liabilities incurred from the importation of merchandise into the United States."

See also the Australian legislation: Customs Act 1901 - Sect 183a

"Principal liable for agents acting (1) Where an agent of, or a nominee of a customs broker that is an agent of, an owner of goods makes a declaration for the purposes of this Act in relation to those goods, that declaration shall, for the purposes of this Act (including the prosecution of an offence against this Act), be deemed to be made with the knowledge and consent of the owner.

Customs Act 1901 - Sect 183

Agents personally liable

(1) Where a person is, holds himself or herself out to be or acts as if he or she were the agent of an owner of goods for the purposes of the Customs Acts, that person shall, for the purposes of the Customs Acts (including liability to penalty), be deemed to be the owner of those goods.

(2) Where a customs broker is the agent of an owner of goods for the purposes of the Customs Acts and a person who is, holds himself or herself out to be or acts as if he or she were a nominee of that customs broker acts in relation to

In other words, indirect representatives might be charged customs duties but there are no guidelines about how customs duties should be passed on to the true importer. Although the issues related to customs debtors in case of non-compliance will be discussed later, this argument also applies in every case of joint liability, including the irregular introduction of goods or removal from customs supervision where the customs debtor is regularly identified with a person who was remotely connected to the breach of customs rule or did not actively participate in the infraction. Broadly speaking, with regard to the identity of the taxpayer, the tax literature[84] refers to the incidence of the tax, distinguishing between the formal incidence of the tax (who is required by law to pay it) and the effective incidence (who is economically affected). Linked with that, there is of course the presence of mechanisms to charge the tax to the substantive taxpayer. Conversely, the structure of customs debt liability has been developed to put on an equal footing the primary and the alternative or secondary forms of liabilities. In fact, a remarkable feature of the system laid down by European customs legislation is joint liability[85] as an ordinary means by which the formal and the effective incidence of customs debt coalesce and are not distinguished, without addressing or providing any guidance to re-establish the allocation of the customs debt according to an imputation system able to affect the subtantive customs debtor (namely the indirect representative or the principal infringer in case of non-compliance).

Interestingly, in spite of the fact that the EU enjoys exclusive competence, the interpretation of customs rules can vary from State to State. This inevitably leads to concurrent interpretations which might hinder a uniform application of the customs law. Notwithstanding the joint customs liability of the owner of goods and the indirect representative, it remains unclear whether the indirect representative should be

those goods, that person shall, for the purposes of those Acts, (including liability to penalty), be deemed to be the owner of those goods."

(3) Any act done, or representation made, by a nominee of a customs broker for the purposes of the Customs Acts shall be deemed to be an act done or, a representation made, by that customs broker.

(4) Nothing in this section shall be taken to relieve any owner from liability.

[84] G. Morse, D. Williams, S. Eden, "Davies: Principles of tax law", Sweet and Maxwell, p. 13.

[85] See article 84 of Union Customs Code.

qualified as a customs debtor on the basis of an automatic (and thus absolute) liability in case of any infractions, regardless of his knowledge or the reasonable duty to have known about the irregularities. The vagueness of certain customs rules encourages discretionary interpretation as well as non-uniformity of judgments.

More generally, as noted above, Article 201 of the previous Customs Code has always been intepreted as referring to the incurrence of a customs debt in case of regular and compliant import of extra-EU goods. In contrast, Articles 202, 203, 204 and 205 were supposed to regulate those irregularities that give rise to the incurrence of a customs debt. The new UCC formally provides for certain amendments to the mentioned articles by incorporating all the cases of non-compliance in one single and unique article. Nevertheless, it almost wholly reproduces the previous text and thus does not provide additional clarity. As such, the question remains whether the indirect representative is automatically responsible[86] and liable for any payment arising from irregularities according to the general rule that provides joint liability. The issue to be assessed is whether Article 77 captures the customs liability of an indirect representative in case of irregularities, regardless its negligence or intention. Or must his/her customs liability be imputed according to the "culpability requirements" provided in case of non-compliant introduction of goods?

There is a line of cases suggesting the automatic extension of liability to the indirect representative, regardless the subjective mental requirement. Another line of decisions is at variance with the above rule, which supports the need for the fault element's requirement. In this perspective, the Court seems to have recognized a first form of

[86] S. Armella, *Diritto doganale*, Milano, 2015, p.110-111. The author finds that "Chi agisce in veste di rappresentante indiretto, sia esso uno spedizionere o un intermediario, diventa, in linea di principio, responsabile dell'obbligazione doganale, nonché delle violazioni alla legge doganale compiute nell'esercizio del proprio incarico, giacchè agisce per conto dell'importatore, ma in nome proprio, assumendo personalmente la veste di dichiarante. Di conseguenza, in caso di ricorso all'istituto della rappresentanza indiretta in dogana si configura un'ipotesi di responsabilità solidale del proprietario della merce insieme allo spedizioniere, anche se nella maggioranza dei casi l'importazione avviene mediante trasporto in *container* e l'intermediario si limita a trasporre nella dichiarazione i dati forniti dall'importatore, senza aver alcun contatto diretto con la merce. Alla luce di tali considerazioni, il rischio di una responsabilità oggettiva, in ordine al pagamento dei dazi a carico dello spedizioniere, derivante automaticamente dalla sottoscrizione delle dichiarazioni doganali, non è solo fonte di preoccupazione per la categoria professionale, ma pone concreti dubbi sulla ragionevolezza dell'ordinamento che la preveda e ne accetti le conseguenze."

strict "customs liability". If going through the European judicial interpretation, in *Schenker Customs Agency BV T-576/11*, pursuant to Article 201(3) of the Customs Code, the importer's agent was considered the debtor of the entire debt, including the import duties that had not been collected because of declaring that Taiwan was the country of origin of the imported glyphosate when the country of origin was actually China and, therefore, the goods were subject to anti-dumping duties. These declarations were filled in on the basis of certificates of origin[87] issued by Taiwanese chambers of commerce evidencing that the goods originated in Taiwan. These certificates were sent by the importer to the applicant. The Court ruled that "a customs agent, by the very nature of his functions, renders himself liable for the payment of import duties and for the validity of the documents which he presents to the customs authorities",[88] and so he is responsible for any irregularities regardless of an ascertainable absence of negligence.

In contrast, a decision by the Corte di Cassazione in *Erreck*[89] arrived at the opposite conclusions. In the domestic case 9773/2010, the company Erreck, acting as indirect representative on behalf of another company, lodged a customs declaration to import bananas based on a certificate of origin that subsequently proved to be false. The Italian Supreme Court ruled that this case must be resolved in light of Article 202 of European

[87] See *Schenker Customs Agency BV T-576/11,* para 62:"In that regard, reference must be made to the case-law according to which an expectation as to the validity of certificates of origin which prove to be false, forged or not valid does not constitute, in itself, a special situation justifying a remission of duties (order of 1 July 2010 in *DSV Road* v *Commission*, C-358/09 P, EU:C:2010:398, paragraph 81; see, by analogy, judgments of 13 November 1984 in *Van Gend & Loos and Expeditiebedrijf Bosman* v *Commission*, 98/83 and 230/83, ECR, EU:C:1984:342, paragraph 13, and 10 May 2001 *Kaufring and Others* v *Commission*, T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, ECR, EU:T:2001:133, paragraph 234). Post-clearance checks would be largely deprived of their usefulness if the use of such certificates could, of itself, justify granting a remission. The opposite result could discourage traders from adopting an inquiring attitude and make the public purse bear a risk which falls mainly on traders (see, to that effect, judgment of 18 January 1996 in *SEIM*, C-446/93, ECR, EU:C:1996:10, paragraph 45)"

[88] P.103 "In addition, it follows from the rules on indirect representation, as set out in Article 5 of the Customs Code, that an indirect representative, in so far as he acts in his own name even if he does so on behalf of another person, is responsible for the declarations he submits to the customs authorities. It has been held that a customs agent, by the very nature of his functions, renders himself liable for the payment of import duties and for the validity of the documents which he presents to the customs authorities (judgments in *CT Control (Rotterdam) and JCT Benelux* v *Commission*, cited in paragraph 49 above, EU:C:1993:285, paragraph 37, and of 18 January 2000 in *Mehibas Dordtselaan* v *Commission*, T-290/97, ECR, EU:T:2000:8, paragraph 83)."

[89] Corte di Cassazione nr. 9773 of 2010.

Regulation No 2913/1192, i.e. by considering the subjective element. As such, an indirect respresentative must be classified as those persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful. At the same time, the Court concluded that, being an experienced economic operator in the area of exports and imports in the EU, he should reasonably have known that those certificates were false.

Moreover, the last paragraph of Article 201 (now transposed into Article 77) also gives rise to major "coordination problems" in light of ECJ case-law, with regard to a recent judgment on abuse of customs law[90] that will be analysed later. More precisely, in the last paragraph it establishes that:

> Where a customs declaration in respect of one of the procedures referred to in paragraph 1 is drawn up on the basis of information which leads to all or part of the duties legally owed not being collected, the persons who provided the information required to draw up the declaration and who knew, or who ought reasonably to have known that such information was false, may also be considered debtors in accordance with the national provisions in force.

This seems to be considered an independent case of non-fulfillment although in theory it might be considered as one of those circumstances referred to in Article 79 which no longer offers a strict definition of unlawful introduction.

With regard to the coordination of these articles, it is important to stress that, despite the vital role of the ECJ to ensure the consistency of interpretation, it will be shown that the uniform interpretation of the applicable rules of law is not fully guaranteed. Uniformity[91] in the treatment of similar cases seems to be an essential premise for the unicity of the customs union. However, there are still several ambiguities, stemming from the de-centralized mechanism of application and interpretation, which inevitably give rise to disparities in judging economic operators. Applying dissimilar interpretations to equivalent transactions which are wholly regulated under EU's exclusive competence is one of the most obvious contradictions in the mechanics of the customs legal framework. This has important implications from both a practical and academic perspective. Clarity and conciseness are fundamental to preclude high

[90] C-522/16 *A contro Staatssecretaris van Financiën.*

[91] K. Limbach, *Uniformity of Customs Administration in the European Union*, Bloomsbury, Publishing London 2015.

inhomogeneity in the application of customs law. Of course, it is also the case that the structure of customs law in itself creates the preconditions for this existing disharmony. Member States are required to function as *longa manus* of the EU. In applying, implementing and enforcing European customs law, this double-level structure entails all the inherent risks that have the potential to undermine significantly the unicity of the customs union.

3.3 Incurrence of customs debt through non-compliance: The distribution of liability among a broad range of customs debtors on the grounds of objective and culpability elements

The discussion will now shift to identify the central structural features of customs debt liability and the issues regarding its juridical interpretation. Customs debt liability has an interesting and unique tax liability structure. At its base, it is possible to disaggregate three key aspects: the customs debtor, the breach of the customs provision or the misconduct, and the mental element. The structure and phraseology employed is similar to that frequently adopted to describe liabilities of a criminal, civil and administrative nature. When examining the customs liability model in case of non-compliance, scholars[92] emphasize that it seems to be tailored to the primary intent to preserve the fiscal interest since it captures a large range of potential customs debtors. Indeed, the emphasis on keeping this value prevailing and central is unmistakeable. The UCC lays down the conditions to determine the customs debtors in case of several varieties of uncompliant "conducts" or misconducts under Article 79 entitled "Customs debt incurred through non-compliance".

The new UCC further refines the obligations whose non-compliance triggers customs debt liability under Article 79 which is divided into 3 paragraphs. This article, which

[92] M. Scuffi - G. Albenzio - M. Miccinesi, *Diritto doganale, delle accise e dei tributi ambientali*, Milano, 2013.

is wholly dedicated to customs debt liability, constitutes a fundamental part from which it is possible to extrapolate the structural elements of the customs system.

Indeed, its material content is wide-ranging as it covers different aspects: the incurrence of customs debt, an open list of customs debtors and the time of the incurrence. From a theoretical perspective, this article delineates the key features of the customs debtors' model, which represents the fundamental legal basis to determine customs debt liability from a subjective and objective point of view. In other words, it establishes when the customs debt is incurred and who are the customs debtors.

Paragraph 1 of Article 79 specifies the obligations whose non-compliance determines the incurrence of customs debt. Paragraph 1(a) considers the obligations laid down in the customs legislation concerning the introduction of non-Union goods into the customs territory of the Union, their removal from customs supervision, or the movement, processing, storage, temporary storage, temporary admission or disposal of such goods within that territory. Paragraph 1(b) specifies non-compliance of the obligations laid down in the customs legislation concerning the end-use of goods within the customs territory of the Union. Paragraph 1(c) covers non-compliance with regard to the condition governing the placing of non-Union goods under a customs procedure or the granting, by virtue of the end-use of the goods, of duty exemption or a reduced rate of import duty.

In order to gain a proper understanding of customs debt liability and the case-law given below, it is necessary to be aware not only of the current system laid down by the rules of the UCC which spell out the scope of the customs debt liability but also its predecessors. In fact, the ECJ will presumably rely on its pre-codified case-law to interpret the text of the new provisions regarding customs debt liability.

In surveying their evolution, the origin of the legal framework dates back to Council Directive 79/623/EEC on the harmonisation of provisions laid down by law, regulation or administrative action relating to customs debt of 25 June 1979. The second sentence of the fifth recital in the preamble to that directive stated already the necessity to

establish common rules for determining the moment when the customs debt is incurred in order to ensure uniform application of the Community provisions in force on imports and exports. Under its Article 2, this directive established common rules regarding the incurrence of the customs debt. However, that directive was rather laconic. In fact, it did not provide any legal basis for determining the person liable for payment of the customs debt but merely stated the notion of customs debt defined by Article 1(2)(a) as 'the obligation on a natural or legal person to pay the amount of the import or export duties'.

As noted by customs scholarship,[93] all the directives regarding customs law[94], adopted by the European Community after 1968 an based on article 100 TEEC (now article 115 TFUE) such as Council Directive 79/623/EEC, in that they were binding with regard to the objectives, have not significantly contributed to legal unity in customs law despite the approximation of the laws. For this reason, in order to ensure a homogeneous application of customs provisions, Council Directive 79/623/EEC was replaced by two regulations: Council Regulation No 2144/87 of 13 July 1987 on customs debt and Council Regulation (EEC) No 1031/88 of 18 April 1988 determining the persons liable for payment of a customs debt.

Henceforth, the exclusive character of European competence in this area, read in relation with the common commercial policy, has led to the harmonization of customs rule by regulatory legislation. The European legislator acknowledged, as a corollary, the need to establish a common market and ensure the unicity of the customs territory and the uniformity of customs law, from the second recital in the preamble of Regulation No 2144/87, that 'the rules governing the incurrence of a customs debt, the determination of its amount, when it becomes due and its extinction are so important for the proper functioning of the customs union that it is essential to ensure that such rules are implemented as uniformly as possible in the Community' and that, 'to this

[93]K. Limbach, *Uniformity of Customs Administration in the European Union*, Bloomsbury, Publishing London 2015, p.16.
[94] See: Council Directive 68/312/EEC; Council Directive 69/73/EEC; Council Directive 69/74/EEC; Council Directive 69/75/EEC; Council Directive 76/119/EEC; Council Directive 78/453/EEC; Council Directive 78/1018/EEC; Council Directive 79/623/EEC; Council Directive 79/695/EEC; Council Directive 81/177/EEC.

end, the present provisions of Directive 79/623/EEC should be embodied in a Regulation', leading to 'greater legal certainty for individuals'.

With regard to Regulation No 1031/88, the fifth recital in the preamble stated that:

> ... in the case of a customs debt resulting from the unlawful introduction of goods into the customs territory of the Community, the person who committed the act which gave rise to the customs debt and any other persons who are also liable, under the provisions in force in the Member States, by reason of such an act having been committed should be held liable for payment of such debt.

In essence, Article 3 of Regulation No 1031/88 thus created the current system which imposes customs debt liability in case of non-compliance, through which the persons liable for the payment of a customs debt in the case of unlawful introduction of goods are a cluster of persons, jointly and severally liable for the debt, regardless of the extent and degree of participation: the person who introduced the goods and, 'under the provisions in force in Member States', any persons who participated in the unlawful introduction of the goods, any persons who acquired or held the goods in question and any other persons who are liable by reason of such introduction were to be 'jointly and severally liable for such debt'.

The most significant reform came with the Customs Code which brought together most of the pre-existing legislation on customs law. By setting up the Customs Code, the EU legislature made the most salient contribution in terms of sector-specific legislation.

In fact, Articles 201 and subsequent of the Customs Code, which substituted the above-cited provisions of Regulations Nos 2144/87 and 1031/88, are even more detailed than those regulations. It no longer refers to 'the provisions in force in Member States' but now provides the basic conditions to extend the meaning of 'debtor' to the persons 'participating' in the irregular cases of introduction of goods. The previous Customs Code which established the rules of incurrence of customs debt liability in case of non-compliance was based on several provisions. It divided incurrence of customs debt through non-compliance into different categories. Most of the case-law developed on these rules has predominantly focused on the unlawful introduction of

goods,[95] removal from customs supervision,[96] and Article 204[97] regarding customs debt on importation incurred through non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods.

At present, in determining the persons who shall be considered customs debtors, the previous rules, articulated into six articles, have been transposed into the new UCC.[98] The circumstances of non-compliance have been subsumed into one article and include some differences which will be analyzed later.

The second paragraph of Article 79 is organised around a theme that is central to customs law: who can be regarded as customs debtors. There is not a single, undifferentiated category of customs debtors. Customs debt liability, as laid down in the abovementioned article, occurs if one or two cumulative conditions are met: the objective and subjective one. According to the second paragraph of Article 79:

> the debtor shall be any of the following:
>
> (a) any person who was required to fulfil the obligations concerned;
>
> (b) any person who was aware or should reasonably have been aware that an obligation under the customs legislation was not fulfilled and who acted on behalf of the person who was obliged to fulfil the obligation, or who participated in the act which led to the non-fulfilment of the obligation;
>
> (c) any person who acquired or held the goods in question and who was aware or should reasonably have been aware at the time of acquiring or receiving the goods that an obligation under the customs legislation was not fulfilled.

There are various points of interest that arise from an analysis of this provision. The principal virtue of this model is the way customs liability extends over an indeterminate class of customs debtors. This article therefore introduces a mechanism which aims to

[95] A. Elia, "L'irregolare introduzione di merci nel territorio doganale comunitario: conseguenze in materia di dazi doganali, accise ed Iva", *Diritto e pratica doganale*, 2011, 83, 5

[96] F. Rapisarda, "Traffico di perfezionamento attivo: sottrazione della merce al controllo doganale e nascita dell'obbligazione*", Commercio internazionale*, Fasc. 17,5, 2010,6.

[97] F. Briganti, "Il regime doganale del transito", *Rassegna Tributaria*, 2017, 3.

[98] Hans-Michael Wolffgang and Kerstin Harden, The New European Customs Law, *World Customs Journal*, Volume 10, nr. 1.; Das neue europäische Zollrecht in *Spektrum der Steuerwissenschaften und des Außenwirtschaftsrechts* 2/2016, S. 85 ff.

target a wide gamut of potential customs debtors. Customs debtors, by virtue of joint liability, are on the same footing, which clearly reflects the underlying rationale for the protection of European financial resources. Clearly, the *ratio legis* is to protect the interests of the EU so as not to suffer potential losses of revenue.

A key design feature of customs debt liability is how it tackles evasive conducts – specifically through a systematic and compulsory use of forms of vicarious, strict and joint liability to guarantee the customs payment. First, it facilitates the work of tax authorities and courts by allowing for a wide range of potential debtors. Legal scholars[99] conclude that this tax modelling essentially exemplifies a tool which is respondent to ensure the recovery of the customs debt. In doing so, it has the potential to undermine the role that the *subjectivité passive*[100] plays in the justification of the imposition of customs. Trivellin argues that the traditional model of *subjectivité passive*[101] has been replaced by the logic behind liabilities of a non-tax nature. This important observation is of fundamental importance to understand a few features of the customs framework. Frequently and intuitively, the traditional standard requirements and reasonings to impose and justify tax liability are abandoned.

As will be shown, the extension of customs liability structurally occurs along the group dimension. The expansive nature of this model of liability, casts some doubt on the neat division of responsibilities and customs debtors. Moreover, the development of the case-law has facilitated the way this model of liability expands. The model of

[99] M. Trivellin, "Rappresentenza indiretta nel regime dell'immissione in libera pratica: problematiche aperte sulla soggettività passiva in materia di dazi e di Iva all'importazione", in *Dir. prat. trib.,* 2004.

[100] G. Ardizzone, *Il presupposto del tributo ed utilizzazione della merce nel diritto doganale*, Rimini, 1984; C. Corrado Oliva, "Dazi doganali e accise sui prodotti energetici e sugli olii minerali", in V. Uckmar (a cura di*), Intrecci fra mare e fisco*, 2015, pag. 60 emphasizing that "le peculiarità del presupposto dei dazi doganali per il rilievo più ai meccanismi di importazione e circolazione delle merci che non ai concreti indici di capacità contributiva che sono classico riferimento del nostro sistema impositivo."

[101]M. Trivellin, "Rappresentenza indiretta nel regime dell'immissione in libera pratica: problematiche aperte sulla soggettività passiva in materia di dazi e di Iva all'importazione", in *Dir. prat. trib.,* 2004, I, p. 554, according to which: "due elementi tendono ad affermarsi nella disciplina comunitaria dell'obbligazione per il tributo doganale: da un lato, le esigenze di cautela e garanzia come rationes di alcune ipotesi di corresponsabilit, e, dall'altro, la predominante attenzione agli aspetti applicativi di estensione degli obbligati al pagamento. Tale attenzione verso l'individuazione degli obbligati al pagamento del tributo del confine non sembra, peraltro, accompagnata da un'altrettanta stringente ricerca del soggetto che realizza il presupposto del prelievo. La dogmatica della soggettività passiva, fisiologicamente in stretta connessione con la ricerca del soggetto che realizza il presupposto del tributo, sembra, cioè, cedere il passo ad una diversa logica, che potremmo chiamare di responsabilità patrimoniale."

customs liability seems to be clearly tailored to preserve customs revenue collection,[102] also by the legal technique of joint liability (which is not even based on some sort of hierarchical relationship that exists between the several customs debtors). Because the position of the ECJ is grounded in utilitarian arguments rather than in principles, one consideration is the extent to which we can stretch the domain of customs debt liability given its structure. The difficulty is, thus, to grasp the criteria by which it is appropriate to evaluate whether the customs debt liability goes beyond its constraints.

As noted before, there are many cases of joint customs liability, namely through the the use of an indirect representative and in every case of non-compliance. However, having highlighted that several persons can be charged customs debts, the way customs debt is passed onto the effective importer is left to the discretion of Member States.

Thus, technically, it is necessary to bear in mind that the Customs Code does not address the issue related to those tools that ensure that the effective importer will be charged customs duty. Neither are guidelines provided with regard to those "devices" necessary for passing-on the customs duty to the substantive customs debtor. For instance, legal mechanisms represented by the principle of deduction and the obligation to recover the tax substantially ensure that the burden of the VAT is shifted to the real taxpayer so that the principle of the neutrality operates effectively through the passing-on of the tax. Unlike this system, customs provisions are based on joint liability that do not provide mechanisms through which the tax burden is shifted to the "substantive customs debtor". This might be problematic in relation to tax fairness standards but represents, in a certain way, a feature of the rules dedicated to the customs debt liability. Most specifically, Article 84 entitled "several debtors" establishes that "where several persons are liable for payment of the amount of import or export duty corresponding to one customs debt, they shall be jointly and severally liable for payment of that amount" but then gives to Member States the opportunity to regulate and provide a legal means to distribute the economic incidence. This might be identified as a legal

[102] Spedition Ulustrans C-414/02 Para 31

vacuum since the customs duties are strictly collected on the basis of the joint liability, provided by the legal source of a regulation, but this neglects the issue of appropriate instruments to ensure general and specific fairness and equality principles. However, investigations into the legal substance of a minimum standard ability-to-pay principle have not resulted in proving its existence at the European level. Therefore, as suggested by leading tax scholarship,[103] within the European VAT structure:

> certain aspects of ability-to-pay cannot be fully guaranteed by an indirect tax, but this does not call into question the requirement that in principle, to the extent possible, all implications of this constitutional standard and, ultimately, of the constitutional values underlying it must also be implemented in the field of consumption taxes.

However, attempting to juxtapose perspectives relating to constitutional values and European customs theory, as far as the European resources are concerned, almost inevitably leads to disappointment. This concern seems amplified in customs since, from a technical legal perspective, neither could the famous doctrine on constitutional limits (counter-limits doctrine)[104] be invoked because the ability-to-pay principle and various indicators of taxpaying capacity refer to national revenue-raising sources whilst customs duties are wholly destined to the European budget.

These considerartions are of particular practical and theoretical significance. The grading of customs law as a sub-system of tax law is not purposeless. For this reason, the discussion carried on by scholarship on distinguishing customs law, so far considered a branch of financial law, into a separate legal category is not a a purely academic issue. One author[105] has especially focused and insisted on the term "autonomy" of customs law as "entitlement, independence, self-reliance". Moving forward from this starting point, this reflection seems to be central since its detachment from tax and financial law determines the acceptance of different theoretical reference

[103] Joachim Englisch, "Chapter 19: Ability to pay" in *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Online Books (Last Reviewed: 1 April 2014)

[104] On this point, see: M. Scuffi - G. Albenzio - M. Miccinesi, *Diritto doganale, delle accise e dei tributi ambientali*, Milano, 2013, p. 18. See also: Diana-Urania Galetta, 'European Union Law in the Jurisprudence of Italian High Courts: Is the Counter- Limits Doctrine a Dog That Barks but Does Not Bite?' *European Public Law*, Issue 4, pp. 747–763, 2015; Francesco Grisostolo, Luisa Scarcella, '"Trouble Always Comes in Threes': The Taricco Case Saga and the Italian Limitation Period in VAT Fraud', *Intertax*, Issue 11, pp. 701–713, 2017; Mikhel Timmerman, 'Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: Taricco' Common Market Law Review, Issue 3, pp. 779–796, 2016.

[105] A. Drozdek, The autonomy of the European Union Customs Law, *Acta Universitatis Carolinae – Iuridica 1*

criteria. One of the main arguments which claims the separation of customs law from financial and tax law insists on the individual nature of the object of regulation including principles of foreign trade in goods, collecting relevant customs duties and charges, customs proceedings, customs control, and organisation and functioning of customs administration. As such, quarantining customs legal rules through a regulation neither proves nor necessarily constitutes a hint at its autonomy.

Yet, it remains the *vis expansiva* of European principles. Since the general principles of EU tax law[106] do not have a constitutional status, within which limits or set of criteria does the EU exercise its fiscal powers? As commentators[107] argue, the only criteria that bind EU institutions in the exercise of their legislative and administrative competences, in this sense that have a constitutional force, exist in the form of general principles of EU law.[108] These are the only boundaries of the European legislator to be included in any respectable theory of the power to legitimately impose customs and taxes.

However, their open-endedness[109] does not always take us very far in fixing the boundaries of the European fiscal legislator and, consequently, the expansion of the breadth of customs or tax liabilities is as yet unclear. Indeed, the legal arguments that might be used against the "Customs legal order" or the ECJ interpretation, whether framed in terms of proportionality, legitimate expectations or legal certainty,[110] might substantively alter the current structure of customs debt liability if, instead, they depend on a constitutional framework[111] for European tax law. Without vigorous principles as the basis, the risks are intuitively related to the limits of expansible and equally collapsible forms of tax liabilities. In other words, there are general European

[106] A. Di Pietro, *I principi europei del diritto tributario*, CEDAM, Padova, 2013, XXXIII.
[107] C. Barnard and S. Peers, *European Union Law*, Oxford, 2017, p. 205
[108] Stirn, *Towards a European public law*, Oxford, 2017; T. Tridimas, *The general principles of EU law*, Oxford, 2006; J.A. Usher, *General principles of EC law*, London/New York, 1998.
[109] On the openness of principles: Armin Von Bodìgdandy, *Founding principles in European Constitutional law*, P.16
[110] Traversa, Edoardo; Modonesi, Diego. *Les principes de sécurité juridique et de la confiance légitime en droit douanier et fiscal*. In: *Revue du Droit de l'Union Europeenne*, Vol. 2015, no. 2, p. 261-292 (2015).
[111] On this point see: A. Amatucci, "An European Tax legal order based on Ability to pay" in *International tax law,* Alphen aan den Rijn, 2012: "To summarize, tax equity specified as taxation according to individual ability to pay is the common denominator of European tax law which must form the constitutional core of an European legal tax order. As the constitutional framework of European law is predominantly enshrined in the EC and Eu treaties, their application in the field of cross-border taxation will have to realize this as a starting point." P. 257

principles applicable to the European tax law but there is not a proper fiscal principled basis.

Nor do the definitions provided by the UCC help. On the one hand, the “customs debt” is described as the obligation on a person to pay the amount of import or export duty which applies to specific goods under the customs legislation in force. On the other, the "debtor" is defined as any person liable for a customs debt, which leads to a general absence of autonomous principles.

The design of customs debt liability offers multiple categories of customs debtors in order to expand the customs debt liability to ensure the collection of European financial resources. Now, the different conducts that are able to trigger customs liability might require the subjective element. In this respect, the subjective mental elements resemble those “culpability” requirements typically adopted in the context of administrative, civil and criminal liability. In fact, the Code requires that the relevant breach of customs rule (to assign customs debt liability) must be performed by the person who was “aware or should reasonably have been aware”. Interestingly, the required level of culpability may be absent when the person was required to fulfil the obligations, whose non-compliance determines the incurrence of a customs debt. In determining the culpability requirements, it can be concluded that the customs legislation recognizes three levels. The first level suggests a previous normative assessment of the customs debtor’s behaviour as conduct *per se* capable of determining a customs debt liability. Accordingly, the person became objectively a customs debtor, regardless of any subjective culpability, when the person was required to fulfil the obligations concerned. In contrast, the term “awareness” seems to contemplate the highest level of culpability for the person who participates in the “non-compliance” of the obligations. Since such meaning is not specified, it might cover various grade distinctions: the notion “awareness” is less than having the general intent to do a particular thing in a certain way. Lastly, the concept of “people who should reasonably have been aware” might target general categories of negligence. However, these vague conceptualizations left it for national courts to fill in the culpability requirements in practice. Of salient

importance are the interpretations and adjudications of the ECJ which have actually adhered to a model of customs liability mainly targeted to a scope, the protection of financial interest. Significantly, the ECJ has emphatically suggested a purposive reading of the extensive model, mainly driven by the constraints of the protection of financial interests[112] and not for the purpose of pinpointing the real taxpayer. This is compounded by a judicial interpretation that assumes that any trader is able to avoid irregularities[113] by its diligence and has a responsibility not to harm the common market.

In terms of objective requirements, the Court has also widened the scope by expanding the meaning of the type of misconduct subject to liability through a purposive reading, such as in case of the irregular introduction of goods subject to import duties. In this regard, one of the most landmark case is *Papismedov*[114].

In summary, following the same logic, ECJ case-law has enlarged the boundaries of the scope of customs debt liability by reducing and relaxing the role of the subjective condition and by interpreting extensively the content of some "misconducts".

[112] C-195/03 - Papismedov and Others

[113] P. 62 e 65 case Schenker "In that regard, reference must be made to the case-law according to which an expectation as to the validity of certificates of origin which prove to be false, forged or not valid does not constitute, in itself, a special situation justifying a remission of duties (order of 1 July 2010 in *DSV Road* v *Commission*, C-358/09 P, EU:C:2010:398, paragraph 81; see, by analogy, judgments of 13 November 1984 in *Van Gend & Loos and Expeditiebedrijf Bosman* v *Commission*, 98/83 and 230/83, ECR, EU:C:1984:342, paragraph 13, and 10 May 2001 *Kaufring and Others* v *Commission*, T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, ECR, EU:T:2001:133, paragraph 234). Post-clearance checks would be largely deprived of their usefulness if the use of such certificates could, of itself, justify granting a remission. The opposite result could discourage traders from adopting an inquiring attitude and make the public purse bear a risk which falls mainly on traders (see, to that effect, judgment of 18 January 1996 in *SEIM*, C-446/93, ECR, EU:C:1996:10, paragraph 45)." See further: Acampora

[114] C-195/03 - Papismedov and Others

3.4 European Court of Justice's interpretation on customs debt liability in the absence of guiding tax principles and in pursuit of the protection of own resources. What limitations are there on the exercise of taxing power?

Most of European case-law developed on these rules has predominantly focused on the unlawful introduction of goods and removal from customs supervision. However, the most interesting aspect has been the way the Court has interpreted the customs liabilities within these categories.[115] The role of customs has clearly steered the judicial interpretation toward revenue maximisation rather than, for instance, an evaluation of customs liability in light of the principle of proportionality. Increasingly, the justification for the imposition of customs duties has been ascertained by straying beyond the traditional criteria to such an extent that its justification exclusively rests on the feasible introduction of goods in the European network, regardless of the fiscal relationship with the customs debtor. The long line of case studies that follows reveals an extensive effort to protect the financial integrity of the European budget. The judgments are significant for various reasons but the underlying rationale is clearly recognizable. First, the case-law tends to provide a purposive interpretation in order to assign the customs debt liability which rests on the main argument of the prioritization of financial interests whilst barely considering the substantive customs debtor. Customs liability is regularly imposed in the absence of culpability. Second, when judging the nature of negligence requirement, it is difficult to deal concisely with a notion as ambiguous as the reasonableness of the debtors' knowledgeability of the misconduct of another offender.

A famous example is the decision in *Viluckas Jonusas*[116] whereby drivers unwittingly imported goods. As such, those who would be accessories in the chain of events leading

[115] "Rassegna di giurisprudenza comunitaria e nazionale sui dazi e diritti doganali", in Giur. imp., vol. LXXXV-2012; F. Cerioni, "Gli elementi caratteristici dell'obbligazione doganale", in M. Scuffi - G. Albenzio - M. Miccinesi, Diritto doganale, delle accise e dei tributi ambientali, Milano, 2013; S. Armella, Diritto doganale, Milano, 2015.

[116] C-238/02 *Viluckas Jonusas*. On the topic, see also: Cassazione civile, sez. trib., 07/05/2010, n. 11181; Cassazione civile, sez. trib., 13/09/2013, (ud. 14/01/2013, dep.13/09/2013), n. 20947.

to the incurrence of customs debt were shifted into the position of principal infringers. The Court did not apply the "culpability requirements" even if the persons, namely drivers, were not substantively responsible for any omission regarding the non-compliance. More specifically, it was held that the driver and co-driver of a lorry who introduced the goods, which were hidden in the vehicle without their knowledge, could be considered custom debtors even if they were not aware and had no reason to be aware of the goods hidden or concealed in the lorry. That is precisely what the Court has stated under the guise of "the presentation to customs of goods introduced into the Community" that must concern all goods, including those hidden in a secret compartment. What is critical here is, from a logical perspective, how the "presentation to customs" must include goods hidden in a secret compartment, which could not be discovered by adopting proportional measures. The court ruled that the customs debtors were qualified as the persons who introduced such goods unlawfully, in other words irrespective of the subjective element of negligence represented by the term "should have known", and not those persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful or those persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully. The emphasis should first be laid on the refusal by the local criminal court to allow criminal proceedings to be instigated against the driver and the owner of the lorry on the ground of insufficient evidence of tax evasion. Notwithstanding the procedural autonomy between criminal and tax proceedings envisaged by domestic legislation, these subjects were considered the principal responsible for the unlawful introduction of goods, through an interpretation which only applies the objective criteria of liability on the basis of an argument that conceives the "presentation of goods" as an obligation whose compliance concerns all the goods, even though they were slipped in by a third party before the trailer had been delivered for loading in a compartment that was not such as to arouse suspicion. The negligence requirement, which demands that economic

operators take all the measures reasonably expected to be careful, was not applied. In other words, they were responsible because they were in charge of the potential source from where the misconduct emanated. As they were qualified as the persons who introduced such goods unlawfully and not categorized as those persons who acquired or held the goods in question, their degree of potential or actual knowledge was not taken into consideration. Moreover, in this case and very frequently in others, the evaluation of customs debt liability is addressed with a narrow economic rationale, which explains why and how customs debt liability is imposed. The Court emphazised that it is obvious "from the wording of Article 202(3) that the EU legislature intended to give a broad definition of the persons capable of being regarded as debtors of the customs debt, in cases of unlawful introduction of goods subject to import duties"[117].

This argument acts as the cornerstone of the interpretation carried out on the customs debt liability and the main argument to strengthen the position aimed to enlarge the range of persons liable for customs duties' payment but, at the same time, it undermines the clarity and predictability of the incurrence of customs debt. As a consequence, here the customs debt liability goes beyond the presence of a minimum contributory mental element. In fact, the use of an objective construction does not require any degree of subjective requirement. As such, although the drivers were not themselves negligent, they were held as the principal customs debtors on the basis of the fact that they carried out a specific service. This reasoning threatens to result in the failure to comply with legal certainty[118] and the principle of proportionality[119]. Such flexibility in determining and interpreting the cluster of customs debtors might shift into a seriously questionable and transparently disproportionate allocation of customs debt liability since economic operators, regardless of their role within the unlawful project, are liable for the customs

[117] see *Spedition Ulustrans*, paragraph 25, and *Papismedov and Others*, paragraph 38

[118] On the legal certainty as a concept incorporating a number of ideas concerned with the boundary between legality and illegality, or lawfulness and unlawfulness, which should be marked in advance, see: N. Foster, *EC law*, Blackstone press, 3d edition, p. 92. According to the author, "legal certainty includes sub-concepts of legitimate expectations, protection of vested rights, proportionalty and non retroctivity. It was first ackowledged by the Court of Justice in Defrenne vs Sabena and was later confirmed in the Barber vs Guardian Royal Exchange case."

[119] Especially when referring to the punitive nature of customs duties.

debt in case of unforeseen and unpredictable types of unlawful conducts. Imposing a strict customs liability on the drivers due to an interpretation that recognizes the drivers as the main "customs debtors", because of the physical dimension of the introduction, represents the height of utilitarian reasoning. Here, the subjective state of mind is irrelevant. Once it is established that the the driver was formally the main infringer, though not substantively, he can neither disprove his presumed awareness nor negligence. This results in the establishment of a duty of care, including all potential risks, in such cases where there is no relationship between the parties and thus a further extension of the customs debt liability to many new situations. At the same time, Europe-State would benefit from an irrebutable presumption of lawfulness and culpability.

Additionally, another important decision is given in *Papismedov*[120]. This ruling seems to be noteworthy for two reasons. First, the European court has extended the scope of the unlawful introduction beyond its wording. Its interpreation has widened the range of breaches covered by the unlawful introduction, literally termed as any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

Instead, the Court has provided a dynamic interpretation of the obligation represented by the presentation of goods at customs that has the dual effect of ensuring that the customs authorities are informed not only of the fact that the goods have arrived but also of all relevant information about the type of article or product concerned and the quantity of those goods. According to the Court, the presentation represents the juncture at which the goods are identified for the purposes of their tariff classification and, if appropriate, for the calculation of import duties. In this sense, the violation of rules regarding the presentation of goods to customs is not confined to an exclusive breach of the mentioned articles as it includes a collateral obligation to lodge without delay a summary declaration or complete a customs declaration. In this way, by conceiving the summary or customs declaration as the inital phase of the introduction

[120] C-195/03 - Papismedov and Others.

of goods, even if not expressly envisaged, and as a direct outcome of the presentation, attention is drawn to the identification of goods whose incorrectness leads to an unlawful introduction.

The Court has provided an interpretation that covers the lodging of a summary declaration but, on the other hand, it creates uncertainty about the differences between 201 and 202. The Court appears to confirm that any incorrect statement triggers the customs debt liability on the basis of unlawful introduction by ruling that:

> When the presentation of goods to customs required by Article 40 of the Customs Code is accompanied by the lodging of a summary declaration or of a customs declaration which gives a description of the type of goods which bears no relation to reality, the notification to the customs authorities of the arrival of the goods, within the meaning of Article 4(19) of that code, is lacking. It cannot, in those circumstances, be considered that the information necessary for identification of the goods has been provided to those authorities by the mere production of certain documents. It is also necessary that the statements contained in the documents which accompanied the presentation to customs are correct. Where those statements make no mention of the presence of a significant part of the goods presented to customs, those goods must be regarded as having been introduced unlawfully.

As noted above, this judicial interpretation inspired the Italian Corte di Cassazione[121] to apply Article 202 instead of Article 201 on whether the irregularities affect the introduction of goods and more specifically provide incorrect, forged or false documents or statements. As a result, here, the customs debt liability of the indirect representative seems to arise by proving his negligence or intention. But, as seen before, other interpretations could be proposed. The indirect representative might always be responsible, regardless of his subjective requirement, according to Article 201. Furthermore, when considering the myriad of customs debtors, the customs agent could also be considered the main person who introduced the goods. The person who in practical terms introduced the goods, without declaring them, remains the debtor by virtue of the provisions of the first indent of Article 202, regardless of the subjective assessment.

The second and probably most complex type of non-compliance, which has been the object of intense interpretation by the Court of Justice, is the violation represented by the "removal from customs supervision". The ECJ has resolved a number of long-

[121] Corte di Cassazione nr. 9773 of 2010.

standing and significant questions concerning the application and the implications of this type of breach that is able to trigger customs liability. With reference to its legal concept,[122] it has been promptly reconstructed from the jurisprudence of the Court, on the basis of a necessary and functional link with customs control. The notion of customs supervision is mentioned within the entry of goods into the customs territory as a status to which all goods are subject from the moment the goods enter into the customs territory, without the necessity for any declaration. Compared to Article 202 of the Customs Code, which is considered sufficiently clear in the qualification of the "irregular introduction" and explicitly defined as a violation of one set of defined procedural obligations, the general and limited definition of "removal from customs supervision" has demanded, instead, an exegetical operation. According to the ECJ, removal from customs supervision is substantially reflected in a concept that privileges an objective solution, and it came to be undersood as "any act or any omission the result of which is to prevent, even if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the related checks". This is the *discrimen* utilised by the Court to subsume the incurrence of the customs debt under Article 203. Accordingly, it is sufficient that the goods are objectively removed from any possible customs controls regardless of their effective introduction in the European market. The jurisprudence relating to the punitive nature of customs duties in case of removal from customs supervision will be analysed in the paragraph dedicated to the punitive use of customs to ensure the effectiveness of customs operations. However, it is possible to extrapolate other specific characteristics to clarify this concept.

[122] On the concepts of customs supervision and customs controls see: T. Lyons, *EC Customs Law*, Oxford, 2008. "From the moment that goods enter into the customs territory of the Community, they are subject, without the necessity for any declaration, to the supervision of the customs authorities and may be subject to customs control. Supervision by the customs authorities means action taken, in general by those authorities, with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed. Customs control means the performance of specific act such as examining goods, verifying the existence and authenticity of documents, examining the accounts of undertakings and other records, inspecting luggage and other goods carried by or on persons, and carrying out official inquiries and other similar acts, with a view to ensuring that customs rules are observed" p. 323

Firstly, the removal from customs supervision does not correspond, in terms of the effects, to the offence of smuggling. Here, it is important to distinguish the criminal and administrative responsibility from the customs debt liability and not confound the effects of smuggling with the concept of customs supervision.

Secondly, the removal of customs supervision can result in a formal violation without any substantial consequences for the European market. This might happen when goods have been temporarily removed from customs supervision without entering into the economic network.

In other cases, the effects on the European market can be substantial when goods have been removed from customs supervision and dispersed. This often leads to the practical effect that the customs burden is not allocated to the person who has materially removed the goods from the supervision. The customs debt liability, for instance, that is allocated to the victim of armed robbery with hostage-taking, prompted an intense debate regarding the standard of care reasonably expected and the broad definition of customs debtors. It also led to a rethink about those issues connected to an appropriate allocation of the tax burden. However, this evokes the issue of the autonomy of customs duties or its reliance on taxes and, regardless of its proved dependence on a tax structure, the absence of a "European fiscal constitution" capable of limiting the tax liability.

Certainly, from the tax perspective, the fiscal relationship between the chargeable event and who realizes it seems to be reduced to an essential requirement. In economic terms, the effect will be that the burden of customs debt will fall on the person not necessarily involved in the removal from customs supervision. In assessing the legitimacy of this "catch-all" structure of the European customs model, it seems necessary to retrace those criteria that define its boundaries, beyond which the exercise of public power might be illegitimate.

4 Customs liabilities and customs actors: Cases of "third-party" and "strict" liabilities

The peculiarity of customs debt liability is that its structure serves two distinct purposes. On the one hand, there is the fiscal purpose which theoretically implies a lynchpin or inter-relationship between the chargeable event and the taxpayer who realizes it. However, it has already been argued that there is no unified or unique concept of tax at the European level, which renders extremely difficult conceptualizing an European fiscal paradigm to which taxes must conform. Furthermore, the chargeable event, in case of customs debt, is questionable. On the other hand, when it covers cases best referred to as "irregular", the joint liability approach, which evokes models of criminal and administrative liability, is adopted to ensure the collection of customs duties. It shows similar characteristics in the structure, and the way the liability is attributed brings to mind traditional issues around criminal, civil and administrative liability. Strictly speaking, this pattern expands the net of customs debt liability beyond paradigm strict cases to such an extent that it can be questioned how far and how closely a person needs to be involved in the chain of events leading to the irregular introduction to be held liable to customs. Frequently, it shifts the customs liability to someone who holds an accessory position. In other words, the scope of customs debt liability does extend over the persons who have more or less joined the "wrongdoing". In fact, an individual might bear customs liability because of his/her "proximity" to the event of the incurrence of customs debt. The degree of proximity is not always based on some sort of relationship between customs debtors. In other words, the customs debt liability is formulated (and interpreted) in a way that it widens the range of customs debtors to such an extent that it does not necessarily require/imply some degree of minor participation in the unlawful act perpetrated by others.

It is important to understand and analyse the customs liabilities in their context. First and foremost, the breaches of certain customs provisions generate customs liability. The construction of such misconducts will take two forms:

- for the person who is considered the materially responsible for the breach in question, there is no requirement of the subjective mental element.

- in contrast, those persons who have participated in the breach of certain customs rules must possess a certain state of mind at the relevant time. The subjective standards are the "knowledge" or the "ought to have known" statement.

The first problem arises in relation to certain cases where the one responsible for the material breach of certain customs rules is not the actual or true infringer behind the misconduct. However, if qualified as the material author of the breach, the customs liability will be placed upon him, regardless of any subjective requirement, on the grounds of the objective construction. The most striking example of this is found in the case of *Viluckas Jonusas*[123]. This ruling typifies a case of strict customs liability: the driver, who was not the substantive infringer, was regarded as the main infringer (through a formal reading) and thus put in the position where he could not prove that "he could not have known". In addition, the process of objectifying the subjective requirements seems to also increasingly affect the subjective construction of customs debt liability. Thus, the role of the mental element has been progressively diminished with the result that objective culpable conducts are found (despite the derivation of liability from the main person's violation of law) and cases of strict customs liability have arisen. This is reflected, primarily, though not exclusively, in the arguments put forward in the settled case-law about removal from customs supervision.

The ECJ rejected the extinction[124] of customs debt according to the previous Article 206 in respect of goods destroyed or irretrievably lost as a result of their actual nature, unforeseeable circumstances or force majeure. This case related to items of jewellery placed under customs warehousing arrangements that were stolen in an armed robbery with hostage-taking. The question at issue was whether the robbery of goods held under

[123] Viluckas e Jonusas, C-238/02 and C-246/02
[124] C-273/12 - Harry Winston

customs warehousing arrangements could be regarded as an irretrievable loss of the goods and thus a case of *force majeure*, with the consequence that in this situation no customs debt on importation would be incurred. In fact, the Court followed a stringent interpretation, answering in the negative. The conclusion was mainly based on a literal interpretation, namely that article 206 is applicable only to situations in which a customs debt is liable to be incurred pursuant to Articles 202 and 204(1)(a) of that regulation. In assessing the incurrence of a customs debt in such circumstances, the Court pointed out that it was justified by the presumption that goods enter the European economic network when removed from the customs warehouse without having been cleared through customs. As a result of this reasoning, the only factor that seems relevant to the incurrence of customs liability is the objective one, justified on the grounds of potential entry of goods in the European network. Considering the circumstances, the victim should have employed measures to prevent the hostage event. However, the paradox is that, logically, he was made liable for the customs debt. This implies that the conduct reasonably to be expected would avoid any potential risks. The standard of reasonableness is so high as to demand that the economic operator could avoid armed robbery with hostage-taking. Because of this, this judgment has been strongly criticized.

Indeed, the exact scope of the "defence" of the victim of the robbery seems to be non-existent. The victim is not even in the position of having to prove force majeure. However, force majeure is not interpreted as covering armed robbery because it triggers customs debt liability under removal from customs supervision. As a result, in case of removal from customs supervision, the victim can never be exonerated by proving certain unexpectable circumstances such as an armed robbery.

Consequently, the imposition of the customs debt might be conceptualized on the basis of a sort of strict customs liability: even if an armed robbery with hostage-taking was not reasonably foreseeable, customs debt liability can still be attributed to the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed, notwithstanding

a robbery impeding the fulfilment of the duty to control the goods. Clearly, the rationale behind this conclusion is quite utilitarian: the real offender cannot be caught and this seems a plausible and sufficient justification to apprehend someone who can be easily targeted.

Finally, something must be said about the relationship between the assumption of the customs debt liability and the role of customs debtor. It is apparent from the case-law that emphasis is squarely on the incurrence of customs debt, from an objective point of view. In attempting to delineate the theoretical basis for attributing the customs debt liability, using the traditional criteria to assign the tax liability, and consequently developing an argument capable of searching out the nexus[125] to charge customs debtors according to their ability to pay,[126] seems to be utopic. Notwithstanding, it has long been recognized that the ability-to-pay principle is the fundamental principle[127] which justifies the tax burden, according to objective and subjective requirements, yet it is not formally recognized at the European level.[128] However, the tax literature has

[125]On the theoretical concepts underlying nexus for taxpayers in direct and indirect taxation, see: P. 575-576 Michael Lang, Peter Melz, Eleonor Kristoffersson, Thomas Ecker, *Value Added Tax and Direct Taxation: Similarities and Differences,* IBFD, 2009, p. 575-576. The authors refer to the nexus to legal taxpayers in both direct and indirect taxation as both having the goal of charging individuals according to their ability to pay both distributing the tax revenue among several jurisdictions**.**

[126] C. Bardini, "The Ability to Pay in the European Market - An Impossible Sudoku for the ECJ", *Intertax,* Volume 38, Issue I, 2010, Kluwer Law International BV; Frans Vanistendael, 'Ability to Pay in European Community Law' (2014) 23 *EC Tax Review*, Volume 23 (2014), Issue 3, pp. 121–134; I. Vukevi "(lack of) understanding of the ability-to-pay principle in the montenegro tax system - constitutional court case practice and legislative approach"; R. A. de Mooij, L.G. Stevens, "Exploring the Future of Ability to Pay in Europe", *EC Tax Review*, Vol. 14, Issue 1 (2005); A. Zalasinski, "Limits of the EC Concept of Direct Tax Restriction on Free Movement Rights, the Principles of Equality and Ability to Pay, and the Interstate Fiscal Equity", *Intertax*, Volume 37, Issue 5, 2009, Kluwer Law International BV.

[127] According to IBFD's definition: Principle of tax economics, based on the theory that taxes should be equitable, that a taxpayer's burden should reflect his economic capacity to bear that burden relative to other taxpayers. Income is traditionally considered to be the best measure of a person's ability to pay. However, alternative measures of economic position, such as consumption and net worth, may also be used for these purposes. The principle is used, inter alia, as an argument for progressive tax rates, for the imposition of taxes on capital and for various allowances such as age and disability allowances. Although it may appear inconsistent with the benefit principle, the two may arguably be reconciled.

[128] On this point, see: Joachim Englisch, "Chapter 19: Ability to pay" in *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Online Books (Last Reviewed: 1 April 2014). Significantly, the author contends that "The Treaties of the European Union contain only a few tax-specific provisions, and none of them make any explicit reference to the concept of ability to pay. Nor is this principle enshrined in the EU Charter of Fundamental Rights, which forms an integral part of primary Union law. It has also never been invoked by the Court of Justice of the European Union (ECJ) as an unwritten general principle of Union law. One might therefore wonder how the ability-to-pay principle could have any constitutional status under Union law. However, the experience of several EU Member States, and the jurisprudence of the German constitutional court in particular, show that it is not necessary for the ability-to-pay principle to be expressly mentioned in a constitutional text in order for it to attain constitutional relevance. To the extent that the ability-to-pay

addressed the subjective nexus in the indirect taxation by centering the discussion on whether the VAT design is consistent with the ability to pay. The major argument regards the tax consumption as revealing the ability to pay to be at odds with the minor one, which considers that creating "added value" is itself a form of ability to pay.[129] Despite the ongoing debate between the two main arguments on determining specifically the indicator of ability to pay, it is possible to perceive a subjective nexus through which the tax liability is charged on the individual related.

Therefore, efforts should be made to develop an argument to interpret the customs debt liability in the light of minimum "subjective" requirements in the absence of a tax legal frame of reference. If it is true that the customs law is the first stage towards convergence' processes and uniform application of tax rules, however, its structural design seems to diverge significantly from standardized models of tax liability.

If the jural relationship of the potential customs debtors cannot be ascertained on the basis of a subjective, personal link between the incurrence of a customs debt and the customs debtor, how can we establish limits on imputing customs debt liability? This is the rationale behind the solid argument which considers the ability to pay principle as the relevant dimension of tax equality to be "a genuine and binding limit to governmental taxing powers and not a rule of prudence for legislators in the design of tax system'.[130]

principle can be derived from fundamental rights and general principles of Union law, as their special manifestation or corollary in the field of taxation (or at least regarding certain taxes), it would seem only logical that the ability-to-pay standard partakes in the constitutional status of those constitutional rights and principles. A similar development can indeed be observed regarding the principle of neutrality in the ambit of indirect taxes on consumption expenditure: The ECJ has consistently referred to the neutrality principle as "the reflection of the equality principle" in this particular context and applied it as such when assessing harmonized national VAT and excise tax legislation as to their compatibility with Union law (although the Court has so far – inconsistently – denied that it has any constitutional implications vis-à-vis the Union legislator."

[129] See: L. Cerioni and P. Herrera, "The Nexus for Taxpayers: Domestic, Community and International Law" *in Value Added Tax and Direct Taxation: Similarities and Differences*, IBFD, Online Books (Last Reviewed: 1 June 2009).

[130] See: A. Amatucci, "An European Tax legal order based on Ability to pay" in *International tax law,* Alphen aan den Rijn, 2012: "To summarize, tax equity specified as taxation according to individual ability to pay is the common denominator of European tax law which must form the constitutional core of an European legal tax order. As the constitutional framework of European law is predominantly enshrined in the EC and Eu treaties, tnheir application in the field of cross-border taxation will have to realize this as a starting point." P. 257

Concern is widespread that customs debt liability might be interpreted without a framework of tax principles due to its peculiarities, coupled with its underlying task of collecting European financial resources. In fact, it embodies a hybrid model of liability which echoes the subjective elements test for other types of liability, such as criminal or administrative. There may be grounds for this concern since hybrid models are likely to escape the purview of general principles.

On the contrary, theoretically speaking, it is the very nature of criminal and also administrative-penal-civil responsibility to be personal[131] according to the so-called fault or subjective or culpability requirements, due to their reliance on the commission of criminal offences and administrative irregularities. Conversely, tax and customs debt liability are forms of liability deriving from a chargeable event, deemed to be taxable in accordance with rules laid down in a State, realized by a certain person. However, it is clear that they might arise from infractions that have potential or substantial effects of he chargeable event. Regardless of the extent and degree of participation, in several cases, their role as a material presence is sufficient to trigger the liability of participants. Of course, one might conceptualise different gradations of the subjective element: customs liability starts with those persons who are at the level of execution and it is imputed to persons, regardless of the intent or at least the negligence. At the next level, the liability might attributed to a variety of individuals, regardless of their duties or their status, as long as they knew or they should have known. However, on matters of application, the parameter represented by the "knew or should have known" formula is vulnerable to generous interpretations. The case of *Harry Winston*[132] is the best example of a person the authorities know to be not only innocent but a victim of hostage-taking and robbery, being easily targeted to pay the customs debt incurred for a misconduct known to be committed by another. Intuitively, the allocation of customs debt liability exclusively relies on the objective criterion, represented by the likelihood of goods entering in the economic circuit. Not only is there no link between the

[131] P.47 Peter Cullen, *Enlarging the fight against Fraud in the EU,* Koln, 2004.
[132] C-273/12 - Harry Winston

chargeable event and the substantive importer but the liability that the party bears for the misconduct of another person is not even based on some sort of relationship between the two parties. In other words, the interplay of principles and values at stakes is rather obvious – it swings the balance in favour of European financial interests. Undoubtedly, the furtherance of substantial European interests is of crucial significance but the issue of the limits exceeding a proportional and legitimate imposition of customs duties resurfaces.

The preceding discussion reveals that this approach however comes to weakening the subjective element such as the attitude towards the chargeable event or the offence.

A further instance in which complex legal issues relating to the compromise between the effectiveness of European rules and the principle of legal certainty is worth mentioning. An attempt to challenge what might be called "third-party liability" in the form of a strict liability was raised in *Pascoal v Fazenda Publica*.[133] The ECJ stated that the imposition of liability on an importer acting in good faith, where the exporter has made a fraudulent application of an EUR 1 certificate, is not contrary to the general principles of EU law. This judgment not only clarified the allocation of responsibilities between importing and exporting states in relation to the origin of goods. The preliminary ruling derives from an attempt to cap the liability of the importer within the methods of administrative cooperation in order to issue the EUR 1 certificates attesting that the goods have been produced, manufactured or processed in a particular country to obtain exemption from customs duties. The procedure to obtain the EUR 1 certificate involves the exporter and the customs authorities of the country of exportation; it is regulated by the article which requires that the exporter must submit the request and any appropriate supporting document proving that the goods to be exported are such as to qualify for the issue of the EUR 1 certificate. Some of the central legal questions arising in this case relate to the allocation of the payment of customs duties if the importer, acting in good faith, has declared the imported goods

[133] C-97/95 Pascoal & Filhos Ld. a v Fazenda Pública

on the ground of an EUR 1 certificate, which subsequently proved to have been based on the false information supplied by the exporter.

The applicant claimed that the exporter was liable for the customs debt by reason of his fraudulent application for an EUR 1 certificate and that, if the importer were to pay that debt, he would, to his own financial detriment, be paying the debt of a third party, which would be contrary to the principles of justice, prohibition of enrichment at the expense of others, proportionality, legal certainty and good faith. Still, the importer assumes a responsibility which goes not only beyond his obligation but also the duty of diligence. He might be held as a customs debtor whether or not his failure to produce it was due to his fault. Here, the liability does not depend on proof of negligence or intent but is based instead on his role as an importer.

In considering the abovementioned principles, the Court reasoned that the terms of the contract will determine the extent of responsibilities and will be construed to impose a lesser or greater liability by a limitation of liability clause. So although the importer was not himself negligent, he was held liable for the customs debt. Hence, the concurrent liability, attributed regardless of any degree of negligence, clearly benefits the exporter-breaker of the customs rule.

This case neatly illustrates the priority given to the interests of the European Union over the protection of expectations. Generally, the principle of legal certainty and the principle of the protection of legitimate expectations are conceived as both sub-concepts of the rule of law. Indeed, the ECJ has consistently identified the principle of legal certainty as a fundamental principle of EU law which requires that:[134]

- rules should be clear and precise and aim to ensure that situations and legal relationships governed by Community law remain foreseeable

[134] See: C-169/80 *Administration des douanes v Société anonyme Gondrand Frères and Société anonyme Garancini*; C-143/*93 Gebroeders van Es Douane Agenten BV v Inspecteur der Invoerrechten en Accijnzen*; C-110/03 *Belgium v Commission;* C-158/06 *Stichting ROM-projecten. v. Staatssecretaris van Economische Zaken*; C-201/08 *Plantanol GmbH & Co. KG. v. Hauptzollamt Darmstadt*; C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

- individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly. In other words, the rule of law is typically construed to require that the law contains an exhaustive description of the conduct proscribed.

Considering the circumstances under which the importer is consider liable, regardless of any omissions, within an administrative cooperation system, it is evident that the rule of law has been eroded in favour of the customs debt recovery. This interpretation, which seems to be in contrast with the existence of a justifiable reliance[135] arising from a cooperation system which can give rise to protected legitimate expectations,[136] inevitably leads to a form of liability based on a *culpa in re ipsa* since the economic operation becomes liable to the additional customs payment, irrespective of any negligence, for the misconduct of a business partner.[137]

This judgment offered a good opportunity for the Court to elucidate and determine the extent of the customs debt liability in the light of the abovementioned principles, which still remained uncertain. Unfortunately, all grounds put forward by the applicant were dismissed.

In summary, the cases above are indicative of an existing pattern in European customs law. They illustrate one of the fundamental aspect of customs debt liability – the existence of forms of strict customs debt liabilities. This seems to be the fiscal response within customs law, shifting from the perspective of "who is economically affected" to focus on "who is required to pay". However, as the scope of customs liability is expanded towards forms of "strict liability" due to non-compliance of other individuals who benefit from irregular introductions, all the subjective criteria are most likely depleted.

[135] Case T-176/01 Ferriere Nord Spa v Commission (2004) ECR II-3931
[136] Case T-283/02 EnBw, para 89.
[137] See on this point: G. Grasso and R. Sicurella, *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, 2008, p.144

4.1 Who are the persons who knew or should have known? The know or should have known test and other forms of third-party liability

In the previous section, special emphasis was given to the several "liabilities" imposed on different agents which might be properly responsible for the payment of customs debt, regardless of some effective and substantial relationship with the importation of goods. The ECJ has stretched the meaning of these provisions through a teleological interpretation in order to safeguard EU goals. The extent of the customs debt liabiliy has been freely manipulated due to the parameter of the "knew or should have known" test. Against this background, one might respond to the question of what is the meaning to be attributed to "knew or should have known" by referring to the objective standard represented by the "reasonable person". The reasonable agent reflects a concept which, even if adopted both by civil and common law States with very few different features, serves the general-deterrence goals within criminal and administrative liabilities. It represents a parameter[138] to individualize the liability for negligence and includes the substantial risk he/she was aware of and the risk he/she should have been aware of on the basis of the characteristics of the agent. In other words, the customs debt liability rules *outsource* the classic subjective standards from the domains of other liabilities. The selection of such a standard may be criticised because it leaves a vague and abstract line that is not easy to handle.

This standard of liability has not been adopted by the ECJ from its case-law and applied to the customs system; it is in fact already codified by the customs law. However, the customs legislation does not specify how to determine when the agent *should* be aware that he is acting wrongly. Hence, it is necessary to work systematically through its interpretations to find an answer to this.

[138] Parallels between customs law and criminal law can be drawn here. See: P. Robinson, M. Cahill, Criminal Law, p.248. Although in the criminal context, the author describes the so-called "Individualized objective standard as the objective standard represented by the reasonable person which individualized to include the factsknown to the actor and the actor's situation".

Fixing the meaning of "aware or should reasonably have been aware" seems crucial in identifying the agent debtor for the customs duty, whether through direct or indirect involvement. While the awareness is a issue inherent to the proof, interpretations in the domains of "should reasonably have been aware" are likely to enlarge the boundaries of the customs debt liability. What does the "should reasonably have been aware" test encompass? What is the reasonable duty of care expected for disproving the negligence in that regard?

The first time the Court had to confront the precise limits of the subjective requirement of customs debt liability was in *Spedition Ulustrans*.[139] The Austrian national court, *Verwaltungsgerichtshof*, referred a question to the ECJ on whether Article 202(3) of the Customs Code allowed a Member State to widen the meaning of customs debtor to the employer, on the basis of Paragraph 79(2) of the ZollR-DG, as a co-debtor of an employee's customs debt, when that employee has acted unlawfully with regard to customs obligations in the conduct of the employer's affairs. Referring to the *ratio legis* behind the formulation of the European customs debt liability, which was intended to widen and expand the use of a customs liability to the employer, the Court recognised a *summa divisio* of customs debtors under which different rules regarding the verification of the subjective element apply. The Court rejected the compatibility of a sort of "vicarious liability"[140] for misconducts by employees within the scope of their employment by holding that under European law the verification of whether "the person was aware of or should reasonably have been aware that such introduction was unlawful" has to be conducted by narrowly assessing the position of the economic operator. This has an important implication – the employer was able to exonerate himself by showing that he was not aware of the misconduct and he could not have been aware.

[139] C-414/02

[140] Even if the term vicarious liability is used in the criminal or civil context it is used here to evoke a "Liability that a supervisory party bears for the actionable conduct of a subordinate or associate based on the relationship between two parties", according to Black's law dictionary.

Here, the Court dwelled on the specific position assumed within the unlawful introduction, which is relevant to determine whether the subjective condition must be evaluated. According to the thricotomy provided by the customs rules, the first indent of Article 202(3) of the Customs Code refers to the 'person' who performs the actual operations of the unlawful introduction of goods, without specifying whether that means a physical person, such as an employee or an employer of an undertaking, or a legal person, such as the company responsible for the unlawful introduction of the goods. By its action, the person becomes the main responsible party without any possibility to be exonerated, by proving, for instance, the diligence.

Unlike the person qualified as the main responsible party for the unlawful introduction, the condition that those persons who participated in that introduction 'were aware of or should reasonably have been aware that such introduction was unlawful' applies to the second indent of Article 202(3) referring to 'persons' in the plural, without further specifying whether that means physical or legal persons, who have 'participated' in the unlawful introduction of the goods. However, the participation here is not intended as an active and aware contribution but implies a softer and lower standard of participation, well described in the concept of "those who have taken some part in such introduction". The imposition of the customs debt rests therefore on matters of subjective assessment which are such as to exclude, in certain cases, treatment as a debtor.

Finally, the third indent of Article 202(3) of the Customs Code also envisages treating as 'debtors' persons but again without specifying whether they are natural or legal persons who, after the unlawful introduction of the goods, that is to say after the operation which has given rise to the customs debt, acquired or held the goods and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully. The extension of the meaning of 'debtor' is therefore in that case, as it is for the application of the second indent of Article 202(3), subordinate to a subjective condition.

Here the Court stated that imposing an irrebutable presumption of fault and a consequent assumption of liability on the employer would be not compatible with European law. Outwardly, this position seems to recognize that customs debt liability falls within the terms of the subjective condition, dictated by the proportionality principle. But a different complete picture emerges by enquiring the ECJ's case-law which confirms the existence of strict customs liability.

Another important ECJ judgment[141] that adopts an interpretation which expands the customs liability through the indicator of the "participation" and "knew or should have known" test was on one German citizen who auctioned goods originating in China on eBay where he ran two online shops. He worked as an intermediary in the conclusion of the contracts of sale of those goods, collected the sale price and transmitted the purchasers' names and addresses to the Chinese supplier who was responsible for the setting of prices and the procuring of the goods. The supplier delivered the goods directly to the purchasers based in Germany by post, without their presentation to customs authority and without import duties being levied, apparently owing to inaccurate declarations by the supplier as to the contents and value of the goods.

The Court, in line with the Advocate General at point 39, rendered the intermediary of Ebay the person who had participated, by emphasizing that the legislature did not specify that the persons covered by the second indent of Article 202(3) were solely those who directly contributed to the unlawful introduction but also those involved in acts related to the introduction. It emerges an interpretation through which it is sufficient be involved in acts roughly linked to the unlawful introduction.

As a result, since the concept of "person who participated" is not specified, the Court has construed the content to require that it is sufficient to be in the domains of the prohibited conduct. Any person engaging in some acts loosely related to the misconduct can become the customs debtor. This type of proximity suffices; there is no requirement for a minimum level of aid or assistance. This extension is not without

[141] Case C-454/10 Oliver Jestel vs Hauptzollamt Aachen

controversy and triggers some concerns about what exactly amounts to “participation”. Next, considering the “knew or should have known”, it seems, according to the interpretation of the ECJ, that the dictum implies that the economic operator “should have known”.

On the one hand, this rigorous application is surely a source of motivation for European operators to comply with the customs regulation in the regular introduction of goods in the European market. This answer, however, threatens to extend the net of customs debt liability too broadly, no matter how remote the connection is between the conducts. On the other hand, it is sufficient under a merely instrumental and incidental role within an import transaction to assume the customs debt liability, supported by a presumed all-encompassing competence of the trader that embraces “the undertaking of all the steps which could reasonably be expected of him to ensure that the goods concerned would not be unlawfully introduced, in particular whether he informed the supplier of its obligation to declare the goods to customs”. This stems from an interpretation of the subjective condition, referred to as a reasonably circumspect and diligent trader. This is rather abstract and so might result in a vague and general concept, when applied to all the persons involved in acts merely related to the introduction. The customs law provides no basis for distinguishing between the conduct of different participants other than through the “knew or should have known” standard. By measuring the standard of conduct, for the use of this formula, economic operators might easily become customs debtors when performing certain economic activities. Two differently situated economic operators—one who truly participated to the unlawful introduction and one who performed acts remotely close to that—stand on an equal footing. The corollary of this approach has been an expansive reading when adjudicating on customs debt liability. However, this extension of liability beyond the person effectively responsible, by an interpretation enlarging the scope of both the participation and the the subjective standards, makes it very difficult for economic operators to be effectively isolated by culpable individuals and not be thus “infected” and so avoid liability when carrying out certain types of transactions.

4.2 Remarkable aspects

Although the limb of Article 79 echoes the "knew or should have known" test, the case-law developed around this concept does not offer precise and objective criteria to ring-fence prospective customs debtors. The greater hurdle for national authorities is to interpret authentic European legal notions, whose content is deemed to be autonomous and unattached to domestic interpretations. Still, the kind and degree of negligence to be applied in determining customs liability might be different. Despite the regulation setting up the harmonization of customs, the uniform interpretation and the autonomy of the EU legal system are not always guaranteed.

Furthermore, the extension of customs debt liability beyond the person contravening customs rules to include any person, not only those knowingly involved, presents several difficulties since it has greatly widened potential customs debtors. In essence all those who have made a "material" contribution to the misconduct may find that they are held liable. There is no distinction in terms of their degree of participation awareness: the taxable person is evaluated in the same way as a person who aids the authors of the misconduct and becomes their accomplice. This makes it very difficult for certain economic operators to avoid customs liability especially because the standard for the measurement of negligent conduct is high for traders as they are expected to have higher skills and knowledge than those they actually hold.

These decisions are a further sign of the relevance of deterrence for policy-making in customs law. Cases such as *Harry Winston*[142] turn on an acceptance that deterrence of customs wrongdoing is an important aim for customs law. The degree of care expected has been pitched at such a high level as to amount to a form of strict liability.

In regulating customs debt liability, European customs law provides a definition of customs debtor which is not confined to the person realizing the chargeable event. In

[142] C-273/12 - Harry Winston

sum, economic operators who engage in all forms of customs procedures are susceptible to become customs debtors. This extension of liability has been designed to avoid recovery problems, with the burden largely shifted to economic operators. The path taken by the ECJ might be summed up as follows. The Court tends to follow a composite and not always homogeneous methodological approach to answer the question of whether an individual must be regarded as a customs debtor. First of all, the rules of customs debt liability must be interpreted in light of the task conferred on customs duties as European financial resources. As a result, the customs debt liability is far removed from what we might theorize as "customs capacity" to recall a sort of tax capacity. Texturally, the customs debt liability is not framed within what might be called the tax capacity's perspective but engineered with a view to achieve a multiplying and expansive effect to ensure the collection of customs duties. In this context, the Court has galvanized an interpretation of the customs debt liability rules in accordance with the rationale behind them, aimed to to provide for a broad definition of the persons capable of being regarded as debtors of the customs debt, in cases of unlawful introduction of goods subject to import duties.[143] Furthermore, and this represents a controversial point, the Court insists on the European legislature's intention[144] to lay down comprehensively the conditions for determining who the debtors of the customs debt are. However, the content of the subjective condition tends to be a liable and volatile since the "know or should have reasonably known" test is a dilatory term that leaves broad margins of discretion to courts to actually construe its meaning. It seems to depend on the parameter of reasonableness. In fact, this reasonabless has to be evaluated by the domestic courts but it is presumably easy to believe that the person could be aware of certain circumstances every time he/she has minimum competences in the sector. And yet, its assessment is substantively left to the external scrutiny of Member States. The fear is that parameters stemming from administrative or criminal liability might have an excessive impact in terms of customs

[143] (Case C-414/02 Spedition Ulustrans, not yet published in the ECR, paragraph 25).
[144] (Spedition Ulustrans, cited above, paragraph 39).

debt liability and further blur the boundaries between legitimate and non-legitimate customs debtors. How to determine the customs debt liability in light of criteria stemming from administrative and criminal liability were largely illustrated with examples. Additionally, the mandatory use of a third-party to guarantee the customs debt surely constitutes an administrative measure for the recovery of customs duty but not without undesiderable effects connected to the excessive burdens imposed within this context. The upshot is that there must be some sense of proportion between the relative importance of the financial interest at stake and the expansion of the customs debt liability alongside the mandatory guarantees. Otherwise, the risk is that this model of tax liability becomes exclusively moulded by non-legal factors, such as financial interests, rather than construed within the context of legal considerations.

Providing a minimum standard of liability leaves the implementation of the provisions to the discretionary powers of the Member States. Providing further classification of the requirements regarding the test should properly be considered in this context. In this regard, objective parameters to establish negligence in many sectors should be provided.

4.2.1 Third-party liability and "knew or should have known" test within VAT: Differences and similarities

Even though this formula is deemed to be notably difficult to handle, the "knew or should have known"[145] liability standard was widely adopted in the context of VAT fraud[146] until it became a fundamental parameter for the legitimacy of several anti-

[145] This terminology is adopted, alluding more generally to the test employed in other legal contexts, such as in: George Sher, "Who knew? Responsibility without awareness", Oxford, 2009.

[146] For a detailed analysis of VAT frauds, see: G. Moschetti, "Consapevolezza dell'altrui frode e detrazione Iva*", Il fisco*, 2011; Logozzo, M., "Il diritto alla detrazione dell'iva tra principi comunitari e disposizioni interne", *Rassegna Tributaria*, 2001; A. Giovanardi, *Le frodi IVA. Profili ricostruttivi. Vat frauds identifying main aspects*, 2015 - G Giappichelli Editore; P. Centore, "Sintomatologia delle frodi IVA. L'indirizzo della recente giurisprudenza comunitaria", *Fisc. int*, 2008; M. Greggi, *Presupposto soggettivo e inesistenza nel sistema d'imposta sul valore aggiunto*, Cedam, 2013; Mereu, *La repressione penale delle frodi Iva, Indagine ricostruttiva e prospettive di riforma,* Cedam, Milano, 2011; Mondini, *Contributo allo studio del principio di proporzionalità nel sistema dell'Iva europe*a, Pacini editore, 2013; Moschetti, *Diniego di detrazione per consapevolezza nel contrasto alle frodi Iva - Alla luce dei principi di certezza del diritto e*

fraud measures. It is believed that, according to some authors, the credit and refund mechanism has double implications because it makes the VAT self-enforcing "in the sense that each trader has an incentive to ensure that their suppliers have themselves properly paid output Vat, in order that themselves can then claim an appropriate credit".[147] Neverthless, it is likely to provide abuse opportunities resulting into evasion and fraud. Parallels can be drawn with the approach adopted within VAT enforcement since, on the basis of Article 205 VAT Directive, Member States may hold another person jointly and severally liable for payment of VAT. This liability is restricted to the payment of the tax due and cannot extend to the assumption of administrative obligations.[148]

Litigation that originates from anti-fraud measures[149] provides an interesting example of the precarious interplay[150] between the protection of financial interests and the imperative principle of neutrality. Roughly speaking, the legal means to combat VAT frauds are mainly grounded on two mechanisms on the basis of the VAT legislation: the denial of the right to deduct (which still remains under debate), and domestic measures providing joint liability for the payment of the VAT. In the text that follows, we will grapple with the development of the case law that interprets the "should know or should have known" test.

Moreover, problematic issues have arisen in the implementation and application of anti-fraud VAT measures. This entailed, among other things, striking a balance

proporzionalità, Cedam, 2013; Raggi, "Il Fine delle operazioni inesistenti nell'Iva?", in *Dir. e prat. trib*., 2011, p. 275 ess; Toma, "La frode carosello nell'IVA. Parte seconda. Risvolti tributari (II)", in *Dir. pr. trib*., 2011, n. 4; Basilavecchia, "Sulla prova della responsabilità del cessionario nelle frodi Iva", in *Corriere Tributario* n. 20/2007; P. Centore, "Misure operative di prevenzione e contrasto alle frodi", *Corr. trib*, 2006; F. Cerioni, "La responsabilità soggettiva degli operatori nelle frodi IVA", *Riv. giur. trib*, 2013; F. Cerioni, L'onere di conoscenza del soggetto passivo nel sistema dell'Iva europea ei suoi limiti secondo la Corte di Giustizia, *Boll. trib*, 2013;

[147] See: Ian Crawford, Micheal Keen, Stephen Smith in the chapter "Value added tax and Excises" in *Dimensions of tax design*, The Mirrless Review, p.313; E. Traversa, "Prevention of evasion and avoidance and abuse in EU VAT Law" In: M. Lang, D. Raponi et al., *ECJ- Recent developments in Value added tax*, Linde Verlag, 2014, p. 35-54;

[148] Fundamentals of EU VAT law, p. 431, Wolters Kluwer; Ceci, Emanuele; Traversa, Edoardo. *[Fraude à la TVA] Principe général de droit communautaire*. In: sous la direction de Charlène Adline Herbain, *La Fraude à la TVA*, 2017.

[149] Maurizio Bernardo e Gianpaolo Sbaraglia*, "*Contrasto alle frodi iva: misure alternative alla solidarietà d'imposta", in il *Fisco* 3/2018.

[150] De Girolamo, "L'evoluzione della giurisprudenza comunitaria in tema di responsabilità del cessionario nelle frodi Iva", in *Il Fisco*, n. 31/2007; G. Lishi, Tesi di dottorato unibo.

between principles of legal certainty and proportionality and the more practical consideration of preventing fraud. As is clear, the structure of VAT and customs liability is similar and there is also much commonality in terms of formulas used. Despite the common measures of expression, there are also differences between the two, some of which flow from their different roles, others from differences in the subject matter. Unsurprisingly, within customs, the Court is likely to apply the concept of proportionality less intensively than in VAT case-law.

Although there is no specification of the content of the "knew or should have known" test, Optigen[151] can be considered the seminal case in that it lays the foundations for the subsequent evolution of the case-law on the importance of the subjective condition in order to refuse the benefit of rights to VAT deduction. The High Court of England and Wales enquired, inter alia, whether certain transactions can be considered to be economic activities under the meaning of the Sixth Directive if they are not fraudulent but part of a chain of supply in which another prior or subsequent transaction is vitiated by such fraud. More specifically, the classification of these transactions as "economic activities" affects the entitlement of a trader to a credit for a payment in respect of VAT. The UK and Czech governments insisted on the fact that, under the common system of VAT, and in the light of the First and Sixth Directives, the entitlement of a trader to credit for a payment in respect of VAT under a transaction had to be evaluated considering the totality of transactions, including subsequent and prior transactions and taking account the purposes of other participants in the chain of which the trader has no knowledge and/or means of knowledge. Naturally, this would lead to the result that all transactions within a circular chain of supply the only purpose of which is to perpetrate a fraud on the VAT system were wholly outside the scope of the Sixth

[151] L. Salvini, *Operazioni inesistenti e frodi "carosello" con particolare riferimento all'IVA, "* In questo contesto si inserisce la sentenza Optigen (cause C-354/03 et a. del 2006) la quale afferma, esaminando per la prima volta una fattispecie di "frode carosello" il principio secondo cui "il diritto di un soggetto passivo ... di detrarre l'IVA pagata a monte non è pregiudicato dal fatto che, nella catena di cessioni in cui si inscrivono tali operazioni, senza che il medesimo soggetto passivo lo sappia o lo possa sapere, un'altra operazione, precedente o successiva a quella realizzata da quest'ultimo sia inficiata da frode all'IVA".Pertanto il diritto di detrazione perde le sue caratteristiche di certezza "per dipendere dall'evanescente concetto di conoscibilità della frode altrui(Giovanardi, *Le frodi IVA*, Torino 2013, 92)".

Directive, regardless of the involvement of an innocent trader. By contrast, the ECJ held that:

> The right to deduct input value added tax of a taxable person who carries out such transactions cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by value added tax fraud, without that taxable person knowing or having any means of knowing.

This point is crucial for assessing the legitimacy of the refusal to deduct input VAT. In other words, the Court's opinion is that the economic substance of the transactions has to be evaluated according to objective criteria, within the meaning of the Sixth Directive. This implies that it cannot be stated that transactions cannot be considered to be economic activities within the meaning of the Sixth Directive because the objective of related, subsequent or prior transactions is unlawful. However, here the recognition of the central position of the "subjective" element, the right to VAT deduction, is subject to the "knowledge of or reasonableness to have knowledge" of the fraud.

Since this ruling, the discussion on anti-fraud VAT measures has evolved markedly. In particular, in *Federation of Technological Industries*, the Court[152] raised some important objections to the mechanisms that, under Article 21(3) of the Sixth Directive, might be enacted by Member States, under which a person is to be jointly and severally liable to pay a sum in respect of VAT payable by another person made liable by one of the provisions of Article 21(1) and (2).

This judgment has shown the difficulties inherent in the implementation of it at a national level but is also undoubtedly a step forward in terms of the boundaries of legitimate domestic measures adopted by States. The reference for the preliminary ruling was raised in the course of an application for judicial review in proceedings between 53 traders in mobile telephones and computer processing units and their trade body, the Federation of Technological Industries ('the Federation'), and, on the other side, the Commissioners of Customs & Excise and the Attorney General ('the Commissioners'). The case concerned the compatibility with Community law of the

[152] C-384/04 Federation of Technological Industries and Others sulle misure nazionali antifrode

provisions of sections 17 and 18 of the Finance Act 2003, which aimed to tackle the fraudulent abuse of the system of VAT. Specifically, the Finance Act 2003 provides for joint and several liability of traders in a supply chain where tax is unpaid on the basis of a legal presumption through which a person shall be presumed to have reasonable grounds for suspecting fraud matters to be as mentioned if the price payable by him for the goods in question was less than the lowest price that might reasonably be expected to be payable for them on the open market, or was less than the price payable on any previous supply of those goods.

Significantly, the balancing test is invoked by the judicial approach. Here, the Court sought to establish that the institutional principles structure on which the European legal order is based, in particular, the principles of legal certainty and proportionality, must frame the legal framework of the Member States. The Court emphasized once again that in adopting the measures to cope with frauds and to preserve the rights of the public exchequer as effectively as possible, on the basis of Article 21(3) of the Sixth Directive, a framework with a proportional-prudential orientation is a necessary condition to cap the effects of disproportional measures going beyond their objectives since the Member States have to be aware of their limitations.

It is important to be clear about the relationship between the principle of proportionality and VAT liability because it serves as a fitting link between this section and the customs liability. Even if the principle of proportionality is established as a general principle of EU law, the scholarship[153] has isolated three general broad types of cases in which the principle is applied: cases regarding discretionary policy choices, such as social, political or economic ones; cases about infringements of a right recognized by EU law; and cases involving penalties that impose a financial burden.

In this case, the Court was willing to balance the proportionality with the conflicting measure based on expanding the VAT liability, as well as penalties (imposed as a result of criminal or administrative liability) are generally evaluated. This is a fundamental

[153] P. Craig, *EU administrative law*, Oxford. On the proportionality, see: p. 591

point to assess a legitimate stretching of the forms of liability. The Court went on to establish that:

> In that regard, the national measures at issue in the main proceedings provide that a taxable person other than the person who is liable can be made jointly and severally liable to pay the VAT with the latter person if, at the time of the supply to him, the former knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or of any previous or subsequent supply of those goods, would go unpaid. A person is presumed to have reasonable grounds for suspecting that such is the case if the price payable by that person was less than the lowest price that might reasonably be expected to be payable for those goods on the market, or was less than the price payable on any previous supply of those goods. That presumption is rebuttable on proof that the low price payable for the goods was attributable to circumstances unconnected with failure to pay VAT.

According to the court, the combination of the following guidelines is likely to ensure proportionality without going beyond the goals.

The requirement of refutable legal presumption must be complemented by rejecting any formulation in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary. Most importantly, the Court, following the Advocate General's concerns (Paragraph 27 of his Opinion), concluded that *iuris et de iure* presumptions which result in a system of strict liability overcome what is necessary to preserve the public exchequer's rights. This case provides an important example of the one-fold approach to the legal presumptions, systematizing the proportionality as the theoretical argument to contrast the implications of a strict liability. This approach was soon reiterated in subsequent cases and it represents the main criterion to legittimize the measures impacting on VAT liability.

Proportionality became a key concept also in *Kittel*[154], signaling the cautious approach of the ECJ in the context of VAT fraud. What is remarkable about this decision is how the Court provides an interpretation which equalizes the position of the participants in the fraud, regardless of their profit by the resale of the goods.

By contrast, it is incompatible with the rules governing the right to deduct under that Directive, as noted in paragraphs 37 to 40 of the present judgment, to impose a penalty in the form of refusing that right to a taxable person who did not know, and could not

[154] Joined cases C-439/04 and C-440/04, Axel Kittel v Belgian State (C-439/04) and Belgian State v Recolta Recycling SPRL (C-440/04).

have known, that the transaction concerned was connected with fraud committed by the supplier, or that another transaction forming part of the chain of supply prior or subsequent to that transaction carried out by the taxable person was vitiated by VAT fraud[155]. This position is bound to invite the argument that tax liability is imposed as a form of penalty. The position of the Court is also peremptor in stating, like a mantra, that the establishment of a system of strict liability would go beyond what is necessary to preserve the public exchequer's rights.[156]

In *Mahageben*[157], the Court, while asserting that the right to deduct is an integral part of the VAT scheme and in principle may not be limited, mantains that the refusal can be justified if the tax authority proves the objective evidence which leads to the conclusion that the taxable person knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with fraud committed by the supplier or by another trader acting earlier in the chain of supply.

It should be acknowledged that in subsequent cases concerned with fraudulent evasion of VAT, the ECJ did not generally review them with as much intensity as the ECJ did in VAT cases when deciding about customs. The possible explanation for this is predominantly connected to the role of customs duties.

As a result, a number of conclusions follow from the case-law:

- As stated in the scholarship,[158] from the decisions concerning third party liability for fraud, the development of the principle of third-party liability might be inferred: the genesis of the (sub-)principle of third party liability for fraud can be traced back to *Optigen, Fulcrum and Bond*[159]; *Kittel and Recolta Recycling*[160];

[155] See, to that effect, *Optigen and Others*, paragraphs 52 and 55, and *Kittel and Recolta Recycling*, paragraphs 45, 46 and 60.
[156] P.48 C-80/11 Mahageben e C-142/11 Sentenza sul diritto detrazione e strict liability
[157] C-80/11 - Mahagében and Dávid
[158] R. De La Feria and R. Foy, "Italmoda: the birth of the principle of third-party liability for VAT fraud", *British Tax Review*, 2016 (3). pp. 270-280.
[159] Optigen Ltd (C-354/03), Fulcrum Electronics Ltd (C-355/03), Bond House Systems Ltd (C-484/03) v Commissioners of Customs & Excise in Joined Cases C-354/03, C-355/03 and C-484/03
[160] Joined cases C-439/04 and C-440/04, Axel Kittel v Belgian State (C-439/04) and Belgian State v Recolta Recycling SPRL (C-440/04).

and *Italmoda*[161] which confirms the existence of a principle. However, to the extent that this case-law turns on an acceptance that deterrence of fraud is an important aim, the Court strikes out the use of strict liability. Within Vat, third-party liability would be possible if there was evidence of bad faith, fault or negligence. In contrast, in the context of customs, forms of authentic strict liability exist.

- Within both fiscal regimes, the critical point of this orientation resides in the element of the "knowleadgeability" of fraud in case of the VAT or the misconduct in case of customs. In fact, as noted by the scholarship,[162] whilst ascertaining knowledge of fraud will most likely be a proof issue, the expression "should have known" has raised legal concerns as to its meaning and scope. In order for the Court to consider the taxpayer's good faith, requires an awareness that the transaction concerned was not connected with fraud committed by the supplier, or that another transaction that formed part of the chain of supply prior or subsequent to that transaction carried out by the taxable person was vitiated by VAT fraud. It follows that the commercial diligence that is required of the economic operator cannot be defined a priori but is likely to be evaluated on the basis of individual concrete cases.

4.3 The punitive role of customs duties

Deterrent tax policies are conceived as compliance strategies adopted by policy-makers to encourage tax compliance. More specifically, there are crucial functions of tax penalties that the legal and economic literature generally recognizes:[163] creating a more

[161] Joined Cases C-131/13, C-163/13 and C-164/13, Staatssecretaris van Financiën contro Schoenimport «Italmoda» Mariano Previti vof e Turbu.com BV Turbu.com Mobile Phone's BV contro Staatssecretaris van Financiën

[162] R. De La Feria and R. Foy, "Italmoda: the birth of the principle of third-party liability for VAT fraud", *British Tax Review*, 2016 (3). pp. 270-280.

[163] Tutti vedi: Sulla funzione della pena: G. Vassalli, Funzioni e insufficienze della pena, in Riv. it. dir. e proc. pen., 1961, pp. 297; L. Eusebi (edited), *La funzione della pena: il commiato da Kant e da Hegel, Giuffrè*, Milano, 1989 L. Eusebi, *La pena in "crisi". Il recente dibattito sulla funzione della pena*, Morcelliana, Brescia, 1990; Luca Tumminiello, Il volto del reo: l'individualizzazione della pena fra legalità ed equità, Milano, 2011, p. 17.

effective tax administration, encouraging voluntary compliance, enhancing taxpayers' morale and strengthening and enforcing compliance. Therefore, the natural consequence of the breach of law results in the imposition of civil, administrative and criminal sanctions, even if this distinction has become more and more opaque. Another fundamental role[164] of tax penalties is linked to the definition of tax compliance. Indeed, tax penalties not only foster tax compliance but they also distinguish compliant conducts from non-compliant conducts. From a purely deterrence perspective, the sanctioning function[165] can be reproduced by installing different legal mechanisms. For instance, a specific fiscal regime might be utilised as a *quasi-sanction* as a negative reaction to potentially any violation of a certain standard of conduct with an expectation.

Interestingly, taxes or fiscal mechanisms might have a punitive nature.[166] This occurs where, for instance, the tax is imposed on a person due to the infringement of a rule but the chargeable event is not realized by the taxpayer. From a legal perspective, establishing the punitive character is not merely a juridical qualifier because it will alter the principles to apply. Instead, if the tax turns out to be punitive, this threatens to over-sanction the same irregularity, thus requiring a legal assessment in terms of the proportionality principle but also legal certainty.

In particular, theoretical concerns arise from the tax/customs architecture when several sanction mechanisms coexist to assert the standards of conduct.

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[164] M. Doran*, Tax Penalties and Tax Compliance*, 2009.

[165] L.B Mulder, "When sanctions convey moral norms", European Journal of Law and Economics, 2 march 2016.

[166] On the punitive nature of customs duties, see: Hans-Michael Wolffgang and Kerstin Harden, "The New European Customs Law", *World Customs Journal*, Volume 10, nr. 1.. See generally: F. Mazzacuva, *Le pene nascoste: Topografia delle sanzioni punitive e modulazione dello statuto garantistico*, 2017, p. 158; L. Del Federico, *Le sanzioni amministrative nel diritto tributario,* Giuffré, Milano,1993; L. Del Federico "Introduzione alla riforma delle sanzioni amministrative tributarie: i principi sostanziali del D.L.vo .472/1997, in Rivista diritto tributario 1999, I,108; L. Del Federico, "Sanzioni improprie ed imposizione tributaria", in AA.VV*., Diritto tributario e Corte costituzionale*, edit. by L. Perrone e C. Berliri, Napoli 2006, 519-532; L. Del Federico, "La tipologia delle sanzioni amministrative tributarie", in *Corr. trib*., 2002, 820; L. del Federico, "Le sanzioni improprie nel sistema tributario", in *Riv. dir. trib*., volume XXIV, Giugno 2014, 6, pp. 693-709; C. Fava, Sanzioni tributarie e persone giuridiche tra modelli penalistici e specificità di settore, Milano: Giuffrè, 2006; Rastello, Sanzioni tributarie (Contributo alla teoria generale), in *Noviss. Dig. It*..

However, penalties are adopted for a natural purpose, the repression of offences against the law. Conversely, taxes are collected *iure imperii* and are considered a source for financing the so-called *res publica* revenue and function as a measure that reddresses inequalities. In structuring a penalties system, States can adopt sanctioning measures with an afflictive (or punitive) function, a reparatory function or a general or special preventive function. When fiscal regimes are designed to fulfil the purposes of penalties, there is not only a coexistence of punitive measures but an alteration of the legal framework. For instance, at the European level, in *Italmoda*[167]*a* the Court denied the nature of a penalty[168] or a sanction to the refusal of the benefit of rights (such as deduction) stemming from the common system of VAT within the meaning of Article 7 of the European Convention on Human Rights[169] or Article 49 of the Charter of Fundamental Rights of the European Union (since refusal is seen as the consequence of a failure to satisfy the conditions required in that respect by the relevant provisions of the Sixth Directive).

Reconstructing the customs debt liability as having a monolithic nature would not help to explain the actual role of the customs duties. Customs duties might be used as puntive measures against "deviant" conducts detrimental to financial stability. This leads to some pertinent implications for the overlapping of deterrent measures, highlighting the merger of two spheres, the punitive and the fiscal one. It is the very purpose of a punitive sanction to deter future crimes and protect the rights of law-abiding citizens. That is why we should be reluctant to establish different punitive responses whose effects are indistinguishable from genuine punishment.[170] These

[167] Joined Cases C-131/13, C-163/13 and C-164/13, Staatssecretaris van Financiën contro Schoenimport «Italmoda» Mariano Previti vof e Turbu.com BV Turbu.com Mobile Phone's BV contro Staatssecretaris van Financiën

[168] V. Ficari, Indetraibilità dell'imposta ed operazioni oggettivamente inesistenti tra dimostrazione della fattispecie e sanzione «impropria» in capo all'intestatario, pp. 230-232.

[169] European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

[170] See: L. Del Federico in "Chapter 7 - Decriminalization of Tax Law by Administrative Penalties on Tax Duties" in *Surcharges and Penalties in Tax Law,* IBFD, 2015: "Finally, one of the most interesting issues is the emerging phenomenon of situations in which taxpayers who shirk certain duties are subject to the negative consequences, in addition to (or as an alternative to) administrative and, sometimes, criminal tax penalties. Scholars define these further negative consequences as indirect, "hidden" or atypical sanctions."

concerns must be addressed in principle. Consequently, deterrence-based duties must be replaced by penalties because they are not designed to address/target the violation of the customs system. This calls for a framework that must be directed toward preventing the cumulative usage of deterrent mechanisms.

4.3.1 The incurrence of customs debt, regardless of the effective introduction of goods: The controversial case of removal from customs supervision

As mentioned earlier, there is a category of customs liability which has been highly debated, namely "removal from customs supervision". This is because the wording of the Code on this point iss rather vague. Therefore, the development of case-law has gradually filled this void. In fact, Article 203 of the previous Customs Code simply required removal from customs supervision for customs liability to arise.

As anticipated before, this category which can trigger the incurrence of customs debt covers different situations in terms of the effects. However, these "sub-categories" share one common feature: goods have been removed, even temporarily, from customs supervision.

In fact, the elements needed to bring about to arise removal from customs supervision have been promptly reconstructed by the jurisprudence of the Court, substantively taking into consideration the objective, functional linkage between goods in question and customs supervision and customs controls.

The interpretation of the ECJ on the removal from customs supervision has been necessary. Surprisingly, the category of "unlawful introduction of goods", contained in Article 202 of the Customs Code, was explicitly defined as arising from the violation of one of several defined procedural obligations. Compared to it, the inadequate and generic formulation of the removal demanded, instead, an exegesis. More importantly, according to the orientation of the ECJ, the removal from customs supervision is substantially reflected in a concept which privileges an objective and formal solution

defined as: “any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Community customs legislation”.[171]

In this context, it is correct to state that smuggling can be regarded as a sub-category of removal from customs supervision. In essence, it can be said that removal from customs supervision carries with it an appreaciable risk that extra-EE goods enter into the European economic network. The question of how to draw a line between the application of Articles 203 and 204 is highly contested. There is a fundamental distinction in that if the incurrence of customs debt arises from Article 204, then Article 859 of Commission Regulation (EEC) No 2454/93 might apply.

This means that customs debt does not incur when failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure. According to Article 859, this occurs when they do not constitute an attempt to remove the goods unlawfully from customs supervision; and they do not imply obvious negligence on the part of the person concerned, and all the formalities necessary to regularise the situation of the goods are subsequently carried out.

A common example used to illustrate the meaning of removal from customs supervision is the *Hamann*[172] case. This has attracted much controversial debate because there is no distinction, within removal from customs supervision, between substantial and formal failures to comply with customs controls.

Here, the Court held that there was removal from customs supervision when non-Union goods which were subject to the customs warehousing procedure and intended for re-export from the customs territory of the Community were removed and transported from the customs warehouse to the customs office at the point of exit without having

[171] (see Case C-66/99 *D. Wandel* [2001] ECR I-873, paragraph 47; Case C-371/99 *Liberexim* [2002] ECR I-6227, paragraph 55; Case C-337/01 *Hamann International* [2004] ECR I-1791, paragraph 31; and Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 47).

[172] C-337/01 - Hamann International

been placed under the external transit procedure. This is an exemplary case to understand the meaning of this category and the ECJ's interpretation on the point of the customs debt that arises from the removal from customs control. For its part, the Hamann company believed that:

> The Finanzgericht had wrongly found that a customs duty had been incurred for the purposes of Article 203 of the Customs Code and not Article 204 of that code. It had also erred in finding that Article 203 of the Customs Code prevailed over Article 204. In addition, the implication of Article 204 of the Customs Code, read in conjunction with Article 859(5) of the implementing regulation, was that in a situation such as the one in question here, no customs debt had been incurred. The export of the goods without having placed them under the external transit procedure did not constitute removal from customs supervision, or even an attempt at such removal, but rather was merely an operational error which had no effect on the proper conduct of the customs warehousing procedure.

There seems to be a well-established jurisprudence to ascribe the incurrence of the customs debt to Article 203. Consequently, according to the Court, it is sufficient that the goods are objectively removed from possible customs controls, regardless of the status of goods. Thus, "removal from customs control" has been considered applicable exclusively on the grounds of an objective solution, strictly focused on any failures to comply with customs supervision and with the possibility of carrying out customs checks. However, this interpretation displays a strict and rigid application which, by denying relevance to effectiveness, ends up by not distinguishing between non-compliance resulting in economic prejudice and those failures that result in a mere formal breach of rules. In *Hamann*, the ECJ justified the application Article 203 because it was impossible for the customs authorities to guarantee customs surveillance between the time of removal from the customs warehouse and the presentation at the customs office of exit, regardless of the fact that those goods did not enter into competition with European products. In other words, the breach of obligations that interfere with the control activity would always trigger the incurrence of a customs debt because of removal from customs supervision, regardless of the assessment of the actual entry into a free economic network (what is the object of presumption). In summary, the incurrence of customs debt arising from the removal from customs

control is not, under any circumstances, precluded if proving[173] the actual exit of goods or that the removal from customs controls was temporary.

Undoubtedly, the removal from customs supervision was meant in the Customs Code as a category designed to encompass all highly-risky situations leading to "dispersion" of goods imported from third countries into the EU market. The underlying rationale is that removal from customs supervision involves the impossibility of identifying the goods and the risk of introducing them in the market, which is not in accordance with the law. This outcome is not, however, the one foreseeable in absolute terms: implication of removal from customs supervision can well be configured differently, on the basis of consequences. On the other hand, the Court has always privileged a rigorous interpretation. In cases of formal violation, such as *Hamann*, the Court did not accept the suggestions for an interpretation by taking into consideration the principles with regard to *effet utile*. On that occasion, the Advocate General insisted on a systematic interpretation of Articles 203 and 204 to avoid that the latter was deprived substantially of *effet utile*. Specifically, in attempting to safeguard the useful effect of the combined provisions of Articles 204 and 859 of the implementing legislation, the Advocate General suggested to interpret Article 204 as covering all breaches not resulting in a loss of customs revenue. Again, the principle of proportionality could, perhaps, function to orient the interpreter to mitigate the effects of an absolute presumption by effect of which the customs debt arises from the mere fact of the removal from customs control, even temporarily, without looking at the effects.

However, the new provisions on customs debt in case of non-compliance are now entirely regulated by Article 79 of the new Code. On the other hand, the cases represented by “failures considered to have no significant effect on the correct operation of the temporary storage or customs procedure, not able to trigger the customs debt” have become one of the new causes of extinguishment provided for by Article 124 of the EU Regulation No 952/2013. The purpose of this is to highlight that

[173] F. Briganti, “Il regime doganale del transito”, *Rassegna Tributaria*, 2017, 3.

the combined reading of the aforementioned standards suggests an extension of the scope of application of the new cause of extinction to the subtraction hypothesis. So far, the primacy of the removal from customs control and, with it, the exclusion of the application of Article 859 of Regulation No 2454/93 was guaranteed by the fact that the latter was applicable only whether the breach of customs rule did not constitute a case of removal from control (besides not having consequences on the proper functioning of the regime and not revealing negligence). That wording seems to have changed now.[174] The new formulation under Article 124 of the new Code requires, for the extinguishment of a customs debt, that the non-compliance has no consequences on correct functioning and it does not constitute an attempt at deception. There is no longer a reference to the category of removal, relevant for the purpose of ascertaining liability. The reference is, instead, to the fraudulent nature of the operation. In fact, from the reading of the provision in question, it is no longer the removal from customs supervision that prevents the extinction of customs debt but a more consistent and different element, the *animus nocendi*. It is a prerequisite evidently inherited because the absence of fraud in the old Code constituted the requirement to justify the repayment and remission of the customs duties. It is clear that the notion of fraud, significant within the scope of criminal law, does not coincide with the customs category of removal relating to customs debt liability. Again, the ECJ will have the difficult task of ruling on the coordination of Article 79 concerning the incurrence of customs duties in all non-compliant cases and Article 124 on the causes of extinguishment of a customs debt and on the application of a new rule that requires the

[174] H.-M. Wolffgang, K. Harden, "The New European Customs Law", *World Customs Journal*, Volume 10, nr. 1.. The authors suggest that "Article 124 (1)(k) UCC tackles another problem encountered in case law by providing that a customs debt can also be extinguished if the customs debtor submits evidence that the goods have not been used or consumed, and have been taken out of the customs territory of the Union and there has been no attempt at deception. This should provide a solution to the controversial cases of Article 204 (1) CC, at least concerning the incurrence of the customs debt. Hitherto, the judgements of the ECJ have not provided operators with a satisfactory solution.26 In such cases, a customs debt was incurred owing to non-compliance in the form of a failure or removal despite evidence that the goods concerned had already been taken out of the customs territory of the Union and had not entered economic circulation at any time. This provision in the UCC makes clear that the law on customs debt should not be punitive in nature (contrary to what judgements of the ECH have suggested). Rather, it places emphasis on the economic theory of customs. Accordingly, the incurrence of a customs debt depends on the goods entering the economic circulation of the EU. In future, cases of non-compliance will be addressed according to a separate catalogue of penalties (for example, fines)."

attempt at deception to exclude the extinction of the customs tax incurred as a result of failure to comply with the various obligations.

It is important to understand the key structural issue of the category represented by "removal" when considering its relationship with the VAT treatment of goods removed from customs supervision. The relationship between the incurrence of customs debt, in the irregular hypotheses, and of the import VAT has been addressed by the ECJ which ruled that the incurrence of customs debt does not automatically trigger import VAT. Significantly, it rejected the idea that import VAT is automatically due when the customs debt arises under Article 203. In fact, as suggested by Advocate General Campos-Sanchez Bordona in *Wallenborn Transports SA vs Hauptzollamt Gießen*[175], it is necessary to ascertain separately the import VAT and the customs debt if the latter is due following the removal from customs control:

> When a customs debt under Article 203 of the Community Customs Code is incurred due to the removal from customs supervision of goods in a free zone, this gives rise to the chargeable event and import VAT becoming chargeable if it is reasonable to presume that the goods were able to enter the economic network of the Union, which is a matter for the national court to determine.

5. The origins of the abuse of law within Customs. Expanding the customs debt liability and administrative liability in case of abuse

Not rarely an eminent role for the genesis of the principle of abuse of law[176] within fiscal context, is attributed to the case Halifax. In point of fact, the abuse of law[177] epitomise a topic to which the field of customs law[178] has mainly given its contourns. But it is worthwile anticipating that the development of this concept in customs law seems to reveal its own hallmarks with regard to the issue of the applicable penalties.

[175] C-571/15.

[176] On the concept of principle of abuse of law and the prohibition of abuse of law, see: R. de la Feria, "Prohibition of abuse of (Community) law: the creation of a new general principle of EC law through tax", *Common market law review*., 45 (2), 2008, pp. 395-441.

[177] C-6/71 C-3/74 C-77/78 C-10/77 C-125/76 cremer

[178] D. Weber, *Tax Avoidance and the EC treaty freedoms. A study of the limitations under European Law to the prevention of tax avoidance*, The Hague, 2005

Additionally it will be observed in due course that, in restoring the *status quo ante*, the Court has seized the opportunity to force a further expansion of the customs debt liability. Firstly, to analyze in detail the present-day developments, it is necessary to provide the background on which the concept of abuse has been formed within customs law. Historically, the abuse of customs law has been devoloping on three predominant categories of cases.

The first one formulating the main test of abusive practices, was a preliminary ruling posed by Bundesfinanzhof on the the exports refunds on agricultural product. Even if one may categorise this as a case regarding agriculture policy and not the customs, generally speaking, the export refund system is part of a hybrid legislation that granting export refunds for basic agricultural products exported in the form of processed products, substantially deals with the exports. The mentioned case was about the so called U-turn transactions, through which the company Emsland-Stärke GmbH[179]

[179] See D. Weber in "Chapter 2: Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ" in *EU Income Tax Law: Issues for the Years Ahead*, Online Books, IBFD, (Last Reviewed: 1 May 2013): "Together with Wattel, I am of the opinion that abuse takes place in general at two levels: (i) at EU level and (ii) at national level. In the case of abuse at EU level, endeavours are made to make direct use of the EU rules (e.g. by invoking a certain exemption in a Directive) which in fact is not intended for that person. Such a form of abuse often occurs in situations in which the law has been made uniform or has been harmonized (e.g. consider VAT). By abuse at national level, endeavours are made to avoid certain national legislation (e.g. the non-deductibility of interest) by invoking Union law (e.g. the right of establishment). Such a form of abuse occurs, for example, in non-harmonized areas such as direct taxation, where taxpayers devise all kinds of structures in order to avoid the non-deductibility of interest. In the course of time, the Court has developed two different formulations in the case law on the basis of which abuse can be combated. The first formulation can be found, inter alia, in *Emsland-Stärke*, in which the Court considers that for the question whether there is abuse, an objective test and a subjective test must be satisfied. The Court maintains this formulation each time there is an issue of abuse at EU level. In the second formulation, the Court does not refer directly to the objective and the subjective tests, but considers more in general that the Member States may impede abuse. The Court maintains this more general formulation of abuse in case there is abuse at national level. One example is *Centros.* Also in cases concerning direct taxation in which the Member States invoke the combating of tax avoidance as justification for the free movement, the Court refers, not directly to the objective and subjective tests, but mentions more in general the combating of "wholly artificial arrangements(….) For that matter, we see that the Court refers more and more to cases from various areas of lawand accordingly, in this manner, it is already active in bringing the case law more on one line. It is recommended, however, that the Court be more consistent in the formulation of what can be considered abuse. Hereby, an alignment as close as possible with the objective and subjects tests from *Emsland-Starke* has my preference, and we see from the doctrine and in the views of the AGs that this description is considered a general guideline".
See also: Georg Kofler, Michael Tumpel in *Value Added Tax and Direct Taxation: Similarities and Differences*: "While *van Binsbergen* may be considered the first case to deal with this issue, it was only after *Emsland-Stärke* that the concept of "abuse" drew increasing attention. As *Emsland-Stärke* applied an "abuse test" to the claim of export refunds and thus concerned the Community's own resources, it was only a short step to ask whether such a test should also apply in the area of the harmonized Value Added Tax, which is also part of the Community's own resources. Indeed, and given the fact that the prevention of tax avoidance and abuse is an objective recognized and encouraged by Community law, the

GmbH exported to Switzerland several consignments of a product based on potato starch. Subsequently the HZA granted the company an export refund, on the basis of the application submitted by the exporter and the Swiss customs clearance certificates. However, subsequent investigation carried out by the German customs authority revealed that, immediately after their release for home use in Switzerland, the exported consignments were transported back and released to Germany for home use in that Member State on payment of the relevant import duties. The judicial reasoning of this case has been overwhelmingly considered as the first attempt to mould the anti-abuse principle's structure. Up to that point the question of its existence arose in regards to the area of agricolture[180], but resulting into a blurred and uncertain definition. Indeed it has been noted[181] a diversified and incoherent terminology used to describe abusive practices until the final stabilisation of the concept in *Emsland*'s ruling. However, compared to the following case-law, in such case, it is noteworthy that the Ecj does not refer to the "abuse of law" but to the "abuse of right". This issue has been rather neglected as though right and law could be used as synonims, nevertheless the use of the term "right" might imply the existence of a right whose exercise is not consistent with its purpose whereas the notion law is referred to those cases in which there the party does not exercise a right but avoid the application of the rules. By contrast, the distinction suggested by scholarship aims at differing the formulation given in case of

road to an abuse test in VAT started with cases such as *RAL* and *Gemeente Leusden and Holin Group* and found its culmination in *Halifax*, *Part Service* and *Ampliscientifica and Amplifin.*"
See: Francesco Tesauro in *Legal Remedies in European Tax Law* "The *Emsland-Stärke* (on customs duties) decision can be regarded as the starting point of this anti-abuse principle, as advantages may not be claimed when resulting from operations undertaken for the sole purpose of obtaining such advantage".
R. de la Feria, 'Prohibition of abuse of (Community) law: the creation of a new general principle of EC law through tax.', *Common market law review*., 45 (2), 2008, pp. 395-441; M. Seiler, *GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU,* p.259**.**

[180] Cremer 125/76, C-8/92 General Milk

[181] See: R. de la Feria, 'Prohibition of abuse of (Community) law: the creation of a new general principle of EC law through tax.', *Common market law review*., 45 (2), 2008, pp. 395-441 "For many years the Court used words such as "avoidance","evasion","circumvention", "fraud"and "abuse" in an apparently interchangeable fashion.Moreover, two of those words were sometimes used in the same sentence, separated solely by the conjunction "or", and thus implicitly indicating that the Court considered these terms to be synonymous. This terminological confusion was also refl ected in the literature, with a prime example being the reference by some commentators to the "circumvention principle", others to the "Van Binsbergen principle", and yet others to the "evasion principle", instead of the principle of abuse or abusive practices. Only in the late 1990s, and in particular since the judgment in Emsland-Stärke, has the Court consistently referred to "abuse" within its rulings."

issues of abuse at EU level from those at national level. Still, there remains considerable controversy about how determine abusive pratices. Scholars have failed to agree upon a single concept, mainly because it is a complex notion involving different artificial constructions.

However, even if the genetic lines of the abuse can be traced back earlier, most notably Emsland case reveals to be particularly striking and clearly anticipates modern arguments to stymie the abuse of law.

The instrument which allowed the Commission to develop and fine-tune the abuse of law is the existence of a general legal principle of abuse of rights in almost all the Member States. There is another supportive argument, which has been crucial in demonstrating its existence. Despite its not being applicable at the time, the legal base in the European legal order was extrapolated by the Article 4(3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312 p. 1), according to which '[a]cts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal". As noted above, this ECJ's judgement presents an evolutionary construction concerning the requirements of the abuse of law.

As a result, an articulated test has been theorised to gauge the extent of abuse of law. Firstly, the Court establish the criteria[182] required for a finding of an abusive practice,

[182] See case *Emsland-Stärke GmbH*, p.43: **"**The Commission contends that the concept of an abuse of rights comprises three elements:
- an objective element, that is to say, evidence that the conditions for the grant of a benefit were created artificially, that is to say, that a commercial operation was not carried out for an economic purpose but solely to obtain from the Community budget the financial aid which accompanies that operation. This requires analysis, on a case-by-case basis, both of the meaning and the purpose of the Community rules at issue and of the conduct of a prudent trader who manages his affairs in accordance with the applicable rules of law and with current commercial and economic practices in the sector in question.
- a subjective element, namely the fact that the commercial operation was carried out essentially to obtain a financial advantage incompatible with the objective of the Community rules.

described as a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.

The notion of abuse of law, whose elaborating started in 1998, has progressed from an inkling of a possibly response for ambivalent transactions to a pervasive principle of the European Tax law.

A further second example of the court considering the abuse of law within the customs is the case *Cimmino*[183], regarding the allocation of tariff quotas between traditional operators and newcomers alongside the system of import licences. More precisely, some agricultural products may be imported in total or partial exemption from duties. The general rules for the management of these tariff quotas, subject to a system of licences, are provided by Reg. CE 1301 of 31.8.2006. In order to clarify the legal framework, the allocation of tariff and import of traditional ACP bananas is managed in accordance with a system based on measuring traditional trade flows ("traditionals/newcomers"). Thus both traditional and newcomer operators are entitled, at different rates, to rights arising under import licences but the transfer of rights from newcomers to traditional operators is not permitted. The artificial construction that has been utilised was the following: firstly, a traditional importer used to sell bananas which were outside EU customs territory to a newcomer company. Secondly, the bananas were sold to the newcomers, which held the import licences necessary to obtain the preferential rate of duty. Third, the newcomers imported the bananas into the EU and subsequently, once they had cleared customs, sold them on to the newcomer

- a procedural law element relating to the burden of proof. That burden falls on the relevant national administration. However, in the case of the most serious abuses, even *prima facie* evidence which might reverse the burden of proof is admissible."

[183] C-607/13 - *Cimmino and Others*

(from which they have received) which finally sold the bananas to the first traditional importer.

It is important to consider one issue in detail. Cases such as *Christodoulou*[184] and *Cimmino*[185] display a number of obscurities or perhaps points to one of the deepest divergences between abuse of law within customs law and other sectors of taxation. Despite the restoring of status quo ante as a natural and following measure provided by the settled case-law, here the ECJ has dedicated its attention to the issue of the penalties applicable. Here we see that the field of penalties, which had reimained beyond the purview of abuse of law, is taken up by the Court. As a result, in both cases, a new position emerges, producing profound changes in the practical aspects of repressing the abuse of law. On the one hand, the Court establishes that "the obligation to give back an advantage improperly received by means of an irregular practice does not constitute a penalty, but is simply the consequence of a finding that the conditions required to obtain the advantage derived from the European Union rules were created artificially, thereby rendering the advantage received a payment that was not due and thus justifying the obligation to repay it"[186]. On the other hand, contrary to the traditional approach, the reaction to the cases in question manifestly admitted the application of appropriate administrative, civil or criminal penalties provided for by national law to apply to an importer who has artificially created conditions required to obtain the advantage derived from the EU rules.

The situation is crucially different in the context of Vat where legal certainty seems to be presupposed as the cornerstone of sanctioning system. Evidently, a case by case approach demonstrates that the abuse of law is a dangerously broad and slippery concept. For its being impossible to monitor, the provision of penalties clashes with the driving principle of legality imposing that countours of an infraction needs to be precise to apply the penalty. The crux of the matter has already been touched upon in

[184] C-116/12 *Ioannis Christodoulou vs Elliniko Dimosio*
[185] C-607/13 - *Cimmino and Others*
[186] see, to that effect, *Emsland-Stärke*, paragraph 56, and *Pometon*, paragraph 32.

Halifax where the Court clearly stated that "a finding of abusive practice must not lead to a penalty, for which a clear and unambiguous legal basis would be necessary, but rather to an obligation to repay, simply as a consequence of that finding, which rendered undue all of part of the deductions of input VAT".

What happened next in this confrontation of effective sanctions versus the use of the principle of legality as a basis for avoiding penalties? For many years the tax policy debate has centered on the question of whether penalties are applicable in case of abuse of law.

Generally, in Italy, the major argument instisted on the assumption that the abusive character of the conduct can not give rise to criminal liability because the definition of of the penalty must be unflinchingly defined and prescribed by a legal provision under the principle of legality (pursuant to art. 25, paragraph 2, of the Constitution). The debate on the deterrent or punitive nature of administrative tax sanctions will be explored due chapter but we might anticipate the extent of the impact of ECHR principles on administrative sanctioning system. Moreover, the principle of legality also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. From these principles it follows that an offence must be clearly defined in law.

In recent years, the issue of administrative sanctions has been subjected to a profound critical revision: above all because of the growing influence exerted by some reconstructions emerged in the jurisprudence of the European Court of Human Rights and gradually accepted in our and others European legal systems. The starting point of this evolutionary process was the recognition, by the judges of Strasbourg, of the essentially "criminal" nature, according to the articles. 6 and 7 of the ECHR, of many sanctions that traditionally were qualified as administrative.

The Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, runs

counter to the theory of non punishment, in case of abusive practices. Recital 11[187] to the mentioned Directive states that Member States should not be prevented from applying penalties where the GAAR is applicable.

Recently the Court has incidentally addressed a case concerning the abuse of the law[188] which raises doubts to the extent of customs debt liability in the abuse of the law. The question referred to the court for a preliminary ruling concerns the customs debt liability and its broad scope, as laid down by the Customs Code. To simplify, it was a matter of verifying whether a person who had not communicated the data necessary for drafting the declaration should be qualified as a customs debtor under 201. Logically, the answer should be negative, since one can argue that the person who has not communicated the data for drafting the declaration can not be included in the category of those who "provided data necessary for drafting the declaration, and who were or should have reasonably been aware of their incorrectness ". The court has provided an interpretation of customs debtor, under Article 201(3) of Regulation No 2913/92, that must be interpreted as covering "the natural person who has been closely and knowingly involved in the design and artificial construction of a structure of commercial transactions, which had the effect of reducing the amount of the import duties legally owed, although that natural person has not himself communicated the false information which had served as the basis for drawing up the customs declaration, where it appears from the facts that that person had or ought reasonably to have known that the transactions concerned by that structure had been carried out not in the ordinary course of trade, but solely for the purpose of improperly benefiting from the advantages provided for by Union law". In that regard it is irrelevant that the person communicated

[187] See: "General anti-abuse rules (GAARs) feature in tax systems to tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions. GAARs have therefore a function aimed to fill in gaps, which should not affect the applicability of specific anti-abuse rules. Within the Union, GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have the right to choose the most tax efficient structure for its commercial affairs. It is furthermore important to ensure that the GAARs apply in domestic situations, within the Union and vis-à-vis third countries in a uniform manner, so that their scope and results of application in domestic and cross-border situations do not differ. Member States should not be prevented from applying penalties where the GAAR is applicable. When evaluating whether an arrangement should be regarded as non-genuine, it could be possible for Member States to consider all valid economic reasons, including financial activities."

[188] C-522/16 *A contro Staatssecretaris van Financiën*

the data necessary for drafting the declaration since it is sufficient to be "closely and knowingly involved in the design and artificial construction of a structure of commercial transactions". This broad interpretation of customs liability raises serious doubts about certain limits on the extension of customs debt liability.

6. Concluding remarks. The customs debt liability: An atypical tax model among European tax and sanctions principles

The inquiry up until now has shown the point reached in the development of European customs liability. The ECJ has handed down landmark rulings which are fundamental for understanding the rationale underlying the structure and the application of customs legislation. As seen, customs debts may be incurred not only on importation in the regular way but also due to the breach of certain rules of customs legislation.[189] As concerns the identity of the customs debtors, in customs law there seems to be a less strict relationship, if any, between the taxpayer/customs debtor and the chargeable event than in a traditional tax setting. In essence, the structure of customs debt liability has evolved over the years to include forms of alternative or secondary liability to ensure the collection of customs duties. The best explanation for this is the priority attached to the importance of financial interests protection. This is likely to be reflected in the fact that the customs iural relationship is a wide-ranging category which embraces different types of customs liabilities in terms of objective and subjective requirements related to the specific breach.

In broad terms, these "customs liabilities" have two distinctive features. Firstly, they might vary according to objective and subjective criteria required. These elements can be extrapolated from the provisions on customs liability while keeping in mind one argument – that they have been made an autonomous concept by the ECJ. The correlation between the the rationale for the existence of several liabilities and the

[189] T. Lyons, *EC Customs Law*, Oxford, 2008, p. 438

protection of financial interests is succinctly expressed by the Court in the following passage: "the European Union legislation on customs liabilities are designed to give a broad definition of the persons capable of being regarded as debtors of the customs debt". Indeed, in certain circumstances (such as *Fazenda*[190] and *Viluckas*[191]), customs debt liability appears to be substantially justified on the basis of the mere participation in certain economic activities. By making the driver or the importer bear the costs (the customs debts) of others' misconducts, the European legislator price certain economic activities. However, in *Viluckas*[192], the drivers were made customs debtors for the infringement committed by another person, with whom they had no direct relationship or dealings. In other words, forms of both strict liability and third-party (or vicarious) liability are encountered, recognised to be effective means to guarantee the payment of customs debt. The stringency of the expected duty renders the customs liability substantially strict, such as in *Harry Winston*[193]. In other cases, the economic operator, regardless of his culpability, is framed as the main responsible person for misconduct known to be perpetrated by another.

Frequently, the person who has not engaged in culpable misconduct, is the only possible way for the European system to ensure the collection of its own financial sources. However, this approach risks an indeterminate and undefined liability. Besides, the structure of the customs debt liability, taken to an extreme, might capture such a large range of unexpected customs debtors and result in general uncertainty. The second feature of the imposition of the customs debt is not always the result of a substantive entrance of goods in the European economic network. It is argued here that this might be of a punitive nature when the customs debt is unconditionally imposed in case of removal from customs supervision, irrespective of the actual entrance of the goods.

[190] C-97/95 *Pascoal & Filhos Ld. a v Fazenda Pública*
[191] C-238/02 and C-246/02 *Viluckas & Jonusas*
[192] C-238/02 and C-246/02 *Viluckas & Jonusas*
[193] C-273/12, *Harry Winston*

Concerns around these issues arise around the limits of customs debt liability. Most importantly, this latter has been interpreted widely on the grounds of the task assigned to its structure. If this wide category determines the extent of customs liability, limits are necessary in order not to extend it beyond what is necessary. It is difficult to gauge how widely Article 79 of UCC can be interpreted on the basis of proportionality, which is the only principle able to counterbalance the tendency to enlarge the scope of tax liabilities. Customs liability, in case of removal from customs supervision, can hardly be based on fiscal explanations since customs duties might serve a punitive function. Furthermore, it might arise not only when the person participates in or contributes to the breach of a customs rule. Still, the customs debt liability can be imposed on the economic operator, for the conduct of another one, by virtue of an implicit power/duty to prevent the violation, no matter how unforeseeable that breach was (*Harry Winston*[194]) or how remote was the relationship between the acts in the chain of events (*Jestel*[195]). Because of this, anyone can be involved, according to the interpretation of the ECJ, no matter how remotely their position is connected to a specific breach of customs committed by another person.

[194] C-273/12, *Harry Winston*
[195] Case C-454/10, *Oliver Jestel vs Hauptzollamt Aachen*

Chapter III

The development of the enforcement of Union customs law

7. The legal concept of a customs union: constructing the enforcement of Union customs law between the international and European dimensions

As seen in the first chapter, the path towards the creation of a customs union has been a slow and lengthy process. As suggested by the scholarship,[196] in building such a leviathan as this the founding members had to strike a delicate balance between the loss of national sovereignty and the capacity of the Union to produce a more competitive Europe abroad. In creating a customs union with a common external tariff, the four freedoms of the Treaty of Rome were the irreducible elements of the EU programme. Doubtless, the European provisions dedicated to the free movement of goods form the basis of the EU's customs union. Pursuant to Article 28(1) TFEU, the EU constitutes a customs union comprising all trade in goods. Based on this, legal scholars[197] theorize two dimensions of the customs union, an external and an internal one. The external one is represented by the establishment of uniform common rules which apply to goods originating from third countries: a common customs tariff (Article 31 TFEU) and the common commercial policy in trade with third countries (Article 207 TFEU). The internal dimension is reflected in the abolition of internal barriers to trade in goods between Member States through a set of fiscal and non-fiscal rules: a) the prohibition of customs duties and charges of equivalent effect (CEEs) (Article 30 TFEU); b) the prohibition of quantitative restrictions and measures of equivalent effect or MEEs (Articles 34 to 36 TFEU); and c) the prohibition of internal discriminatory taxation (Article 110). These dimensions are connected. Very simply, the European Customs Union has several contemporaneous objectives and components which are indissolubly linked with each other. The internal free movement of goods is

[196] See: T.C. Fischer, *The US, the European Union and the globalization of the World Trade*, London, 2000, P.103.
[197] European Union Law, p. 341.

linked to the adoption of a common customs tariff as part of a customs union. In turn, the common customs tariff is connected to the development of a common commercial policy.

As suggested by scholars,[198] the European project was not only intended to reorganise Member States' relationships but since its birth has also had an international dimension. This international component took the form of a customs union for the integration of the market into the world trading system. Against this background, two important questions have been posed by legal scholars:[199] firstly, how far has the European integration, in terms of customs law, reached its outer limits; secondly, whether the EU is having an uniform and equivalent influence on world trade as a compact trading bloc or as individual countries acting as scattered pieces of an European trade puzzle.

At this stage, quite surprisingly, there is indeed a customs union at the core of the EU but uniquely it has a great deal of internal legislation and an external tariff in those fields historically considered to be sensitive to harmonizing actions. The current status of customs legislation and its modes of policy has resulted in a double approach and in a tension between two models of integration: harmonization on the one hand, and approximation on the other. The first is a fully uniform system which is crucial to ensure that customs duties are imposed and collected on the basis of harmonized rules, necessarily regulatory in nature, within the framework of a customs union upon which the trade policy is based. The second approach is an enforcement system based on minimum standards of approximation reflected in the principles of proportionality, effectiveness, and dissuasivity with specific regard to customs infractions and penalties, thus with a preserved competence of the Member States to adopt sanctioning measures. This exposes an interesting reality: a lack of homogeneity within the legal systems of the Member States. Notwithstanding the formal integration of principles governing the penalties, not only might this double policy result in possible

[198] Jurgen Bast, Armin von bogdandy: *Principles of European Constitutional law*, Oxford, 2010, p. 316

[199] See: T.C. Fischer, *The U.S., the European Union and the globalization of the World Trade*, London, 2000, p.102.

deficiencies in terms of effectiveness and effects but it would likely impact the Internal Market's functioning in terms of distortions. The result is undoubtedly a legal patchwork in which European principles are ascertained on the grounds of different legal traditions,[200] and thus are subject to manipulative interpretations.

Europe appears to be on the verge of futher integration even if, given the diversity of certain topics and the number of states involved, it is a development that will require a delicate balancing act. In this, the European Commission has proven itself to be fully engaged in undertaking the harmonization of European customs law enforcement. In fact, in 2013, the Commission presented a proposal[201] or a Directive laying down a Union-wide legal framework on customs infringements and sanctions, which is currently being examined by the Council and the European Parliament.

The EU is correct in attempting to have a uniform approach so that the sanctions are the same in whichever country the infringement occurs. In this regard, sanctions are meant to deter so one issue to consider is how a uniform set of sanctions will impact businesses from the countries with smaller economies as against those from larger economies. Another issue is that what may be considered fair in one domestic economy may not be so in another. Fundamental in developing a uniform system of customs infractions and penalties is a common and accepted theory of equity, fairness and justice which can be reconciled with the rational principles of economic theory which results in a more balanced structure. The impact of large financial sanctions might be excessive on the economies of less rich countries in terms of business and employment. This suggests that a cautious approach should be taken to customs infringements and sanctions. In fact, a number of factors must be considered, such as the value of the

[200] J.H. Hans, R. de Lange, S. Prechal and R. J. G. M Widdershowen, *Europeanisation of public law*, p. 165: With regard to the principle of legitimate expectation, the authors suggests that "There is no common tradition in relation to this principle. Moreover, the differences explain the fact that the protection provided by the Court on the basis of the principle is less extensive than, for example, in German and Dutch administrative law. Finally, the differences also have implications for the application of the principle in the Member States. While the discussion in, for example England has above all centred on the extent to which the national courts should apply the European principle, the debates in Germany and the Netherlands by contrast concern the limiting effect of Community law on the national principle of legitimate expectations."

[201] Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, n. 2013/0432.

transaction, severity of the infringement, first time offender, repeat offender, the impact of applying the sanctions. The creation of a uniform system of sanctions must take all of those forces, even when they are antagonistic, into consideration in order to give the appearance of fairness. In addition, the key legal bases relevant to customs penalties can be seen to fall into three groups: domestic, European and international.

The international dimension is of vital importance to the sector as a whole. In this respect, it is noteworthy to consider that European customs law is oriented towards pursuing objectives at the international level, in combination with instruments produced by multilateral institutions, to form a substantial framework to address customs matters. Various types of international arrangements address customs matters, whether they are bilateral[202] or multilateral,[203] or performed exclusively or partially. The proliferation of international agreements is an indicator that customs law has had a far reaching impact in terms of uniform rules. The most important is the General Agreement on Tariffs and Trade 1994 ('GATT 1994'). There are also a number of international customs agreements dealing with specific customs matters, such as mutual administrative assistance and exchange of information. International agreements dealing with customs matters with respect to customs cooperation can be divided into bilateral and multilateral ones. Most international customs agreements are drafted based on provisions of the WCO Model. Customs literature regards the creation of the WCO as the first example of a customs cooperation[204] formally recognized at an international level. Surprisingly, the first attempt[205] to define and formulate a common conception of customs offences can be found in the Recommendation of the Council on Mutual Administrative Assistance, adopted on 5 December 1953. For the first time,

[202] See, for instance, the bilateral agreements concluded by Italy with third countries, in the field of mutual administrative assistance and customs cooperation: https://www.adm.gov.it/portale/accordi-di-mutua-assistenza-amministrativa-e-cooperazione-in-materia-doganale-firmati-con-i-paesi-terzi

[203] See for instance: Nairobi Convention, June 2002; International Convention on Mutual Administrative Assistance in Customs matters (Johannesburg Convention) – (Adopted in June 2003 but not yet in force)

[204] H. Wu, "Customs Cooperation in the WTO: From Uruguay to Doha", *Journal of World Trade*, Vol. 51, Issue 5 (October 2017), pp. 843-858, 51 J. World Trade 843 (2017)

[205] A. Perfetti, "Cooperazione Doganale" in (ed. by Stelio Mangiameli), *L'ordinamento Europeo. Le Politiche dell'Unione*, pag. 99.

an international agreement had illustrated the most common breaches of customs rules that could be commonly identifiable as customs offences. While it was clarified that the aim was not to provide a precise definition of offences against customs laws, the Council stated that, for the application of the Recommendation, the following might be regarded as such, inter alia, insofar as they concern customs administrations: (a) smuggling and other evasions of duties and taxes charged on importation or exportation; (b) evasion of prohibitions and restrictions imposed for the purpose of ensuring more effective customs control (for example, limitation of importation of certain substances to prescribed places); (c) evasion of import or export licensing; (d) breaches of exchange control legislation or regulations (only insofar as the goods themselves are concerned).

For this reason, the theory of customs infractions and penalties should necessarily be developed along two dimensions, the European and the international one.[206] This chapter aims to develop a systematic and coherent perspective on the systems of penalties which will serve as a theoretical framework for a theory of customs rules' enforcement.

8. Some juridical issues affecting the design of customs offences and penalties: synthesising various theoretical bases for an European theory of customs infringements and penalties

In the reform debate, the aspiration to harmonize customs infringements and penalties blends with the multi-dimensionality of this theme, which points the identification of tensions and frictions between the international legal context and the constitutional limitations of European action. The development of a coherent customs infringements and penalties system should not be conceptualised from scratch but be drawn from the

[206]For a study on the definition of customs offenses in international at the common, regional and bilateral levell, see: Sergey Ovchinnikov, "Definition of Customs Offences in International Law", *in Mediterranean Journal of Social Science*, Volume 6 No 3 S6 June 2015.

rich material found in the European and international legal order. Therefore, it is and will be of utmost importance to focus on the distinctive customs policies of national, international[207] and supranational organs, within which the different functions of customs law re-emerge separately.

The realisation of a "customs infractions and sanctions union" raises several multi-level juridical issues in which it is possible to identify single aspects inherent in or ancillary to the customs legislation but which are all equally destined to orient its pattern, following a progressive scheme:

1) The first one is about the assumption of primary responsibility for the supranational external relations by the EU as a single market and as a contracting party with specific regard to the GATT 94.[208] This requires an overview of the allocation of competence between the EU and its Member States in the field of commercial and tax policy. The question of whether or not there is an external obligation binding the EU as a single market to adopt common customs infringements and penalties still remains controversial.

2) Secondly, the question of division of power between the EU and the Member States in the sphere of customs enforcement is even more thorny if we address the competence of the EU in terms of infractions and sanctioning measures.

3) Thirdly, within the ebb and flow of continuous criteria emerging from international and European legal sources and case-law, the common pattern of customs infractions and sanctions must be consistent with the Union's fundamental rights, whose core may be drawn not only from the binding catalogue of fundamental rights[209] contained in the European Convention on

[207]S. Ibáñez Marsilla**,** "La codificación del Derecho aduanero en la Unión Europea y sus relaciones con el Derecho aduanero internacional" en Memorias del IV Encuentro de Magistrados de la Comunidad Andina y del Mercosur, Ministerio de Justicia, Derechos Humanos y Cultos, Quito, Ecuador, 2012p. 95-113; T. Benito Fernandez, *Fuentes Y Practicas Del Derecho Aduanero Internacional,* 2014.

[208] Dominik Lasok, *The Trade and Customs Law of the European Union*, 1997.

[209] See for speculation on human rights and customs law: Timothy Lyons, *A Customs Union without Harmonized Sanctions: Time for Change?,* Global trade and Customs Journal, Volume 10, Issue 4

Human Rights and the Charter of Fundamental Rights but also from the rich case-law of the ECHR and in the light of the the interpretation of the Court of the principles emerging from the European legal order.

4) Fourthly, the challenge will be to develop a customs infringements and penalties paradigm, taking into account two fundamental characteristics of customs penalties: their potential punitive nature, and their role in protecting financial interests. The objective is to embrace a system able to cope effectively with the defense of financial interests but without ignoring the fiscal nature of customs duties and the criminal charge that customs penalties might have.

These juridical issues will affect the shape of customs offences and penalties, being the stimulus and the base-line on which a theory could be built. Doubtless, while various theoretical bases have been suggested for a coherent theory of customs offences, it is up to the EU to balance all these competing forces if it is to expand towards a complete harmonization.

This multi-tier constellation of forces seems to predict the difficulties in establishing a customs sanctioning system which must be made to fit within the structural framework of different legal sources. In view of such multiple legal commitments, it can be presumed that they may enter into conflict. The "management" of these colliding legal objectives should be the concern of the systematization of customs infringements and penalties. However, since European customs law has been developing against this heterogeneous background, in providing answers to these questions we should approach a potential theory of customs infringements and penalties by recognizing that customs law operates in a context that comprises a multitude of public interests deriving from sectional institutions and antagonistic private interests. In fact, the EU operates within the international trading order through its capacity to enter into international agreements, pursuant to Articles 216 and 207 of the TFEU. As a result, the treaties fit in between primary and secondary law. This is, in principle, broadly acknowledged. In fact, the external action of the EU is not borderless since the Union's

conclusion of an agreement with one or more third countries or international organisations depends on whether the Treaties provide for it or whether the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act, or is likely to affect common rules or alter their scope. On the other hand, an international treaty concluded under Article 216 is automatically binding upon the EU. The impact of international agreements upon European customs and tax is at times explicit. According to academics, the ECHR primarily compensates for the deficiency in the domestic protection of human rights, operating as the international supplementary constitution of the EU.[210] Being described as the "agreed heart of a common European constitutional order", its capacity has been shaping tax law principles, with specific regard to the protection of taxpayers' rights. With regard to the law of the WTO, some authors[211] have militated in favour of its constitutional quality while others disapprove. Whether or not the EU incorporates the legal norms laid down within multilateral international treaties as a consitutional basis, it is plain that the growing internationalization of trade affairs and the rapid growth of international organizations have led to extensive adjustment in order to implement the changing requirements. In consequence, within the European context, many reforms have been implemented. If we accept this, it will become increasingly evident that only by pinpointing and amalgamating these varied interests and perspectives can an adequate theory of customs penalties be satisfactorily formulated.

[210] Jurgen Bast, Armin von bogdandy: *Principles of European Constitutional law*, Oxford, 2010 p.133

[211] Jurgen Bast, Armin von bogdandy: *Principles of European Constitutional law*, p.133 on this dispute between: E. Petersmann, "Human Rights, Constututionalism and the World Trade Organization" (2006), 19 *Leiden Journal of International law* 633; J.P Trachtman, "The constitution of the Wto" (2006) 17 in *European Journal of International law* 623. On the other see: M. Nettesheim, "Von der Verhandlungsdiplomatie zur internationalen Verfassungsordnung in "In einem vereinten Europa dem Frieden der Welt zu dienen." (2001); Mr. Krajewski, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelorganisation*, 2001.

9. The international legal dimension. Compliance with the GATT-WTO's international obligations in the context of customs penalties

The reasons mentioned above are a crystalline confirmation that European customs law is anchored in international legal sources, and thus it would be misleading to conceive customs law as wholly premised upon the European legal framework. Objectives and themes of customs law transcend their character as instruments for European strategies. Rather, its progress is mainly dominated by the identification of strategic goals by international law-making. For this reason, analysis about whether a concept of customs union is provided at the international level and whether external obligations bind the EU to adopt common customs infringements and sanctions requires a partial detachment from the European perspective and the taking on board of the power-shaping forces of of an international institutional nature.

According to the literature,[212] in which there has been research on "metamorphosing the GATT", only after World War II did trade start to become predominantly matter of international concern. At the time there was no centralized authority entrusted with developing an international trade policy. In order to close this loophole, the Bretton Woods/GATT conference was convened to provide a mechanism through which rules could be enforce, known as the International Trade Organization. However, the initial project was killed off by the hostility of the US Congress. Instead, the General Agreement on Tariffs and Trade was negotiated in 1947 and first entered into force in 1948. Over the years, it was modified and amended through sessions called "rounds", with the first major overhaul the result of the 1986-94 Uruguay Round of trade negotiations. The completion of the Uruguay Round, apart giving birth to a new area in world trade,[213] confirmed the status of the EU as a customs union. At the outset, the

[212] See: T.C. Fischer, *The U.S., the European Union and the globalization of the World Trade*, London, 2000, p.201. See also: J. Brsakoska Bazerkoska, "The European Union And The World Trade Organization: Problems And Challenges", *Croatian Yearbook of European law & Policy,* Vol.7 No.7 Studeni 2011.; E. Emiliou and D. O Keefe*, The European Union and World trade law after the Gatt Uruguay round,* Chichester, 1996.

[213] See: T.C. Fischer, *The U.S., the European Union and the globalization of the World Trade*, London, 2000,

European Communities were not a contracting party to GATT 1947 while the EC Member States were. The acquisition of the status of a contracting party has gone through different steps. Legal scholarship[214] claims that it is possible to talk of the EU as a single unit in world trade from the establishment of a commom customs tariff, which was adopted at the end of the original transitional period (1 January 1970). Prior to that date, the founding Member States agreed to apply a common tariff before the deadline, as from 1 July 1968.[215] Formally, the EU became a single contracting party[216] and original member of the WTO in 1994 after the European Member States gave it the so-called intergovernmental competence[217] to deal directly with trading partners to pursue a common foreign policy under Pillar II of the Treaty of Maastricht. However, in the judgment in *International Fruit Company v Produktschap Voor Groenten En Fruit*,[218] the ECJ made clear the relationship between the EU and the GATT. In particular, the Court established that, following the entry into force of the EEC Treaty and the adoption of the common external tariff, the Community, acting through its own institutions, has appeared as a partner in the tariff negotiations and as a party to agreements of all types concluded within the framework of the General Agreement, according Article 114 of the EEC Treaty which provides that the tariff and trade agreements "shall be concluded ... on behalf of the Community". According to the Court, the EU is directly bound by the obligations of GATT since under the EEC Treaty the Community has assumed the powers[219] previously exercised by Member States in

[214] E. Emiliou and D. O Keefe*, The European Union and World trade law after the Gatt Uruguay round,* Chichester, 1996, p.113.

[215] The results of "Kennedy Round", which took place between 1964 and 1967, contained in the Geneva Protocol of 30 June 1967, were ratified by a decision of the Council of 27 November 1967 (Official Journal, English Special Edition, Second Series, I. External Relations (2), p. 228). The success of those negotiations made it possible to introduce the Common Customs Tariff on 1 July 1968, that is to say earlier than was planned.

[216] J. Brsakoska Bazerkoska, "The European Union And The World Trade Organization: Problems And Challenges", *Croatian Yearbook of European law & Policy*, Vol.7 No.7 Studeni 2011.: "The European Community was not a contracting party to GATT 1947. Only the EC Member States were. However, over the years, the EC acquired the status of a contracting party for all purposes. All trade agreements and protocols negotiated in the GATT framework provided in their final provisions that the agreements were open for acceptance by the 'contracting parties to the GATT and by the EEC (or EC)'. Since 1970, most agreements negotiated in the GATT framework have been accepted only by the EC, ie without separate acceptance by the EC Member States."

[217]See: T.C. Fischer, *The U.S., the European Union and the globalization of the World Trade*, London, 2000, P.231

[218] C 21 24 1972, then confirmed by the judgement in *Italian Finance Administration v SPI and SAMI, C-267-269/81*

[219] C. Ryngaert, I. F Dekker, R. A Wessel, J. Wouters, *Judicial Decisions on the Law of International Organizations,* Oxford, 2016.

the area governed by the General Agreement. Consequently, according to the Court, the "membership came as a continuation of the practice of the EC's de facto membership in the GATT". Having clarified that the Member States have transferred their powers in the area covered by GATT to the EU, it is now appropriate to evaluate the status of the EU's compliance with external obligations under the WTO. The question is whether, technically, the concept of a customs union implies, as a natural juridical consequence, the establishment of a harmonized customs infractions and sanctions regime. In terms of positive law, the decisive criteria to refer to the categorisations known as "customs union" and "free trade" are described as follows under the GATT:[220]

> For the purposes of this Agreement:
>
> a. A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that i. duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and, ii. subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;
>
> b. A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

In the literature that deals with customs studies there is an insistence on the diversity of the concept of a customs union, and it is asserted that the underlying concept governing the European customs union is deeply different because it constitutes an element of a wider process of European integration.[221] In fact, with regard to the elimination of duties, the customs union is based on an absolute prohibition of duties and charges having equivalent effect, applicable not only to goods originating in the customs territory but to all goods in free circulation. Instead, the elimination of quantitative restrictions has been eliminated by the free movement of goods. In

[220] K. Chase, "Multilateralism compromised: the mysterious origins of Gatt", 2006 51 World Trade Review.

[221] According to T. Lyons, *EC Customs Law*, Oxford, 2008: "It is, nevertheless, the case that the community's customs union requires a greater degree of integration between its members than the notion of a customs union necessarily implies. There is no doubt because the customs union is itself part of a broader process of European integration".

addition, an external tariff has been adopted so there are no doubts about the substantial application of the same duties.

It is noteworthy that debates on the meaning of "customs union" have been lively, namely on what to make of the wording: "restrictive regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories of the union".

The most remarkable decision from a strictly legal point of view, since it was sparked by a challenge[222] to the EU's system of customs administration "as a whole", was the case brought by the US known as *European Communities – Selected Customs Matters, 36*. The Appelate Body's judgment was as significant as it was controversial. In January 2005, the US complained that the rules concerning the European Communities' system of customs administration, under the Community Customs Code, its Implementing Regulation, and the Common Customs Tariff rules, violated the GATT. The US appealed the panel's first finding but the decision was upheld by the WTO Appellate Body (AB).

More specifically, the US lamented that the "design and structure" of the European Communities' system of customs administration necessarily resulted in a violation of Article X:3(a) of the GATT 1994. This states that:

> Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article. The laws, regulations, decisions and rulings which are in question are those of general application made effective by a contracting party pertaining to customs classification and valuation and: rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

The AB concluded that the penalty laws of Member States could be reviewed under Article X.3(a) GATT 1994 and, thus, theoretically, the claim could be legitimately raised. Despite this, the jury held that the government had not adduced evidence to

[222] See: D. Rovetta, M. Lux, "The US Challenge to the EC Customs Union", *GTCJ* 2007, Vol. No. 5, pp. 195–207; D. Rovetta, M. Lux, D. "Das WTO-Streitbelegungsverfahren zwischen den USA und der EG über die Verwaltung und Rechtsprechung in der EG-Zollunion", ZfZ 2007, pp. 225–238; Niestedt, M./Stein, R. M. Ist das europäische Zollrecht WTO-widrig?, *AW-Prax* 2006, pp. 516–518; K. Przybilla, "The 'WTOisation' of the customs administration: Uniformity of the adminsitration of law according to Article X:3 (a) GATT 1994 and its implications for EU customs law", Deutsches Forschungsinstitut für öffentliche Verwaltung Speyer, FÖV Discussion Papers 58, Speyer, 2010.FÖV 58, 2010, p. 17.

demonstrate the existence of non-uniformity arising as a result of the European choice. The AB noted that the US offered no evidence about the degree of difference between penalty laws and audit procedures created by the various Member States of the EC. Conclusively and significantly, the AB has declared itself unable to complete the analysis with respect to the US's claim that the European Communities' system of customs administration as a whole or overall was not administered in a uniform manner, as required by Article X:3(a) of the GATT 1994.

The next stimulant to the customs penalties might stem from the adoption of the Trade Facilitation Agreement (TFA) entered into on 22 February 2017. Since it applies only to the WTO members that have accepted it, again there is the issue of Member States or EU competence on the acceptance. When looking at the members that have accepted it, we logically find that the EU is classed as a member and not the Member States. In particular, Article 6.3[223] deals with the penalty issues, orienting the sanctioning policy of each WTO member. In this regard, the following legislation seems to be consistent with a common customs penalties' structure since it is provided that:

> Penalty Disciplines 3.1. For the purpose of paragraph 3, the term "penalties" shall mean those imposed by a Member's customs administration for a breach of the Member's customs laws, regulations, or procedural requirements. 3.2 Each Member shall ensure that 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. 3.3 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. 3.4 Each Member shall ensure that it maintains measures to avoid: (a) conflicts of interest in the assessment and collection of penalties and duties; and (b) creating an incentive for the assessment or collection of a penalty that is inconsistent with paragraph 3.3.

[223] Article 6.3. "Penalty Disciplines 3.1 For the purpose of paragraph 3, the term "penalties" shall mean those imposed by a Member's customs administration for a breach of the Member's customs laws, regulations, or procedural requirements. 3.2 Each Member shall ensure that 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. 3.3 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. 3.4 Each Member shall ensure that it maintains measures to avoid: (a) conflicts of interest in the assessment and collection of penalties and duties; and (b) creating an incentive for the assessment or collection of a penalty that is inconsistent with paragraph 3.3. 3.5 Each Member shall ensure that when a penalty is imposed for a breach of customs laws, regulations, or procedural requirements, an explanation in writing is provided to the person(s) upon whom the penalty is imposed specifying 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. 3.6 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. 3.7 The provisions of this paragraph shall apply to the penalties on traffic in transit referred to in paragraph 3.1."

After the judgment given in *European Communities – Selected Customs Matters, 36*, a lively debate[224] emerged on the coherence of a predominately decentralised system of customs infringements and penalties with the creation of a customs union. Furthermore, the judgement shows how the the creation of a customs union as a project of internal integration has never been confined to intra-European relations but has a corollary international dimension since the EU is bound by the WTO's obligations. This makes the international customs policies the starting point of the external and internal actions of European customs law.

10. The European legal dimension. The identification of customs infringements and the construction of sanctions: a sanctioning experimentation for the common punitive tax law

The second level of reflection is more complex because it is aimed at rationalising the current debate about sanctioning measures, with obvious repercussions on the general principles and the structure in the definition of customs infractions. The fundamental issue with the regulation of customs infringements and penalties is how to lay down its foundations, which are necessarily bound to be oriented in the light of the ongoing debate about penalties. To answer this question, we should look more closely at the external variables which might provide necessary guidance.

[224] Timothy Lyons, *A Customs Union without Harmonized Sanctions: Time for Change*?, Global trade and Customs Journal.

The evolution of penalties,[225] especially tax penalties,[226] has been a journey towards Europeanisation. The legislature on penalties has developed significantly since the inception of the EEC. The ECJ and the ECHR have been at the forefront of this evolution, drawing on principles from common and civil law systems and moulding them to the needs of the EU. These developments have of course taken place as a result of a more general discussion on the nature of penalties. Consequently, the principles set out under EU law and the ECHR in the penalties context have become part of national tax penalties' structures. The difficulty in presenting a theory of customs infringements and penalties derives from the multiplicity of inter-related but diverse legal issues. Customs penalties can be described as a rich patchwork where different legal interests intersect. For this reason, it is necessary to weigh up a variety of factors:

1) Common customs sanctions would authentically represent the State's reaction to customs infringements and thus the means of customs law enforcement, what is generally known as a peculiar form of indirect form of enforcement. Thus, the imposition of sanctions for infringements of customs rules implies, as a first consideration, not only a reflection on the measures to be adopted but also the identification of wrongful behaviours (to qualify as infringements, offences, misconducts) which are deemed to have the effect of prejudicing the attainment of a customs union or the EU budget. The use of "wrongful behaviour"

[225]Baron, J., Poelmann, E., "Tax penalties: minor criminal charges", Intertax, International Tax Review; Dec2017, Vol. 45 Issue 12, p816-821; Delphine de Drouas, lsbaelle Sienko, 'The Increasing Importance of the European Convention on Human Rights in the Tax Area', *Intertax*, Issue 10, pp. 332–33; Laurent Partouche, 'The `Right to a Fair Trial': the French Civil Supreme Court Reduces Its Scope of Application to Tax Matters', 33 *Intertax*, Issue 2, pp. 80–85; Mirugia Richardson, 'The EU and ECHR Rights of the Defence Principles in Matters of Taxation, Punitive Tax Surcharges and Prosecution of Tax Offences', 26 *EC Tax Review*, Issue 6, pp. 323–334; Iain Cameron, 'European Court of Human Rights', *European Public Law*, Issue 2, pp. 167–188; Robert Attard, 'The ECtHR's Recent Tax Judgments on the Non Bis in Idem Rule' 26 *EC Tax Review*, Issue 6, pp. 335–338; Philip Baker, 'Should Article 6 ECHR (Civil) Apply to Tax Proceedings?' *Intertax*, Issue 6/7, pp. 205–211; *Le sanzioni tributarie nell'esperienza europea*, Dir. Adriano Di Pietro, en colaboración con José Luis Bosch Cholbi, Giuffre, Milano, 2001.

[226] Dannecker, G./Jansen, O., *Steuerstrafrecht in Europa und den Vereinigten Staaten*, Vienna, 2007; Hecker, B. *Europäisches Strafrecht*, Heidelberg, 4th ed., 2012; Kubiciel, M. Strafrechtswissenschaft und europäische Kriminalpolitik*, ZIS* 12/2010, pp. 742–748. Leitner, R./Toifl, *Steuerstrafrecht International International Tax Criminal Law*, Vienna, 2007; Möller, T., Europäisches Strafrecht und Zollstrafrecht*, ZfZ* 2011, pp. 39–42;

encompasses a broad range of breaches or violations of customs rules. Following this logic, the final element in enforcement is the imposition of sanctions.[227]

2) Second, when enforcing customs law, both Member States and the European legislator must observe fundamental rights. Hypothesizing a potential European theory of customs penalties, this must fall behind the general debates on the development of a cluster of principles, those enshrined in and guaranteed by the European legal order, through a direct application of them within the legislation (very often the result of the application of a national version of the principle).

11. Increasing number of cases of supranational and shared wrongs: the European inroad into domestic sanctioning policies and the grounds for its justification

One might wonder why the European legislator has not intervened in such a fragmented legislation on customs infringements and penalties, accepting this co-existence of different domestic sanctioning systems. This situation prima facie paints an undesirable picture of those remedies meant to stimulate compliance with customs law, a branch of law which is genuinely a European prerogative, in terms of the function assigned to customs duties and of the exclusive competence the EU enjoys. However, these considerations must also be weighed against the concerns of developing uniform customs sanctioning systems. Before focusing on the debate that has arisen on the nature of penalties, it is significant to take a step back to understand what types of behaviours should be punishable and to classify them as infringements. It is generally

[227] J.H. Jans, R. de Lange, S. Prenchal, R.J.G.M. Widdershoven*, The Europeanisation of public law*, 2007, p. 231: "The final element in enforcement is the imposition of a sanction. As already been mentioned on several occasions, this is almost always a matter for the Member States. Only in respect of infringements of the Community competion rules does the Commission have the power to impose fines and penalty payments. Initially, the Community left the Member States a large measure of discretion in the choice of sanctions they could impose for infringements of Community law. In order to ensure a more effective use of sanctions, the Community has, since the mod 1980's, increasingly prescribed more or less specific sanctions which the Member States must impose when Community rules are infringed. In the first place, there are reparatory sanctions designed to restore the situation existing before the infringement of the legal order; for example Community legislation often provides for an action to recover European funds that have been wrongly paid. In the second place, Community legislation increasingly requires the imposition of punitive administrative sanctions. These sanctions go futher than requiring reparation and are designed to punish and deter. The most familiar of this kind of sanction is the administrative fine."

believed that the choice to sanction certain behaviours tends to reflect the beliefs and the attitudes of the people of the State concerned. However, this simplistic interpretation glosses over the way European law has impinged on what for many years has been generally considered an essential feature of statehood. Recent developments in European sanctioning policies have started to erode the idea that these issues remain intact and untouched by European action. In this regard, the cumulative effect of variables and the sources have meaningfully shaped the development of a common sense of shared social disapproval. The gradual acceptance of the European interference within penalties increasingly impacts at a national level because it implies, even at a minimum level, a partial assessment of the stigma attached to the offence. Although sanctioning systems still differ within Member States, they are slowly moving towards European-oriented structures.

The EU impinges on penalties in a number of ways. There are different reconstructions on this issue. Most obviously, penalties might be required by European legislation to be implemented by domestic systems, or penalties might be provided within the enforcement of European law. Furthermore, sanctions can be provided due to shared moves towards the protection of certain values or because it is necessary to sanction the breach of new rules. The scholarship[228] distinguishes several categories of misconducts or offences which have been, to differing extents, directly involved in the process of europeanisation. It is possible to see how European law has remarkably encroached on the domestic penalties system through the scheme proposed by Bernardi. The author mainly refers to criminal offences but this classification can be extended to include those offences that have an administrative or civil nature due to the process of decriminalization which has entered many domestic penalties structures. Bernardi shows the influence of European law at the heart of many offences. What follows below is an attempt to present the European integration from another perspective, in relation to common values that are being protected and promoted. The

[228] A. Bernardi, *L'armonizzazione delle sanzioni in Europa, Linee ricostruttive.*

intervention of the EU in the sanctions sector has proved crucial to the formation of a rich pool of values and has stimulated and encouraged a common sense of disapprobation of certain types of conducts. This classification illustrates how Europe has necessarily influenced the infringements' rules in different policy areas, bringing a certain degree of uniformity of values to be protected.

In fact, this intervention has gone beyond the effects of an European influence on the national enforcement of European rules.[229] The first category includes those offences whose effects and scope are merely domestic. Most broadly, Bernardi refers to those offences that, due to a series of factors such as the type of underlying legal interest (essentially national) or the impact of the relative conduct territorially circumscribed (without any consequent effects out of the national territory), cause and exhaust their social alarm within a single state, and for this reason they are only regulated at the national level and not even at a trans- or supra-national level. According to the author, many of these offences have long been assessed and sanctioned to be rather homogeneous in the various EU countries (this is found, for example, in a large part of the crimes that create "natural" damage, such as murder, rape, personal injury, theft, etc.), while others (such as tax offences) are still regulated in a very variable way by the aforementioned countries. Despite their having substantive effects internally, the natural process of approximation in providing a punitive response to these conducts is due to various reasons such as the pursuit of general objectives of punitive policy reflecting European values of justice and solidarity enshrined in the Treaties. There might also be technical-legal reasons related to the fact that following a strategy that aims to align with common and shared sanctioning policies tends to improve the growth of mutual trust among those working within the individual national systems,

[229] E.R. Belfiore, *Le incursioni della normativa europea nel diritto penale interno* ; A. Bernardi, *L'europeizzazione del diritto e della scienza penale*, Torino, 2004; J.H. Hans, R. de Lange, S. Prechal and R. J. G. M Widdershowen, *Europeanisation of public law* p. 209; *Riciclaggio e obblighi dei professionisti*, C. Bernasconi, F. Giunta, p.26; C. Harding, B. Swart, *Enforcing European Community rules*, Darmouth, 1996; G. Grasso, *Comunità europea e diritto penale: i rapporti fra l'ordinamento comunitario e i sistemi penali degli stati membri*, Milano, 1989; U.Sieber, *Europaische Einigung und Europaisches Strafrecht*, Berlin, 1993.

which favour the strengthening of the variegated forms of relationships that can be established between such systems in the field of criminal justice.

The second category of offences is likely to become the object of a common criminal policy at a supra-national level and consequently to assume transational importance because it concerns types of behaviors that, for several interrelated factors, must be made punishable. The intervention of the European instruments has covered a wide range of matters, for instance, racism and xenophobia, child sexual abuse and pornography, environmental crimes, people trafficking, and more generally certain human rights whose protection, due to their importance, is demanded by *ius naturale* before a recognised charter. Additionally, we might append those transnational infringements whose actual or potential effects are across national borders and offend fundamental values of the international community (for example, the EU has adopted legislation within peculiar forms of transnational forms of organized crime activities such as cybercrimes, terrorism, frauds in relation to electronic payments, drug-trafficking, all marked by an intrinsic "de-territorialization" of the prohibited conducts or criminal international organizations).

The third category is represented by those offences which are technically European in the sense they affect the economic and financial interests[230] of the EU. With the interests of the EU itself in mind, these offences include counterfeiting the Euro, fraud against the budget[231] and market abuse. Within this area, the need to ensure a degree of uniformity in terms of the punishable conducts is likely to be amplified. Obviously, the focus of this research will be on the rules which have been developed within this field.

[230] For an empirical analysis of the factual situation with respect to the phenomena and perpetrators of EC-fraud and study in terms of legal policy see: U. Sieber, "Euro-fraud: Organised fraud against the financial interests of the European Union, Crime", *Law & Social Change* 30: 1–42, 1998. See also: Ester Herlin-Karnell, Nicholas Ryder, 'The Robustness of EU Financial Crimes Legislation: A Critical Review of the EU and UK Anti-Fraud and Money Laundering Scheme', *European Business Law Review*, Issue 4, pp. 427–446, 2017

[231] J.A.E. Vervaele, *EEG-fraude en Europees economisch strafrecht. Europese monografieen*. Deventer: Kluwer, 1991.

There is, however, another phenomenon, often underrated, which has greatly contributed to the transition from a highly-centralized national sanctioning system to a European-oriented pattern. Specifically, it revolves around the issue of compliance with EC legislations. Despite the fact that, generally, enforcement of European law develops piecemeal, it will be shown that it is also subordinate to common standards regarding the sanctioning measures. It will be shown later that, within the enforcement of Union Law, there is a constant confrontation between European principles and domestic law.

In conclusion, what is most striking from this inroad into domestic sanctioning policies is the prototypical example of the European machinery gradually in action. It is nonetheless notable that the EU is being playing a dominant role in influencing the "justice" policies in terms of the integration and development of common values.[232] The move towards European interference in criminal policies has led to the slow perception and recognition of certain behaviours as "antisocial" and thus deserving to be subject to sanctions or of becoming "sanctionable". The means by which this process has partly been possible is the direct enforcement carried out by the EU's institutions and indirect enforcement by the Member States to ensure the compliance[233] with European law.

12. The enforcement of European law and the competence to impose sanctions: a light approach adopted for customs law

As noted by legal commentators, customs debts are own resources whose purpose is to finance the EU budget and are necessary for the maintenance of the European

[232]On the European and Supranational wrongs and shared wrong, see: Stephen Coutts, 'Supranational public wrongs: The limitations and possibilities of European criminal law and a European community', *Common Market Law Review*, Issue 3, pp. 771–803, 2017

[233] Richard Macrory, "Reforming Regulatory Sanctions—Designing a Systematic Approach". The author argues that "Regulation almost by definition is introduced where the unconstrained market cannot by itself guarantee goals that society wishes. An effective system of sanctions underpins any regulatory structure, and within the European Union it is something increasingly required of member states, at least in general terms."

machinery. For the Member States, the customs debt represents "a sum of money which it has a legal obligation to collect".[234] Essentially, the main responsibility for collecting customs duties (and enforcing customs rules) still lies with the Member States but ensuring customs debt recovery and tackling customs irregularities is inherently an European public interest rather than a domestic one. It is, thus, a directly related matter to understand the customs policy[235] in terms of its enforcement. The issue of customs law enforcement, as with every other field, involves a double reflection on the identification of breaches of customs rules, namely "infractions", "irregularities", "misconducts", "offences" with its derived, appropriate "penalties" or "sanctions"[236] to apply. This is logical as both infringement/offences and then penalties are drafted with the purpose of law enforcement.

Even if the logic would suggest the opposite conclusion, before the adoption of the new Customs Code, the EU has not exerted any specific influence on Member States' enforcement of customs law. General obligations such as the obligation to collect customs duties and those relating to own resources[237] are mainly carried out by the administration and enforcement of European customs rules at a domestic level. In the absence of specific rules, the ECJ has influenced not only the domestic administration but also the constraints imposed on national enforcement of customs rules. For instance, in dealing with the collection of customs duties, the ECJ[238] held that, in the absence of relevant provisions of Community law, "each Member State is entrusted

[234]T. Lyons, *EC Customs Law*, Oxford, 2008 p.433

[235] On this topic, see: Dominik Lasok, *The Trade and Customs Law of the European Union*, 1997, p.49

[236] European Union is a mixed legal system, due to the blend of different traditions, both of common law and civil law. It is unsurprising that also the legal terminology, over time, has developed independently, adopting influences from all the Member States. As far as methodology and terminology are concerned, it is of importance to clarify the meaning and the scope of the terms penalties, sanctions and sanctioning measures. These terms have become increasingly used as synonims among European decision-makers, both within case-law and legislation. The same logic is behind the choice of the term breaches, misconducts, failures and violations of customs rules. The term breach is flexible enough to capture any violation of customs rules or failure. More difficult is to distinguish between infringement, infractions and offences as it inevitably exposes different traditional meanings behind their meaning. The term offence is usually used for designating crimes whilst the term "infringement" indicates a breach of a statutory rule of a minor, non-criminal type.

[237] T. Lyons, *EC Customs Law*, Oxford, 2008, P.58.

[238] See: Joined Cases C-153/94 and C-204/94 *The Queen v Commissioner of Customs and Excise, ex parte Faroe Seafood Co Ltd and Ors*, para 66. See also: C-48/98 Firma Sohl & Sohlke v Hauptzollamt Bremen, para 66. C-312/93 Peterbroeck and ors v Belgium, para 12.

with laying down the detailed rules and conditions for the collection of Community revenues in such a way as to not render the system for collecting Community charges and dues less effective than that for collecting national charges and dues of the same kind, or render virtually impossible or excessively difficult the implementation of Community legislation". Later, the European legislator codified the principles stemming from the well-established case law within Article 42 while still exercising the softer way of indirect form of enforcement and allowing the Member States full discretion in relation to it.

Insofar as the enforcement[239] of European rules is concerned, the competence[240] of the EU to prescribe obligations of sanctioning specific breaches of UE provisions for Member States, to transpose into the national legislation, is of a quite different nature to the direct sanctioning competence. The centralized method of enforcement[241] (through which the EU legislator establishes the way in which an infringement of the rules should be punished by an European authority) constitutes an exception to the indirect intervention in the enforcement process.[242] This is due to to the fact that enforcement of EU law, in principle, rests on the responsibility of the national legal systems. Thus, the Member States are obliged to enforce it but discretion is left to the

[239] See generally: P. Craig, *EU administrative law*, Oxford, 2006. D. Curtin, "The decentralised enforcement of Community law rights; Judicial snakes and laddess" in *Consitutional Adjudication in European Community and National law*, Dublin, 1992; P. Van den Bossche, "In search of remedies for non-compliance: the experience of the European Community", *Maastrict Journal*, 1996;

[240] See generally: Dehousse, "Community competences: Are there limits to growth?" in Dehousse (ed.), Europe after Maastricht: an ever closer union?, Maastricht, 1994.

[241] According to J.H. Hans, R. de Lange, S. Prechal and R. J. G. M Widdershowen, *Europeanisation of public law* "Substantially, only in respect of the European competion rules, the Commission has the centralised power to impose fines and penalties", p.231. See further: Roland Bieber, Francesco Maiani, 'Enhancing centralized enforcement of EU law: Pandora's Toolbox?', *Common Market Law Review*, Issue 4, pp. 1057–1092 "For the best part of the history of the EU, centralized enforcement of EU law has been practically synonymous with the original infringement procedure laid down in Articles 169 et seq. EEC. Upon finding that a State was in breach of Community law, the ECJ would issue a declarative judgment entailing an obligation for the State concerned to take corrective action (see now Art. 260(1) TFEU)".

[242]Lezioni di diritto penale europeo, pag. 99: "L'ordinamento comunitario è dotato di un sistema di tutela immediata dei suoi beni giuridici che consiste nel potere degli organi comunitari di comminare sanzioni amministrative punitive, prive di carattere penale; e di un sistema di tutela mediata che consiste nel ricorso al diritto penale, al diritto punitivo amministrativo e al diritto amministrativo degli Stati Membri"; Jeschek, Possibilità e limiti di un diritto penale per la protezione dell'Unione Europea, in Ind. Pen. 1998, p. 229; J. Vervaele, G. Betlem, R. de Lange and A. Veldman (Eds.), Compliance and Enforcement of European Community Law. The Hague/London/Boston: Kluwer Law International, 1999.

measures considered appropriate. Indeed, they may opt for criminal, administrative sanctions but also private law means.

More fundamentally, enforcing European law is thus a general obligation for the Member States. The European legislator might intervene occasionally to reinforce what, in any case, still remains a general obligation for the Member States. For instance, the European laws might require that States should provide adequate means to ensure compliance and penalties should be effective, proportionate and dissuasive.[243] This means that the sanctioning policy is imposed but the Member States develop their own versions of the means of enforcing against infringements of European law. Although there are variations, they share a common pattern.

Generally, within this context, commentators[244] distinguish three models of enforcement of EU law sanctions[245] in national legal orders:

> 1) An EU legal act defines the sanctions for the non-compliance with EU law provisions, which are then imposed by the national authorities directly on the basis of Union law; 2) An EU legal act defines sanctions, which then must be transposed into the domestic legal order and applied by the national authorities; 3) An EU legal act imposes on Member States only a general obligation to enact sanctions for the breach of EU law, and the Member States establish the sanctions within their national legal order and are responsible for their imposition when the EU law is breached.

Other scholars,[246] alongside the employment of legislative instruments to lay down the rules to be applied in the national legal system, suggest another driving force behind the national enforcement of the European law: the case-law of the ECJ. Despite being dragged into a dispute on sanctioning competence matters, the Court has progressively oriented the requirements that the national enforcement must fulfil by referring to the equivalence, effectiveness, dissuasiveness and proportionality. The legal basis through which the court has influenced this process is the principle of cooperation laid down in

[243] P. Root, "Effective enforcement and different enforcement cultures in Europe" in T. Wilhelmsson, E Paunio, A Pohjolainen, *Private law and the Many cultures of Europe*.

[244] On this point, see: Szwarc, Monika. 'Application of the Charter of Fundamental Rights in the Context of Sanctions Imposed by Member States for Infringements of EU Law: Comment on Fransson Case'. *European Public Law* 20, no. 2 (2014): 229–246.

[245] Bitter, Die Sanktion im Recht der Europäischen Union (Springer, 2011), pp. 13–36 (English summary, pp. 275–280); Bitter, "Procedural rights and the enforcement of EC law through sanctions", in Bodnar, Kowalski et al. (Eds.), *The Emerging Constitutional Law of the European Union* (Springer, 2003), pp. 15–46; Poelemans*, La sanction dans l'ordre juridiqe communautaire* (Bruylant, 2004); Roland bieber and francesco maiani, Enhancing centralized enforcement of eu law: pandora's toolbox?, *Common Market Law Review*, 2014.

[246] C. Sotis*, Il diritto senza codice: uno studio sul sistema penale europeo vigente***,** Milano, 2007.

Article 4(3) of the TEU Treaty (Article 10 EC Treaty). The Member States are to take 'all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from action taken by the institutions of the Community'. The Court adopted that wording (previously Article 5 EEC Treaty) in the 1977 *Amsterdam Bulb* judgment specifically with regard to the imposition of penalties for the infringement of provisions of Community law. The Court went further in the leading case *Greek Maize* (*Commission v. Greece)*[247] by proscribing that the Member States must ensure that the penalties are effective,[248] proportionate and dissuasive for breaches of EU law. In fact, the Court observed that whereas European legislation does not specifically provide any penalty for an infringement, Member States are required, according to the previous Article 5 of the Treaty, to take all measures necessary to guarantee the application and effectiveness of Community law. With this, the Court has, for the first time, theorized those criteria which are now usually required by European legislation when requiring Member States to implement measures in case of breach of European law. In this case, the Court stated that, even if the margin of discretion is left to the Member States as to the choice of sanctions for infringement of EU law, they must ensure in particular "that infringements of Community law are penalized 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". The Court specified the concept of equivalence by stating that "the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws".

[247] See the judgments in: Case 68/88 Commission v Greece [1989] ECR 2965, paragraph 24 but also Case 14/83 Van Colion and Kamann v Land Nordrhern-Westfalen [1984] ECR 1891, paragraph 15. The Court has regularly referred to this approach in later decisions: C-7/90 Vandevenne and others; C-326/88 Hansen; C-29/95 Pastoors and Trans-Cap; C-177/95 Ebony Maritime; C-387/02, C-391/02 and C-403/02 Berlusconi.

[248] In *Greek Maize*, the Court established that, in the light of principle of equivalence, the measures taken by national authorities enforcing the EU law must be analogous to those applicable to national infringements.

More disputed and complex was the issue[249] regarding the competence of the EU to adopt penalties (both administrative and criminal).[250] With regard to enforcement by imposing European sanctions[251] (through which the European legislator establishes the way in which an infringement of the rules should be punished by national authorities), the issue of a legal basis requirement was picked up by the ECJ but drastically developed over the years. In *Commission v Germany*,[252] one of the main points of criticism[253] related to the presumed incompetence of the EU to impose sanctions in the area of agriculture.[254] Dealing with this question, the Court demonstrated an acute understanding of the issue by pointing out that the EU's sanctioning competence, in the sphere of the common agricultural policy, was based on Articles 40, n 3 and 43, n 2 of the EC Treaty. In other words, the ECJ formulated this line of reasoning, not because of a clear rule bestowing sanctioning power to the community but insisting on the fact that creating a common organization of agricultural markets should imply *all measures* required to pursue the objectives alongside the proposals, submitted by the

[249] For a detailed analysis of the process of Europeanisation of national administrative law, see: J.H. Hans, R. De Lange, S. Prechal, R.J. G.M. Widdershoven, *Europeanisation of public law*, pp.232-233: "The Community's influence on sanctions originates in the field of the Community's Agricultural Policy. From an early stage, regulations in this field provided for reparatory measures, and more specifically for the repayment of European funds that had been wrongly received. From the late 1980's, the Community increasingly required Member States to impose sanctions that went further than simple reparation. Under various regulations, it was no longer sufficient for Member States to claim the repayment of funds obtained by fraud, but the amounts to be recovered had to be increased by a certain surcharge (fine) and the perpetrators excluded from the scheme in question for the next year. In the *Sheepmeat* case the Court ruled that the Community was competent to impose these sanctions in the agricultural field (..) This decision made it possible for the Community to intervene to a considerable extent in the Member States'imposition of administrative sanctions for infringement of, at any rate, the common agricultural rules. The Community has made a wide use of this possibility. Nowadays, these sanctions can be found in Commission Regulation 796/2004.This regulation prescribes in detail the sanctions the Member States must impose for infringements of the common agricultural policy rules. More specifically, the regulation provides for two sanctions, namely: the reduction on the agricultural aid granted and (in case of intentionally committed irregularities) the exclusion from the support scheme for the following years. The next step in the Europeanisation of national enforcement of infringements of Community law was that the Community increasingly laid down rules regarding sanctions even outside the agricultural field."

[250] P. Szarek-Maso, *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*, Cambridge University Press, p.48.

[251] K. Ligeti*, Strafrecht und strafrechtliche Zusammenarbeit in der Europaischen Union*, Berlin, 2005; M. Polelemans*, La sanction dans l'ordre juridique communauitaire; contribution à l'ètude du système répressif de l'Union européenne*, Paris, 2004; J.A.E. Vervaele, "Administrative sanctioning powers of and in the Community: towards a system of European administrative sanctions?" in J.A.E. Vervaele (ed.), *Administrative law application and enforcement of Community law in the Netherlands*, Deventer/Boston, 1994.

[252] C-240/90 *German v. Commission (Sheepmeat)*

[253] As regards the second objection moved by Germany

[254] On the sanctioning system within Common agricultural policy, see: S. Screpanti, "Il contenzioso in tema di sanzioni amministrative per illeciti comunitari", *il Fisco*, 1998, n.30

Commission after consulting the Economic and Social Committee and within two years of the entry into force of this Treaty, for working out and implementing the common agricultural policy. In other words, the achievement of common objectives rationally implies and defines the scope of sanctioning action[255]. In addition, scholars[256] have emphasized the role of Article 261 (ex Article 172) through which the competence to impose penalties can be inferred and implicitly recognized since the ECJ might be given an unlimited jurisdiction with regard to the penalties provided for in such regulations adopted jointly by the European Parliament and the Council, and by the Council. Expansive tendencies,[257] in terms of the imposition of sanctions outside the agricultural sphere, derived from this decision.

Interestingly, later on, the competence of the EU to adopt the legal measures aimed at protection of financial interests was justified on the basis of Article 308 EC Treaty (ex Article 235) as was demonstrated by Regulation 2988/1995 which establishes that:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.[258]

Some years later, the need to better legitimise the competence of the EU in the field of financial interests led to the insertion, with the Treaty of Amsterdam, of Article 280 as the main legal basis for the legitimacy of administrative measures.[259] This requires the

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[255] Tesauro, "La sanction des infractions au droit communauitaire" in *Riv.dir.eur.*, 1992; A. Maugeri, "Il Sistema Sanzionatorio Comunitario dopo la Carta Europea dei Diritti Fondamentali" In: (edited by): G. Grasso, R. Sicurella, *Lezioni di Diritto Penale Europeo*; Melchior, "Contribution à l'ètude de la sanction des infraction aux reèglement de la CEE", in *Le frontiers de la rèpression*, Universitè Bruxelles, Facultè de droit, 1972; Heitzer, *Punitive Sanktionen im Europaischen Gemeineschaftrecht*, Heidelberg,1997; Pisaneschi, *Le sanzioni amministrative comunitarie*, Padova, 1988.

[256] Maugeri A., "Il principio di proporzione nelle scelte punitive del legislatore europeo: l'alternativa delle sanzioni amministrative comunitarie" In: (edited by): G. Grasso, L. Picottir.Sicurella, *L'evoluzione del diritto penale nei settori di interesse europeo alla luce del Trattato di Lisbona. PUBBLICAZIONI DEL CENTRO DI DIRITTO PENALE EUROPEO*, p. 67-132, Milano, 2011; Maugeri A., "I principi fondamentali del sistema punitivo comunitario:la giurisprudenza della Corte di Giustizia e della Corte europea dei diritti dell'uomo" In: (a cura di): G. Grasso - R. Sicurella, *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale. PUBBLICAZIONI DEL CENTRO DI DIRITTO PENALE EUROPEO*, p. 83-162, Milano, 2008; Maugeri A. (2007), "Il Sistema Sanzionatorio Comunitario dopo la Carta Europea dei Diritti Fondamentali" In: (a cura di): G. Grasso - R. Sicurella, *Lezioni di Diritto Penale Europeo. PUBBLICAZIONI DEL CENTRO DI DIRITTO PENALE EUROPEO*, p. 99-244, Milano, 2007.

[257] See, J. H. Jans, R. de Lange, S. Prenchal, R.J.G.M. Widdershoven*, The Europeanisation of public law*, 2007 p.233.

[258] P. Szarek-Maso, *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*, Cambridge University Press, p.48.

[259] U. Sieber, Euro-fraud: Organised fraud against the financial interests of the European Union, *Crime, Law & Social Change* 30: 1–42, 1998.

Community and the Member States to counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with Article 280, which should act as a deterrent and be such as to afford effective protection in the Member States. Furthermore, "Member States shall take the same measures to counter fraud affecting the financial interests of the Communities as they take to counter fraud affecting their own financial interests". However, a limitation was strictly established: it was specified that necessary measures, adopted by the Council in the fields of the prevention of and fight against fraud affecting the financial interests to ensure effective and equivalent protection in the Member States, could not involve the application of national criminal law or the national administration of justice.

Over the years, even if responsibility for enforcement still mainly rests with the Member States, EU law has gained an increasing amount of power in national systems of sanctions due to the Treaty of Lisbon to such an extent that it can impose burdens of criminalization on the Member States.

The obligations of criminalization have raised the question of whether the EU has overstepped its competences.[260] However, after Lisbon, there are no doubts about the legitimate interference of European law within criminal substantive law. Article 83 TFEU provides that the European Parliament and the Council may adopt directives establishing minimum rules concerning the definition of criminal offences and sanctions in the areas of serious crime[261] with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Additionally, the EU may enact directives establishing minimum rules

[260] The debate between the EU institutions and the Member States was interrupted after the ECJ delivered its rulings in cases C-176/03 Commission v. Council (protection of environment through criminal law) and C-440/05 Commission v. Council (ship-source pollution), where it ruled that the European Community had implied powers to oblige Member States to enact criminal sanctions for the non-compliance with EU law. On this point, see: Szwarc, Monika. 'Application of the Charter of Fundamental Rights in the Context of Sanctions Imposed by Member States for Infringements of EU Law: Comment on Fransson Case' in *European Public Law* 20, no. 2 (2014): 229–246.

[261] These particular crimes are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Plus other types of crime

with regard to the definition of criminal offences and sanctions in the area concerned whereas the approximation of criminal laws and regulations of the Member States is essential to guarantee the effective implementation of a Union policy in an area which has been subject to harmonisation measures. Thus, the Lisbon Treaty has provided a legal basis that facilitates the adoption of directives on criminal law. In this context, Article 325 TFEU is, instead, dedicated to the legal framework regarding the fight against fraud. Both the Union and the Member States are entrusted with countering fraud and any other illegal activities that affect the financial interests of the Union through measures that act as a deterrent and afford effective protection in the Member States and in all the Union's institutions, bodies, offices and agencies. Member States are required to take the same measures to counter fraud that affects the financial interests of the Union as they take to counter fraud affecting their own financial interests. For their part, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, should adopt the necessary measures in the fields of prevention of and fight against fraud that affect the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies. There are, however, no longer limitations in terms of criminal measures to adopt. The recent Directive 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, whose legal basis for EU criminal action is Article 83(2) TFEU. Indeed, EU action in criminal matters has been recognised as necessary for underpinning the effective implementation of EU policies in the financial sector and in protecting the EU's financial interests.

12.1 European customs sanctions and a common frame of principles under article 42 of UCC: Proportionality, effectiveness and dissuasiveness

The existence of different penalty regimes is a vexed issue but the role of the ECJ should be applauded in the way it has oriented and set out the principles and constraints within which the Member States should move. The impetus given by this case-law has led to the codification of these principles. Nevertheless, this area remains fraught with difficulties, which rest on a discretionary level of protection whose content may vary amongst Member States. Indeed, legal scholarship[262] has warned of the unicity which is implicit in a customs union that inevitably requires a uniform structure of the infringements and penalties. Within this, the case-law of the ECJ acts as a guide through the jungle of numerous conflicting interests at stake and helps to identify a sound policy. The assessment of the customs penalties has been the subject of consideration in a number of cases. The process of setting out principles applicable within customs sanctions is part of the more general development of the "instrumental requirements"[263] espoused by the ECJ. As seen above, the basis for the crystallization of the principles within customs penalties is the case-law developed on the national enforcement of European law. In countless decisions, the Court has ruled that Member States not only have an obligation to implement European law but also enforce it, and that the means must be non-discriminatory (equivalent to similar national measures), effective, proportionate and dissuasive.[264]

The national judges have often taken action against alleged breaches of principles. Proportionality[265] more than effectiveness or dissuasiveness has been actioned within the context of customs case-law. In fact, many of the matters which have arisen for debate in relation to the case-law are mainly related to proportionality. Doubtless, proportionality has become the main parameter through which the Court has stimulated the debate on the legitimate measures to be adopted.

[262] T. Lyons, *EC Customs Law*, Oxford, 2008.
[263] J. H. Jans, R. de Lange, S. Prenchal, R.J.G.M. Widdershoven*, The Europeanisation of public law*, 2007, p. 206.
[264] As seen before, on the basis of article 10 EC treaty
[265] J.H. Jans, "Minimum harmonization and the role of the principle of proportionality" in M. Fuhr, R. Wahl, P. von Wilmosky (Herausgeber) *Umweltrecht und Umweltvissenschaft; Festschrift for Eckhard Rehbinder*, Berlin, 2007.

In *Commission v Greece*,[266] the Court dealt with the Commission's request to declare that a State failed to fulfil its obligations under the Treaty. In particular, the question was whether, as the Commission argued, the fine imposed on the German tourist by the Greek authorities was so disproportionate to the gravity of the offence that it was such as to jeopardize the system of temporary importation arrangements for travellers' personal effects. The penalty in question was equal to twice the amount of the customs duties and taxes chargeable on lawful importation of the goods due to the false declaration.

From this leading case, the Court has followed this line of reasoning and bolstered the principles framework on which customs penalties are, nowadays, modelled. First and foremost, in the absence of harmonization of Community legislation in the field of customs offences, the Member States are competent to adopt such penalties as appear to them to be appropriate.[267] Second, States, when exercising the sanctioning competence, are still required to comply with European law and its general principles. In this context, the principle of proportionality seems to be most important in the evaluation of the measure. The principle has been formulated through well settled case-law as follows: the administrative measures or penalties must not exceed what is strictly necessary for the objectives pursued and the control procedures must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty.

In cases which arose later, the Court again relied on the principle of proportionality to evaluate the legitimacy of the sanctioning policy. In *Siesse*, the Court's reasoning resembled that of *Commission v Greece* but went further in terms of content, being inspired by the abovementioned case-law on the agricultural policy. Being called on to rule on a surcharge imposed for a failure to comply with the formalities and time limits provided for in Regulation 4151/88, the Court added two requirements that Member

[266] Case 68/88 Commission v Greece [1989] ECR 2965.

[267] (see, inter alia, Case 50/76 Amsterdam Bulb v Produktschap voor Siergewassen [1977] ECR 137, paragraph 33, and Case 240/81 Einberger v Hauptzollamt Freiburg [1982] ECR 3699, paragraph 17).

States must satisfy for the establishment of penalties, alongside proportionalty: effectivenes and dissuasiveness. Interestingly, the ECJ has practically and concretely explained their substantive and essential content. In fact, the Court, by holding that "[t]he penalty incurred is thus intended to encourage traders to act within the periods laid down and to penalize those who failed to do so", seemed to refer to the dissuasive capacity. In addition, when stating that the regularization of the situation of the goods conditional upon the payment of such a penalizing levy does not appear to be contrary to the European law, it arguably alluded to the effectiveness.

The following cases[268] regarding customs penalties are essentially a mere restatement of the mentioned case-law. One[269] in particular picked up the balancing enquiry between the proportionality and the pressing requirements of enforcement and prevention. The EU judiciary had been asked whether the penalties regime, provided by the Greek legislation, was compatible with the proportionality principle. The defendant, Mr Louloudakis claimed that the sanctioning policy adopted by Greece curtailed free movement as it dissuaded anyone from moving from one country to another with one or more motor vehicles. The penalties regime in question provided that, in the event of infringement of the temporary importation, the application of both fines (set at a flat rate on the basis of the sole criterion of the vehicle's cubic capacity, without taking its age into account) and an increased duty which could amount to up to ten times the taxes in question. The Greek government disagreed, stating that the threat of heavy penalties served to avoid loss of Community and national revenue and ensure the proper functioning of the temporary vehicle importation arrangements. Consequently, it was deemed not to be contrary to the principle of proportionality.

In considering whether the penalties regime infringed the proportionality principles, the Court conducted a balancing enquiry of the values at stake. In doing so, the Court did not massively outweigh the public interest in ensuring the requirements of

[268]See: C-213/99 José Teodoro de Andrade; C-262/99 Paraskevas Louloudakis vs Elliniko Dimosio; C-91/02 Hannl + Hofstetter Internationale Spedition GmbH

[269] C-262/99 Paraskevas Louloudakis vs Elliniko Dimosio

enforcement and prevention. The severity of penalties must be assessed through a justificatory balancing exercise. The real question will be whether the penalties are so disproportionate as to constitute an obstacle to the Treaty's freedom. It is the answer to this question that is decisive. The Court did not exclude that:

> a penalty based on the sole criterion of cubic capacity could be disproportionate to the gravity of the infringement, in particular where it is associated with another heavy penalty, imposed in respect of the same infringement. The same could be true of a penalty amounting to a multiple of the charges at issue, for example ten times such charges.

The heavy and severe penalties adopted to display preventive and dissuasive effects are proportionate as long as they do not impair the freedoms. A balancing assessment must be conducted by national courts, which are also tasked with evaluating the values at stake and specifically "whether, in view of the overriding requirements of enforcement and prevention, as well as of the amount of the taxes in question and the level of the penalties actually imposed, those penalties do not appear so disproportionate to the gravity of the infringement that they become an obstacle to the freedoms enshrined in the Treaty".

As regards effectiveness,[270] this principle is ordinarily expressed as follows: it is not sufficient that national law provides for penalties for infractions of European law. The national authorities must actually and effectively enforce the rules in order to guarantee their effective application.[271] An exemplary case[272] was that of the failure of France to fulfil obligations regarding the fisheries policy. The Court conducted the assessment of effectiveness in combination with other legal constraints. The measures and the controls implemented in respect of infringements of the fisheries rules were judged as lacking and being inappropriate in terms of efficacy, proportionality and deterrence to ensure the effectiveness of the Community system for conservation and management of fishery resources.

[270] On the effectiveness of different strategies and sanctions in securing regulatory outcomes, see: Richard Macrory, *Reforming Regulatory Sanctions—Designing a Systematic Approach*. See also: F. Snyder, "The effectiveness of European Community law: institutions, processes, tools and techniques", *MLR* 1993, p. 19-54.

[271] Case C-42/89 Commission v. Belgium; C-199/82 San Giorgio

[272] Case C-304/02 Commission v. France

Instead, before the Treaty of Lisbon, the debate on the requirement represented by deterrence soon moved onto a different and challenging conceptual level. The point in question was whether only criminal sanctions could be "sufficiently dissuasive".[273] The debate was sparked by the Commission's arguments, contained in the Explanatory Memorandum of the proposal for a directive on the protection of the environment through criminal law 2001, in favour of the imposition of criminal sanctions for their ability to demonstrate a social disapproval of a qualitatively different nature compared to administrative/civil sanctions and thus to convey a stronger signal, with a much greater dissuasive effect, to offenders. This debate spread to the ECJ's scrutiny.[274] Significantly, the Court admitted that: "As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence". It also went further, concluding that:

> [this] finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

Scholars[275] have inferred from this judgment the competence of adopting criminal measures under the condition of the need to ensure the full effectiveness of the sectoral legislation. This decision was adopted before the Treaty of Lisbon but it is fundamental to understand that the issue related to appropriate sanctioning policies has been and still remains a sensitive theme involving not only the balancing of the values at stake but also the choice of Europe-State to punish certain misconducts. Most importantly,

[273] See: Stephen Coutts, 'Supranational public wrongs: The limitations and possibilities of European criminal law and a European community', *Common Market Law Review*, Issue 3, pp. 771–803, 2017 "By insisting on the competence of the Union to criminalize such conduct EU law is by implication identifying certain public goods as European public goods, harm to which constitute a European public wrong. In Ship Source Pollution the Advocate General stressed the fact that "[i]t must be recalled that upholding Community [now Union] law is the responsibility of the Community institutions … if the legal interests protected in such offences were one of the objectives of the Community, no one would dispute the ability of its law-making bodies to require the Member States to prosecute in criminal law." In a somewhat different context, in Åkerberg Fransson it was the Union's interest in the protection of its own resources and the Treaty obligation placed on Member States to ensure their protection that rendered it a matter of EU law thereby ensuring the application of the Charter of Fundamental Rights to the criminal proceedings in question. A similar reasoning and insistence on the Union's interest in the prosecution of VAT fraud can be found more recently in Taricco".

[274] C-176/03 Commission v Council

[275] J.H. Jans, R. de Lange, S. Prenchal, R.J.G.M. Widdershoven*, The Europeanisation of public law*, 2007, p. 237.

it encourages a reflection on whether punitive measures are the most effective tool to deter.

12.2 The need for a common level of disapproval for equivalent breaches of customs rules

As will be shown below, the EU has increasingly meddled with the sanctioning policies of the Member States. Despite exclusive competence and its wide reach (as long as the issues relate to financial interests), there is a paradox at the heart of European customs law in that its enforcement is based on differing national policies. In fact, the interaction between European and national legislation in this area is mainly done on a dual layer, where each Member State implements principles fixed by European legislation. Technically, customs infractions and offences are meant to secure compliance with customs legislation. Hence, they can be regarded as pure breaches of certain obligations which might, directly or potentially, infringe on the European public budget or breaches of rules of a minor type. Such breaches are subject to only patchy regulation, according to Member States' own assessment as the field of customs law has not received that attention in terms of uniformity and cohesion of "harmful" conducts, that is reasonable to have expected. The question of what are, or should be, considered the set of conducts that infringes upon the customs system and how to sanction or punish them depends upon an autonomous evaluation of each Member State. The formulation of "wrong-doing" behaviours, namely infractions and offences, is left to Member States' legislation. In this context, customs enforcement revolves around Article 42 which fixes principles and generally provides that each Member State shall provide for penalties for failure to comply with the customs legislation. Intuitively, "failure to compy with customs law" potentially covers a great variety of breaches of customs rules. Thus, the construction of infractions and offences is not even built on basic, common forms of wrongdoing behaviours. Moreover, in several countries, the current structure of customs infringements and offences is anachronistic and relies on archaic

forms of infractions which have survived to the present day. Furthermore, breaches of customs rules, incorporated by offences or infractions, might be treated more or less seriously. As mentioned before, Article 42 UCC has fixed principles (particularly proportionality, dissuasiveness and effectiveness) to which sanctioning policy must adhere. The implemenation of these principles tends to not materialise in a homogeneous fashion across Member States. One specific and thought-provoking angle of the analysis here is about this sort of neutral standpoint with regard to the identification of breaches of customs rules worthy of being sanctioned and the degree of reprobation to attribute to infringements of customs rules. The concept of the customs union and the cohesion which might be expected is, in this sense, misleading because it does not reflect the fragmentary customs arena within which legal subsystems apply and also within which customs law is implemented.[276] The most remarkable feature of the current customs framework is a scarce attention to the different levels of social disapproval attributed to the breach of customs rules by Member States, and the consequent remarkable contrast between those States which opt for a criminal policy and those which do not provide any criminal penalties. Substantially, both the breaches of customs rules and the appropriate degree of protection of an inherently European interest are subject to the scrutiny of 27 different states. To provide some examples,[277] three different ways of regulating customs offences will be described. In Germany, the national provisions[278] dedicated to customs law can be found in the Customs Administration Act (*Zollverwaltungsgesetz*) of 21 December 1992 and its implementing provision (*Zollverordnung-Zoll* V) of 23 December 1993. The *Zollverwaltungsgesetz* (ZollVG), under section IX entitled "*Steuerordnungswidrigkeiten, Steuerstraftaten und Steuerordnungswidrigkeiten im Reiseverkehr*" provides for a sanctioning system that consists of administrative and

[276] K. Limbach, *Uniformity of Customs Administration in the European Union*, Bloomsbury, Publishing London 2015, p. 4.

[277] For a Spanish legal perspective: S. Ibanez Marsillia, "Infringements and penalties in Customs Matters in Spain", in *Global Trade and Customs Journal* (GTCJ), Kluwer, vol. 13, issue 7&8, 2018, p. 281-289.

[278] Michael Wendler, Bernd Tremml, Bernard John Buecke**,** *Key Aspects of German Business Law: A Practical Manual***,** 2006, p.239.

criminal penalties. A similar system is provided by Estonian legislation which, under Chapter 9 dedicated to Liability for Violation of Customs Rules of "Tolliseadus"[279] for instance, establishes that: "according to § 73, conveyance of goods or cash subject to declaration across the border of the customs territory of the European Union by evading customs control, failing to declare the goods or cash, declaring the goods or cash under an incorrect tariff classification or description, or behaving in any other fraudulent manner is punishable by a fine of up to 300 fine units or by detention".

The French[280] and Polish[281] legislations have opted only for criminal punishment applicable to customs enforcement.[282] With regard to the Italian legal system, before the adoption of a legislative decree on 15 January 2016, n. 8 the customs penalties system[283] was regulated by the TULD, from Articles 282 to 302. The legislative decree provides under Article 1 a general clause that decriminalizes[284] "all the offences for

[279] See for the Estonian legislation: Customs Act**,** Passed 13.04.2004

[280] Freddy Desplanques, Amélie de Franssu, 'Overview of the French Customs Infringements and Sanctions and the Question of Possible Harmonization' (2018) 13 *Global Trade and Customs Journal*, Issue 7/8, pp. 304–309 where the authors argue that "It appears from the studies carried out comparing the different systems in place that some Member States, such as France, have favoured a criminal repression system (criminal sanctions) while others have favoured a mixed system combining both criminal and administrative sanctions. The French system also sets itself apart through the specialized criminal rules governing customs sanctions which derogate from the general criminal rules."

[281] See for the Polish Legislation: Articles 85-96 of Fiscal Criminal Code (PL: Kodeks karny skarbowy) of 10 September 1999 (as amended).

[282] See also: European Court of Auditors' Report nr. 19/2017, *Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU*: "Member States have different approaches regarding penalty regimes. In the EU the enforcement of customs legislation is an obligation on the part of Member States. We found that in Poland, Belgium and France customs infringements are considered to be of a criminal nature and systematically give rise to criminal proceedings. In Poland there are neither administrative nor civil penalties for customs infringements, which can use a diversity of civil, administrative and/or criminal penalties to deter infringements. This can distort competition in the internal market between legitimate traders while fraudsters can exploit these differences and damage the EU's financial interests. The Commission presented a proposal for a Directive laying down a Union legal framework on customs infringements and sanctions, which is currently being examined by the Council and the European Parliament. The Directive proposal is the result of a study. There are loopholes in the customs control of imports on the Member States' legal frameworks on customs infringements and sanctions."

[283] For an explanation of the decriminalization's effects on the imposition of customs penalties, see: 55383 /R.U. Agenzia delle Dogane, 24 May 2016. To sum up, before the decriminalization reform, the decisive element between the smuggling and the administrative sanctions was represented by the subjective element of intention. Thus, the application of administrative or criminal liability was entrusted to a criterion based on the intensity of guilt (Court of Cassation December 3, 1983, No. 10478). After the depenalization of customs offences, the present structure of infractions seemed confusing because of the overlap existing between a number of infringements. In the leading case, the Court established that the art. 303 TULD applied, for instance, whereas the declaration was unfaithful due to negligence, ignorance or gross negligence, whilst the imposition of the criminal offense in cases where the declaration was accompanied by fraudulent means. Since the smuggling cases have been almost totally decriminalized and brought back to the status of administrative sanctions, the internal relations between the various cases are now to be resolved in the same manner.

[284]A. Di Tullio D'Elisiis*, Le nuove depenalizzazioni dopo i Decreti Legislativi 15 gennaio 2016,* Edizione 8**.**

which the penalty of the fine is applicable". This approach leads to an unjustified discrepancy in terms of hierarchies of values. How can it be argued that one interest is different in value and thus subject to a different degree of protection? This question raises the difficult issue of the different perceptions about which customs wrong acts are worthy of reprobation. It is hard to believe that the central desideratum of customs infringements and sanctions systems in order to encourage customs compliance is being achieved by a segmented and uninformed approach based on the diverse views of Member States about justice responses. Different responses do not appear compatible with a system of infringements or offences that presupposes the same public interest.[285] Such irreconcilable standpoints will be evident if the application of this system is considered. When someone commits a customs misconduct, that specific breach of customs rule could be sanctioned in one State yet be permitted in another. Furthermore, the judgment of disapproval or reprobation for shared infringements incorporating breaches of customs rules can vary from the imposition of a fine up to punishment by criminal penalties. The most trenchant criticism of the system is that the breach of the same kind of customs rule done in different countries will have responses based on a different moral basis. Thus, the same non-compliant behaviour is treated in very different ways with resulting fragmentation in terms of the different societal perception of misconducts that affect European financial interests. The asymmetry between the Member States' customs infractions and penalties obviously contradicts the idea of a technical one-dimensionality of the Customs Union and undermines its integrity. Of course, an approximation by principles may be a preliminary stage for further cohesion but the assessment of principles is still a matter for Member States. For instance, translation of proportionality into decriminalization policies of some States shows the degree of autonomy enjoyed by the Member States in assessing whether the severity of the punishment is proportionate to the seriousness of the offence.

[285] On European public interests, see: ", Stephen Coutts, 'Supranational public wrongs: The limitations and possibilities of European criminal law and a European community', *Common Market Law Review*, Issue 3, pp. 771–803, 2017

If it is accepted that a customs infringements and penalties system should function to protect a single, significant, valuable European interest, all law should then satisfy the same standards that pertain to the categorization of wrongful conducts and the justifiability of nonpenal or penal sanctions. In order to promote effective deterrence,[286] the reaction should be uniform or the deterrence will be perceived differently. It is the only way to ensure the cohesion of different subsystems with a common goal.

That said, the difficulty in structuring and conceptualizing an European theory of customs infringements partly reflects its composite nature. Thus, its structure should satisfy the multitude of theoretical bases as parameters of their legitimacy.

Furthermore, customs law offers a new frontier for European penalties but it also offers opportunities for collisions between domestic legal systems and European law. Tensions between European competence, sovereignty and domestic legal heritage might easily arise. In the light of national sensitivity over areas such as tax punishment, the debate on customs infringements and penalties has been rather latent.

Moreover, it gets more and more difficult to imagine a single and coherent body of customs enforcement rules that is able to merge the various cross-referenced legal bases and interest whilst simultaneously being respectful of the domestic legal systems. The system of customs infractions and penalties lies at the intersection beween the unicity of a customs union, their fiscal nature and the protection of European financial interests. For this reason, it may be helpful as a starting point to get a picture of the regulatory approach through which European interests are protected, even though the protection provided by EU measures in the financial interests domain has its own limitations because it cannot result in overstepping the limitation of proportionality.

[286] Mikhel Timmerman, 'Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: *Taricco*', *Common Market Law Review*, Issue 3, pp. 779–796, 2016.

12.3 From centrally regulated domestic sanctioning systems to European-oriented penalties: the transition towards harmonized customs penalties

The first section of this research analyzed the current legal framework of customs enforcement and outlined the different approached adopted by Member States with regard to both infringements and penalties. The conclusions reached by commentators and by the EC in its Report have consistently shown that competition between economic operators is distorted because States apply infringements and penalties of a substantial variety to equivalent breaches of customs law. Having highlighted the importance of the regulation and harmonization of customs enforcement, it remains to be seen how the above suggestions will be implemented with a view to developing a sound and viable customs enforcement structure. The second section aimed to set out the contextual basis for developing a principled theory of customs infringements and sanctions.

Methodological challenges arise from the composite nature of customs duties. Here, the input of existing European penalties in the field of financial interests becomes indispensable. However, as mentioned previously, the last few years have seen a significant development and convergence in European punitive law. Despite a general divergence in the penalties' regime for ideological reasons, the ECHR has contributed to align those domestic systems towards an advancement in terms of guarantees. This background seems to be the seed for a coherent development of European customs penalties. Of course, such a move of increased interventionism within tax penalties might face reluctance. For this reason, policy-makers must balance European public interests against the parameters of domestic penalties. This would give primacy to pivotal principles of domestic sanctioning systems and protect their national tax, administrative and criminal law heritage.

13. Regulation 2988/1995: A sanctioning model (or pattern) to follow?

The question arises which European penalties can be used as models for the purposes of this research. The most significant in this regard is Regulation 2988/1995[287] which was recently followed by Directive 2017/1371.[288] This camp is fundamental for two reasons: the first one relates to the European role of customs duties[289] whilst the second one relates to developments of European sanctions in this field. Intuitively, the Customs Union, the own resources represented by customs duties and the need to prevent frauds are interwoven factors, even if independent EU's objectives to pursue.[290] In hypothesizing a uniform customs infringements and penalties system, this is likely to deal with failure to observe the customs rules. Logically, we might assume both breaches resulting in a loss for customs revenue and minor breaches of customs regulation. Even if the European influence on sanctions originated in the area of the Common Agricultural Policy,[291] Regulation 2988/1995 has been depicted as an "imperfect 'code' of the Community punitive power aimed, on the one hand, to enshrine the fundamental principles that must govern the exercise of this sanctioning power and,

[287] A. Maugeri, "Il regolamento n. 2988/95: un modello di disciplina del potere punitivo comunitario, I parte - La natura giuridica delle sanzioni comunitarie", *Rivista Trimestrale Di Diritto Penale Dell'economia*, vol. III, p. 527-559; A. Maugeri "Il regolamento n. 2988/95: un modello di disciplina del potere punitivo comunitario, II parte - I principi", *Rivista Trimestrale Di Diritto Penale Dell'economia*, vol. IV, p. 929-1015, 1999.

[288] Adopted on the grounds of art. 83.2 TFUE. A. Venegoni, Il difficile cammino della proposta di direttiva per la protezione degli interessi finanziari dell'Unione europea attraverso la legge penale (cd. direttiva PIF): il problema della base legale, in Cass. pen., 2015, p. 2442 ss

[289] See also: Special Report No 19/2017, *Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU*, https://www.eca.europa.eu/Lists/ECADocuments/SR17_19/SR_CUSTOMS_EN.pdf: "The current system does not prioritize the importance of customs duties as a source of the financing of the EU budget. The report of the High Level Group on Own Resources The Commission has not made an estimate of the customs gap highlights TOR as a benchmark of true EU revenue. However, the EU has not yet carried out an estimate of the customs gap, there are disincentives for Member States to carry out controls, and the financing of the EU customs programmes does not fully ensure the financial sustainability of the Customs Union or is not always linked to the protection of the EU financial interests."

[290] In this context, the Court of Justice has, however, stated that "The protection of the financial interests of the Community does not follow from the establishment of the customs union, but constitutes an independent objective which, under the scheme of the Treaty, is placed in Title II (financial provisions) of Part V relating to the Community institutions and not in Part III on Community policies, which includes the customs union and agriculture." Case C-209/97, para 29.

[291] J. H. Jans, R. de Lange, S. Prenchal, R.J.G.M. Widdershoven, *The Europeanisation of public law*, 2007,P.232; Rene Barents, 'Community Agricultural Law and The Court's Case Law In 1986-1988', 26 *Common Market Law Review*, Issue 3, pp. 391–421, 1989.

on the other hand, to address those "irregularities" against financial interests".[292] As noted by the scholarship,[293] the development of the abovementioned regulation by the Council and the Commission was a response to "their insufficient jurisdiction to create truly supranational criminal law". In fact, it represents the highest point in the legislation regarding the "administrative sanctions system" created at a European level to combat fraud against the budgetary resources as a matter of extensive public interest.

In this respect, sediments of very diverse "sanctioning" conceptions have settled in this Regulation. It was a first attempt to develop a theory of European infringements and penalties, and for this reason may significantly contribute to the formulation of an European customs infractions and penalties system as well as to its compatibility with European values. Looking at it as the highest point in the Europeanisation of national administrative sanctions,[294] scholars have attempted to marshal the principles stemming from the European measures through which the EU protects its financial interests. The idea was that this framework would contain an implicit spectrum of assumptions and thus principles about what renders the punitive law legitimate. However, many of these provisions seem to have gone unheeded.

[292]According to A. Maugeri, Il regolamento n. 2988/95: un modello di disciplina del potere punitivo comunitario, I parte - La natura giuridica delle sanzioni comunitarie, *Rivista Trimestrale Di Diritto Penale Dell'economia*: "Il regolamento in esame potrebbe costituire, insomma, un primo, pur imperfetto, «codice» del potere punitivo comunitario volto, da una parte, a sancire i principi fondamentali che devono presiedere l'esercizio di tale potere e, dall'altra parte, a colpire le «irregolarità» contro gli interessi finanziari comunitari, comprese, come esaminato, quelle rientranti nel concetto di frode ai sensi della Convenzione contro le frodi comunitarie, garantendo in attesa della tanto auspicata ratifica di questa Convenzione da parte di tutti i paesi membri, un minimo intervento sanzionatorio comunitario con tro tali irregolarità"

[293] U. Sieber, "Euro-fraud: Organised fraud against the financial interests of the European Union", *Crime, Law & Social Change,* 30: 1–42, 1998. Interestingly the author notes that: *"*The "administrative sanctions system" created by the European Commission also has a significant role in the fight against irregularities. The Council and the Commission developed this in response to their insufficient jurisdiction to create truly supranational criminal law. According to a framework regulation passed in 1995 these "non-criminal" sanctions include fines, exclusion from future subsidy schemes, or the obligation to repay sums exceeding the grant by a specific percentage, not including interest. Despite the European Court of Justice's decision in the so-called "Mutton-case"105 being in the Community's favour, it remains nevertheless unclear exactly how far EC jurisdiction extends with respect to the creation of not only administrative and civil law provisions, but also criminal administrative sanctions, and where this border meets that of actual criminal law provisions."

[294] On the European administrative sanctions: Adrienne de Moor-van Vug, Administrative Sanctions in EU Law, *Review of European Administrative Law*, Volume 5-1, 2012; *Administrative Sanctions in the European Union*, Oswald Jansen. On the European administrative law, see: J-B Auby and J. Dutheil de la Rochere, *Droit Administratif Européen*, Brussels, 2007; M. Chiti, *Diritto amministrativo europeo*, Milano, 2013; P. Craig, EU administrative law, Oxford, 2012; HCH Hofmann, GC Rowe and AH Turk, *Administrative Law and policy of the European Union*, Oxford, 2011; J.E. Soriano Garcia, *Procedimiento Administrativo Europeo*, Navarra, 2012.

Firstly, the regulation embraces a wide concept of 'irregularity' as meaning any infringement of a provision of European law resulting from an act or omission by an economic operator, which has or might potentially have the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources (VAT or Customs) collected directly on behalf of the EU, or by an unjustified item of expenditure (structural funds). Legal scholarship[295] thus inferred its main scope of application: predominantly customs, VAT, structural funds and agricultural field. This regulation is laudable since it gives a fundamental parameter to label and identify the central notion of offences in the field of financial interests. A definition of what can be regarded as an infraction is notoriously difficult to find. More specifically, two categories of irregularities are coherently grouped under the heading "Administrative measures and penalties". According to Article 4, as a general rule, any irregularity should involve withdrawal of the wrongly obtained advantage:

— by an obligation to pay or repay the amounts due or wrongly received,

— by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.

These measures provided for in this Article will not be classified as real penalties.

Instead, Article 5 regulates those irregularities, regarded as intentional irregularities or those caused by negligence, which lead to the following administrative penalties:

(a) payment of an administrative fine;

(b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; this additional sum shall be determined in accordance with a percentage to be set in the specific rules, and may not exceed the level strictly necessary to constitute a deterrent;

[295] J. H. Jans, R. de Lange, S. Prenchal, R.J.G.M. Widdershoven, *The Europeanisation of public law*, 2007, p.234.

(c) total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage;

(d) exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity;

(e) temporary withdrawal of the approval or recognition necessary for participation in a Community aid scheme;

(f) the loss of a security or deposit provided for the purpose of complying with the conditions laid down by rules or the replenishment of the amount of a security wrongly released;

(g) other penalties of a purely economic type, equivalent in nature and scope, provided for in the sectoral rules adopted by the Council in the light of the specific requirements of the sectors concerned and in compliance with the implementing powers conferred on the Commission by the Council.

Interestingly, legal commentators[296] have commended the regulation for the various legal safeguards provided, in particular the distinction between the "reparatory" measures not regarded as "real" measures and the "punitive" administrative sanctions, as well as the fact that "punitive administrative sanctions may only be imposed in respect of irregularities caused intentionally or as a result of negligence". With hindsight, this regulation has not formalised the basis of the principles expected to be strictly applied to European administrative sanctions. More specifically, some of the

[296]J. H. Jans, R. de Lange, S. Prenchal, R.J.G.M. Widdershoven*, The Europeanisation of public law*, 2007, p.234. The authors note that "Regulation 2988/95 provides a good overview of the variety of measures and sanctions for which Community legislation provides. Infringements committed intentionally or negligently are generally punished not only by means of reparative measures, depriving those concerned of the illegal advantage, but also by punitive administrative sanctions, such as the administrative fine or exclusion. It is laudable that various legal safeguards are prescribed in cases where administrative sanctions may only be imposed: for example, administrative sanctions may only be imposed if they are provided for by a prior Community decision (protection from retroactivity), there is a limitation period for proceedings, and these sanctions may only be imposed in respect of irregularities caused intentionally or as a result of negligence (fault). Morevoer, the regulation provides for the situation where concurrent criminal proceedings have been initiated against a person in connection with the same irregularity."

principles extrapolated by the literature have not been assimilated in the ECJ's judgments, which in turn are based on different conclusions.

Since its inception, according to the scholarship, there have been encouraging signs that subjective requirements, and thus the principle of culpability, were put on a statutory footing. The structure of the regulation, providing a distinction between intention/negligence-based irregularities and strict irregularities, would support the argument that the principle of culpability seems to be upheld for administrative sanctions. In other words, the distinction between fault-based offences and strict irregularities was interpreted as a signal for a recognition of the principle of culpability for specific violation of rules, displaying certain characteristics. Unfortunately, despite the perceived position of the culpability principle at the apex of European sanctions, the status of the principle remains a controversial issue and, as it will be demonstrated later, its absolute value is rather undermined by the frequency of the breach within criminal and administrative law.

Importantly, in the recital it is established that this Regulation will apply without prejudice to the application of the Member States' criminal law: this does not preclude Member States from adopting a stricter legislation. As a result, the legal interest protected, namely the financial interests of the European Union, may be protected both by criminal law and by administrative law.

In any case, this Regulation forms an important point of comparison and might be taken into account as a model for any structure of punitive offences relating to own resources.

14. In search of a fiscal (customs) system coherent with human rights

Regulation 2988/95 on the protection of European financial interests must count as a preliminary legal source to be taken into account when devising a uniform customs sanctioning strategy. Of course, it is an important prerequisite because the protection of financial interests burdens the customs legislation. However, the real impetus is

linked to a broader process of Europeanisation which has impinged on the appearance of the domestic penalties regime, with specific regard to the tax ones. High-level supranational framework principles are cascaded into domestic and European systems, which in turn implement such rules. In order to illustrate which and how external trends have been transplanted into domestic tax sanctioning systems, a brief survey follows of the various mechanisms in this process of expansive Europeanisation. Two separate theoretical issues emerge within this background but they will end up coalescing. Undoubtedly, the story of the metamorphosis of the Member States' penalties structure is connected to the development of the case law on fundamental rights established by the ECHR. The controversial debate regarding an adequate level of individual rights protection starts from this. Indeed, the protection of human rights has been ensured by the ECtHR, which has been entrusted with interpreting the ECHR and holding the contracting parties to account. The second step is more recent, coinciding with the phase of full recognition of rights, and concerns the adoption of the EU's Charter of Fundamental Rights[297] and its integration into EU primary law,[298] which has led to a greater legal certainty for the protection of human rights.

In fact, the controversy on the legal nature of penalties arose following one of the most important steps in the history of the EU from the perspective of human rights

[297] Pasquale Pistone, "Chapter 5: The EU Law Dimension of Human Rights" in *Tax Matters in Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD. The author points out that *"In general terms, in so far as EU law incorporates the protection of human rights and fundamental principles that are common to the tradition of its Member States into its own legal system, it is also clear that the institutions and bodies of the European Union should respect such standards. Accordingly, all provisions that are specifically directed at the institutions of the European Union, to the extent that they express principles that are related to fundamental rights, must derive their validity from the underlying principle, whether it is contained in the EU Charter, in other provisions of primary EU law, or otherwise remains an unwritten principle. In so far as the validity is derived by a principle of EU law that neither reflects human rights, nor is based on the common constitutional tradition of EU Member States, nothing would prevent the European Union from adopting a stronger protection of such rights than that which is otherwise available in the Member States. However, if that were the case, one would have to consider that where the protection of a right granted by EU law is at stake in a Member State, the application of the EU principle of effectiveness would require that the same level of protection should be applied at national level. This remark implies, in the context of the implementation of EU law, that there may be no different levels of protection in respect of EU law according to whether its effects are produced at national or European level. This matter will be of particular importance in the context of understanding the meaning and implications of the reference to the implementation of EU law by the Member States in conformity with article 51.1 of the EU Charter."*

[298] C. Stark, "Ein Grundrechtskatalog fur die Europaischen Gemeinschaften" (1981), Europaische Grundrechte-Zeitschrift 545,548 where the author stresses the importance of a formal recognition of Human rights, in terms of legal certainty; Jurgen Bast, Armin von bogdandy: *Principles of European Constitutional law*, Oxford, 2010, p. 483.

protection. As noted by the literature,[299] this is especially true when considering that the Charter has the same legal value as the treaty, as expressly provided by the Article 6 of TEU, and thus those rights are legally binding on the EU and its institutions.

Hence, should a common system of penalties and infringement ever come to be formalized in the future, its content will have to take into account the *ius commune* of fundamental rights[300] stemming from the EU Charter.

14.1 European law's compliance with framework of fundamental rights

Conceptually, as mentioned previously, assuming that European customs rules will be enforced by establishing customs sanctions, the European legislator (as well as Member States) must observe the system of fundamental rights[301] protection. Problems might arise if one tries to define which fundamental rights are binding for the European legislator because of the critical status[302] of the ECHR. In fact, the current status of the ECHR is rather delicate. Despite the ongoing process of accession,[303] the ECHR and the case-law of the European Court of Human Rights, are not directly binding for the Union and its institutions. This derives from the fact that the EU is not party to ECHR while the Member States are, and this places them under its under the full jurisdiction. However, the ECHR is part of European public law since Article 6(3) of the TEU refers to fundamental rights, as guaranteed by the ECHR, as part of the general principles of

[299] C. Barnard and S. Peers, *European Union Law*, Oxford, 2017.

[300] Davide Rovetta, Vincenzo Villante, "Harmonization of Customs Law Penalties in the European Union: Have the EU Institutions at All Realized It Is a Multilevel, Multisource Complex System? Some Reflections Based on the Italian Case", (2018) 13 *Global Trade and Customs Journa*l, Issue 7/8, pp. 343–346.

[301] A. Bernardi, *Cinque tappe nel processo di costituzionalizzazione dell'Unione Europea. Note di un penalista,* in Riv. It. Dir. Pubbl. Communit., 2013; R. Cosio, I diritti fondamentali nella giurisprudenza della Corte di Giustizia, in Riv. It. Dir. Lav., 2, 2012; Davide Rovetta, Vincenzo Villante, "Harmonization of Customs Law Penalties in the European Union: Have the EU Institutions at All Realized It Is a Multilevel, Multisource Complex System? Some Reflections Based on the Italian Case", (2018) 13 *Global Trade and Customs Journal*, Issue 7/8, pp. 343–346.

[302] P. Lemmens, "The Relation between the Charter of Fundamental rights of the European Union and the European Convention of human right-Substantive aspects" (2001) 8 MJ; K. Lenaerts, "Exploring the limits of the EU charter of fundamental rights" (2012), *European Constitutional law review*;

[303] For a debate on the accession to the European Convention of Human Rights: P. Gragl*, The accession of the European Union to the European Convention of Human Rights*, Oxford: Hart Publishing, 2013; Anna Francesco Masiero, "L'adesione dell'Unione Europea alla Cedu. Profili penali"*, Diritto penale contemporaneo* 7/8 2017

Community law. This is reflected in the case-law of the ECJ which regularly refers to the ECtHR and its case-law in its judgments but applies them indirectly as part of the general principles of the EU's law.[304] In fact, according to well-settled case-law[305] of the ECJ, fundamental rights form what has been identified as the *ius commune*[306] of human rights as an integral part of the general principles of EU law. For that purpose, the ECJ draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. As Advocate-General Kokott[307] established, Article 6(2) of the TEU represents the codified version of this case-law. The current situation is that, since the EU is not a party to the Convention, the juridisdiction of the ECtHR over the EU is excluded but fundamental rights are applied *de facto* as limits[308] to the acts of EU Institutions and upon the acts of the Member States implementing EU law.

As such, irrespective of whether the enforcement[309] of European law is primarily stemms from the imposition of sanctions prescribed in detail by an European regulation or is bestowed to the discretion of Member States, the penalties regime, if it has a substantive "criminal charge", must incorporate those binding general principles which are at the heart of that branch of law, known as having a truly and substantial criminal nature, and ensure the protection of individuals' fundamental guarantees in criminal proceedings. The binding effects of these individual rights and principles received

[304] Rutili first case

[305] Rutili first case; in *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 4, and *Nold* v *Commission*, 4/73, EU:C:1974:51, paragraph 13; judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41, and *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 283), Hoecst C-46/87 e C-227/88

[306] DE SALVIA, L'elahoration d'un «ius commune» des droits de l'homme et des libertés fondamentales dans la perspective de I'unitP europenne: I'oeuvre acromplie par la Cotnmitsion et la Cour européennes di9 Drorts de l'Homme, in Protecting Human Rights, op.

[307] Opinion of Advocate General C-2454/15 that defines the relationships between Eu and ECHR. Until recently, the European Union did not have the necessary competence to become a Party (accede) to the ECHR. This has now changed with the entry into force of the Lisbon Treaty, on 1 December 2009. The Lisbon Treaty provides such competence and also commits the Union to accede to the ECHR.

[308] C. Barnard and S. Peers, *European Union Law*, Oxford, 2017

[309] B. P. Vermeulen, "The issue of fundamental rights in the administrative application and enforcement of community law" in J.A.E. Vervaele (ed.), *Administrative law application and enforcement of community law in the Netherlands*, Deventer/Boston, 1994,

significant support from the case-law of ECJ, which referred to them as general principles of EU law before the proclamation of the Charter of Fundamental Rights and are now provided by the Charter itself. They include a wide range of rights: the presumption of innocence; the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*); *lex retro non agit*; the principle *lex mitior*; the proportionality of criminal penalties; and double-jeopardy. As said, these principles were heralded as general principles before the adoption of the Charter.

For instance, it is worth mentioning the first fundamental rights judicial review given in *Hoechst*[310]. In 1989, the Court started to develop arguments light in the light of the fundamental rights protection to confirm later that the principles stemming from ECHR not only constitute part of EU law, but above all they are constitutional principles common to the Member States, and in addition they form part of the ECHR acquis. Consequently, national courts applying criminal penalties within the enforcement of EU law are bound at the same time by legal framework conditions of national constitutions and criminal codes, the ECHR, and eventually from the Charter.

On might wonder, instead, what is the added value provided by the proclamation of the Charter. Undoubtedly, the adoption of the EU's Charter of Fundamental Rights can be seen as a substantive move towards the constitutionalisation[311] of fundamental rights. Article 6 of the TEU, establishing that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law", sparked a reflection on the potential impact of this catalogue of human rights, including on tax matters.

[310] Joined Cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities*

[311] S. Peers, T. Hervey, J. Kenner and A. Ward, *The EU charter of Fundamental rights: a commentary*, Oxford: Hart Publishing, 2014; K. Lenaerts, "Exploring the limits of the EU charter of fundamental rights", 2012, *European Constitutional law review*.

The legal scholarship[312] agrees not only on the higher degree of certainty but insists on the legitimating force of fundamental rights, empowered by the EU Charter. In this regard, it has been emphasized by tax and consitutional scholars[313] that the catalogue of "fundamental rights", which was crystallized by the EU Charter, should not be perceived as a strict maximum standard of protection.

In this regard, Pistone emphasizes the expansive fundamental rights method adopted in this context, pointing out that "the EU Charter of Fundamental Rights should therefore not be perceived as a normative cage within which EU law must frame its future development, but rather as a legal instrument to enhance legal certainty and the ability to predict the boundaries of supranational law not just by reference to the ability of EU legal principles to expand, but also by reference to a more precise framework".[314]

Article 6(3) of the TEU proves his assertion by providing far-reaching protection of human rights, not only for those codified by the EU Charter of Fundamental Rights but many other rights – those enshrined in constitutional traditions common to the Member States, and those stemming from the ECHR.

There might be another additional benefit that derives from the Charter, with specific regard to tax systems. These are rules[315] aimed at orienting the actions of European bodies, such as the right to good administration.[316] As noted by theorists,[317] the notion

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[312] C. Stark, "Ein Grundrechtskatalog fur die Europaischen Gemeinschaften" (1981), *Europaische Grundrechte-Zeitschrift* 545,548 where the author stresses the importance of a formal recognition of Human rights, in terms of legal certainty; Jurgen Bast, Armin von bogdandy: *Principles of European Constitutional law*, Oxford, 2010, p. 483.

[313] According to P. Pistone "Certainly, the existing framework of primary law and the EU Charter provide a clear indication that EU law may allow for a stronger protection of rights, as compared to the minimal standards applicable under the ECHR."

[314] P. Pistone: *Principles of Law: Function, Status and Impact in EU Tax Law* - Chapter 5: The EU Law Dimension of Human Rights in Tax Matters – IBFD Online Books (Last Reviewed: 1 April 2014)

[315] P. Pistone referrs to three categories of rules, whose the first and second aim to codify fundamental rights while *"The third category of rules was possibly conceived in order to provide a more specific set of rules for the operation of the European institutions and bodies. Besides the rules that contain instructions, further provisions belonging to this category in fact reflect the values of fundamental principles and human rights and therefore ought to be construed also as a subset of the first two categories. A very good example of the latter rules is the right to good administration, enshrined in article 41 of the EU Charter. This provision in fact includes several human rights and constitutional principles within its wording, namely the right to be heard, to confidentiality and to receive reasons in connection with administration decisions."*

[316] Rob Widdershoven, Milan Remac, 'General Principles of Law in Administrative Law under European Influence', *European Review of Private Law*, Issue 2, pp. 381–407, 2012

[317] C. Barnard and S. Peers, *European Union Law*, Oxford, 2017, P.214

of good administration is still evolving. It seems to be a particulary noteworthy remark since all customs systems must conform to this structural principle.

In conclusion, the first phase in which a set of unwritten guarantees that belonged only to the legal tradition of the Member States (as common principles) was followed by their appearance within the European legal system (as general principles), and ultimately this was replaced by a new phase of rights' crystallization now contained in the Charter of Nice, which today has the juridical value of a treaty. Thus, neither the European legislation nor the tax sector are exempt from their application.[318] The cluster of rights associated with the truly criminal nature of the penalties, namely fair trial, must be assimilated in each sanctions system,[319] despite the formal terminology used.

This brings us to the next section which deals with how and when the imposition of customs sanctions should theoretically require and assimilate the application of certain fundamental guarantees.

14.2 Role of ECHR within fiscal area: Potential impact on customs (fiscal) penalties

Tax and customs disputes,[320] from a theoretical point of view, do not fall under the ECHR. In fact, Article 6(1) of the Convention, by establishing that "[i]n the

[318] On the relationship between customs law and fundamental rights, see: Timothy Lyons, "EU customs legislation has not always been found to be in conformity with fundamental rights,55 so the Impact Assessment wisely refers to the provisions of the Charter of Fundamental Rights of the European Union (CFREU) in the context of the proposed legislation. Assessment wisely refers to the provisions of the Charter of Fundamental Rights of the European Union (CFREU) in the context of the proposed legislation. The freedom to conduct a business (Article 16), the right to private property (Article 17), the right to good administration (Article 41), the right to an effective remedy (Article 47) and the operation of the principle of proportionality in relation to criminal offences (Article 49) may all be engaged."

[319] Exemplary on this point, Dirk van Zyl Smit, *Community Sanctions and European Human Rights Law*: "There can be little doubt that human rights values may be compromised by the implementation of community sanctions in ways that emphasize their punitive aspects and their potential for limiting the risk posed by the offenders subject to them. The challenge is to ensure that those seeking to shape the European dimension of community sanctions are confronted by these arguments when there may be apparent short-term advantages in ignoring them. By placing human rights concerns at the centre of his criminal justice scholarship, Andrew Ashworth has indicated how this can be accomplished and given us much on which to build."

[320] Philip Baker, 'Should Article 6 ECHR (Civil) Apply to Tax Proceedings?' *Intertax*, Issue 6/7, pp. 205–211; Philip Baker, "The "Determination of a Criminal Charge" and Tax Matters", *European Taxation*, December 2007; Baron, J., Poelmann, E., "Tax penalties: minor criminal charges", Intertax, International Tax Review; Dec2017, Vol. 45 Issue 12, p816-821;

determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law", reveals the limitations of the scope of the Convention, which is limited to "civil rights" and any "criminal charge". In practical terms, it means the Court has jurisdiction to review two legal areas in the domain of human rights. At an early stage, the question arose whether these categories of legal issues, covered by the full protection of the Convention, might be extended to include other matters. The idea that there is something about the tax area which renders it by its nature an essential attribute of statehood led the ECtHR in July 2001, in *Ferrazzini v. Italy*, to conclude that:

> [T]he Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, mutatis mutandis, Gasus Dosier- und Fördertechnik GmbH v. the Netherlands, judgment of 23 February 1995, Series A no. 306-B, pp. 48-49, § 60). Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.

Hovever, this approach and the meaning of "civil" still remains disputed among those seeking to grasp the substantive nature behind the terminology that refers to "criminal" and "civil" domains.

Interestingly, the ECtHR has instead chosen to prioritize the principle of substance over form with regard to the concept of "criminal charge". Since the adoption of the Convention, the notion of "criminal" has been extended, expanded and transformed into an autonomous concept, over which Member States and European Institutions have been charged with ensuring respect for. That said, given the interpretation of its

Delphine de Drouas, lsbaelle Sienko, 'The Increasing Importance of the European Convention on Human Rights in the Tax Area', *Intertax*, Issue 10, pp. 332–33; Laurent Partouche, 'The `Right to a Fair Trial': the French Civil Supreme Court Reduces Its Scope of Application to Tax Matters', 33 *Intertax*, Issue 2, pp. 80–85; Mirugia Richardson, 'The EU and ECHR Rights of the Defence Principles in Matters of Taxation, Punitive Tax Surcharges and Prosecution of Tax Offences', 26 *EC Tax Review*, Issue 6, pp. 323–334; Iain Cameron, 'European Court of Human Rights', *European Public Law*, Issue 2, pp. 167–188; Robert Attard, 'The ECtHR's Recent Tax Judgments on the Non Bis in Idem Rule' 26 *EC Tax Review*, Issue 6, pp. 335–338.

extent and the wide variety of disciplinary proceedings involved in the criminal domain, its scope of application is not free from uncertainty.

In *Engel and Others v. the Netherlands*,[321] the ECtHR theorised, within the framework of Article 6 ECHR, an autonomous[322] concept of "criminal" that embraces disciplinary law proceedings which fulfil three-fold criteria of the formal, the qualitative and the quantitative indicators.

Firstly, it is necessary to take into account the qualification of the offence, according the domestic law. In practical terms, the terminology used by the legislation can serve as a reasonable indicator of the criminal nature. However, this condition only has a formal and relative value and constitutes a starting point.

Secondly, it must be taken into account the intrinsically criminal connotation of the penalties imposed as a result of the offence, which must have a punitive, deterrent and repressive nature. This means that sanctions are not intended to *annul* the infraction (for instance, the loss caused by the offence), as a pecuniary compensation for damage, but serve as a punishment primarily to deter re-offending. Finally, it is necessary to consider the severity of the sanction by reference to the maximum potential penalty for which the legislation provides.

The Engel test does not require that all conditions are simultaneously met. The classification is a determining factor since if domestic law qualifies an offence as criminal, then it will automatically fall under the criminal sphere and the guarantees will be applied. Otherwise, this does not preclude its criminal identity. Thus, the Court will look beyond the national classification and appraise the substantive core of the proceeding in question. Furthermore, the second and third criteria (i.e. the nature of the penalty and the degree of severity of the same) are alternatives to each other and not cumulative. As such, the degree of severity may not be necessary where the sanction substantially has a deterrent and punitive nature.

[321] 8 june 1976
[322] (Adolf v. Austria, § 30).

As formulated by the Court, the Engel test is intended to act as a yardstick to evaluate the substantive nature of the several proceedings and as a criterion to establish whether a specific proceeding falls within the criminal heading. That said, the facts of that case admittedly concerned penalties imposed on conscripted servicemen and was treated as disciplinary according to Dutch law. But, undoubtedly, the decision given in Engel has provided the drive towards the spread of the scope of the right to a fair trial beyond the explicit legal framework, restricted by such clause to the criminal context. The Court compromised by stating the criteria for the determination of the reach to which States are bound by fundamental guarantees.

It was not until a later phase that the question arose of whether tax proceedings[323] could fall under the "criminal" phase. The judgments *Janosevic* and *Västberga Taxi* can be the seen as the first attempt to extend the guarantees of the trial right to tax proceedings, and thus be considered the very first step in this direction. In *Jussila v. Finland*[324], the Court bolstered this approach by transposing the criminal guarantees to tax litigation. It found that, even if certain tax surcharges adopted within VAT matters were part of the tax regime, they were imposed by a law whose purpose was deterrent and punitive, thus having a criminal nature.

[323] R. Cordeiro Guerra, *La tutela – processuale e procedurale – del contribuente sottoposto a sanzioni nella giurisprudenza della corte europea dei diritti umani*: "In altri termini, la giurisprudenza inaugurata con le sentenze Janosevic e Västberga Taxi del 2002 potrebbe rappresentare lo strumento per estendere le garanzie del giusto processo ai giudizi tributari, almeno nei casi in cui essi abbiano. ad oggetto sia il fondamento sostanziale dell'imposizione sia l'irrogazione delle sanzioni. Un tale approdo, per quanto non evidenziato in modo diretto dalla Corte, si può tuttavia intravedere nella successiva sentenza Jussila, la quale merita in questo senso un qualche approfondimento maggiore. Con la sentenza sul caso Jussila la Corte EDU ha, nella sostanza, riconosciuto il diritto del contribuente a vedere rispettati i principi del giusto processo nel corso del giudizio avente ad oggetto la contestazione di atti impositivi. Investita del ricorso di un cittadino finlandese, il quale lamentava di non aver potuto usufruire di una serie di diritti (diritto ad una pubblica udienza, diritto alla prova testimoniale) nel corso di un giudizio nazionale avente ad oggetto la maggiore imposta accertata nei suoi confronti e la relativa sanzione irrogata, la Corte di Strasburgo ha affermato un principio innovativo e, in prospettiva, potenzialmente rivoluzionario."

[324] European Court of Human Right, 23 November 2006

15. What are the consequences for fiscal (customs) penalties of a punitive nature?

The significance of the distinction between reparatory sanctions and punitive sanctions is not merely theoretical or nominalistic. The terminology adopted to describe sanctions or duties as "punitive" should in itself be cause for proper consideration due to the resulting legal implications.[325] It is a decisive factor to determine whether a legal issue touches upon those fundamental guarantees whose observance must be guaranteed by the ECtHR.

In the test's application, the evaluation of the penalties' nature is inherently fit for purpose as it privileges the substantive qualitative nature of the penalties, bearing in mind Member States' implementation or aspiration for depenalization reforms. In fact, the decriminalization[326] denotes the process by which a criminal conduct is re-classified and removed from the *cadre* of criminal law but it does not impede the penalty from remaining truly punitive. The argument which discerns a punitive core also in depenalized sanctions finds support in *Otzurk*[327]. Interestingly, the debate between two views of the effects of decriminalisation on the nature of sanctions emerges from this case.

While the first school of thought, represented by the government, insisted on the "depenalisation" reform brought about by the 1968/1975 Act as the clearest proof of the removal of the offences in question from the criminal law limb, others looked at this as a hint of a potential criminal nature. In this respect, Judge Matscher, in his

[325] One of the first author raising these doubts: p.231, "In order to ensure a more effective use of sanctions, the Community has, since the mod 1980's, increasingly prescribed more or less specific sanctions which the Member States must impose when Community rules are infringed. In the first place, there are reparatory sanctions designed to restore the situation existing before the infringement of the legal order; for example Community legislation often provides for an action to recover European funds that have been wrongly paid. In the second place, Community legislation increasingly requires the imposition of punitive administrative sanctions. These sanctions go futher than requiring reparation and are designed to punish and deter. The most familiar of this kind of sanction is the administrative fine. The importance of the distinction between reparatory and punitive sanctions is that the European Court of Human Rights has ruled that the imposition of the latter, or at any rate the administrative fine, may cause the offence in question to constitute a criminal charge for the purposes of the first paragraph of article 6 ECHR. Consequently, proceedings leading to the imposition of a punitive sanction must fulfil the requirements of the second and third paragraphs of article 6 and article 7."

[326] Council of Europe Report on Decriminalization (1980) nr. 17.

[327] Case of Öztürk V. Germany (Application no. 8544/79), 21 February 1984

dissenting opinion, pointed out that the value of regulatory offences would not amount to criminal ones since this seems the objective and the consequence of depenalisation. He therefore concluded that the nature of the offence itself has changed due to the fact that "the moral verdict is no longer the same, in other words, a "regulatory" offence no longer carries the blame which attaches to a crime".

Reasonably, the Court claimed the autonomous concept of criminal on which the European Convention is based by asserting that a mere re-classification of an offence as not-criminal would automatically exonerate the States from the application of the Convention's procedural guarantees.

However, one of the weaknesses in this judgement is the court's failure to draw a clear distinction between the punitive and non-punitive "character" of sanctions. Whilst it was conceded thar the penalties regime was changed and limited by *Geldbussen*, the Court asserted that its punitive character was still unaltered, which is the customary distinguishing feature of criminal penalties. The court attributed the recognition of the punitive nature to the following:

> The rule of law infringed by the applicant has, for its part, undergone no change of content. It is a rule that is directed, not towards a given group possessing a special status - in the manner, for example, of disciplinary law - but towards all citizens in their capacity as road-users; it prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive. Indeed, the sanction - and this the Government did not contest - seeks to punish as well as to deter. It matters little whether the legal provision contravened by Mr. Öztürk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic. These two ends are not mutually exclusive. Above all, the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature.

These passages indicate a tautological conclusion rather than a definitional distinction to determine the content of the punitive character. The concern arising from this decision is that the failure to fully identify the legal characteristics of the punitive or non-punitive casts doubt on the whole sanctioning legal system.

The Court does not offer the parameters to define punitive or deterrent sanctions. There remains no clear definition of what punitive sanctions are; a case-by-case approach[328]

[328] See: *Human Rights and Taxation in Europe and the World* - Part Seven: The Impact of Human Rights on Tax Procedures and Sanctions - Chapter 26: The Concept of Criminal Charges in the European Court of Human Rights Case Law – IBFD Online Books (Last Reviewed: 15 June 2011)

seems to have been taken in determining the purpose of each measure. In *Bendenoun*,[329] German tax surcharges have been deemed to have a deterrent and punitive purpose on the basis of "their being imposed under a general" rule addressed to all citizens in their capacity as taxpayers and not a given group with a particular status. Moreover, the Court,[330] without making a clear distinction, held that the tax surcharges were intended not as pecuniary compensation for damage but essentially as a punishment to deter reoffending. Controversially, the Court has taken into account that, in case of failure to pay the tax surcharge, the recipient is liable to be committed to prison. However, this component (type of penalty, namely being committed to prison) appears to have carried no weight in other judgments where, in contrast, the Court did not find it decisive. In *Västberga Taxi Aktiebolag And Vulic v. Sweden*,[331] the Court rejected the argument[332] according to which the threat of a prison sentence, in case of non-payment of tax surcharges, is a determining factor for the classification of an offence as "criminal" under Article 6. Furthermore, the conclusion revolved around the fact that the present tax surcharges are not meant to serve as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer's conduct. Rather, it is argued that the main purpose of the surcharges was strictly related to their ability to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The Court inferred the deterrent and punitive purpose of the penalties, which is a character discernible in criminal penalties. In *AP MP and TP*,[333] fines for tax evasion were considered punitive and not simply compensation. It was undisputed that the Finnish administrative proceedings on tax surcharges fell within the domain of criminal law and thus under the *ne bis in*

[329] Judgment of 24 February 1994

[330] Again, the following observations might be controversial: "Lastly, in the instant case the surcharges were very substantial, amounting to FRF 422,534 in respect of Mr Bendenoun personally and FRF 570,398 in respect of his company (see paragraph 13 above); and if he failed to pay, he was liable to be committed to prison by the criminal courts (see paragraph 35 above). Having weighed the various aspects of the case, the Court notes the predominance of those which have a criminal connotation. None of them is decisive on its own, but taken together and cumulatively they made the "charge" in issue a "criminal" one within the meaning of Article 6 para. 1 (art. 6-1), which was therefore applicable."

[331] Judgement of July 2002

[332] see the Lauko v. Slovakia judgment

[333] Judgement of 8 August 1997

idem principle. Similarly, the decision in *Nykänen v. Finland* contains the spirit of this line of thinking, which is focused on the qualitative nature of the measure in question rather than the *quantum* issues. It was held that the Finnish administrative proceedings on tax surcharges of EUR 1,700, fell within the domain of criminal law and thus under the *ne bis in idem* principle.

The previous rulings have two main virtues: harmonizing the different countries' views of relevant substantive issues, and reflecting a reorientation of criminal and administrative policies. It is, however, important to emphasize that this case-law displays the generous view of the Court to extend fundamental guarantees. One of the criticisms of this approach was raised by Judge Liesch[334] in his dissenting opinion: "despite the significant peculiarities of this legal institution, the Court's judgment seems to reflect a desire to include the "offence" under the heading of "criminal offence" at all costs, with the sole concern of bringing the Convention's procedural guarantees into operation". This passage is indicative of this expansive view of criminal substance. Despite the counterarguments, the substantive approach of the ECHR is more than laudable as it undoubtedly attests to some extent to the substantial attempt to pry loose the criminal elements from the formal appearance of domestic penalties regimes.

While the depenalization process might be a warning element of the punitive nature of the sanction, grasping and capturing the true nature of European sanctions is more difficult. However, there are notable examples where the Court has undertaken full investigations into existing penalties. Indeed the ECJ has as yet decided few cases in which the issue was about identifying the nature of sanctions, as being technically and purely European.

Some attention has been paid to the case-law that developed around the issue of whether sanctions laid down in rules under the Common Agricultural Policy should be considered as having a criminal nature and thus be subject to the guarantees provided

[334] Otzurk

by ECHR. The research will now consider when the ECJ had occasion to determine the legal nature of European sanctions.

One of the first issue in which the European Court of Justice[335] had the chance to determine the legal nature of European sanctions, was related to the measure of the loss of a security or deposit. This administrative means has always brought up a number of problems. Currently, Regulation 2988/95 includes the loss of security or deposit within both the reparatory and punitive administrative measures that may be imposed in case of irregularities committed intentionally or as a result of negligence. The earliest case-law on the nature of the loss of security, is still deeply impacting the recent judgements, in spite of the fact that it is questionable and controversial. This can be illustrated by considering the cases of *Internationale Handelsgesellschaft mbH*, *Maizena* and *Germany vs Commission*.

In *Internationale Handelsgesellschaft mbH,* the Court rejected the argument that the the system of deposits as instituted by the third subparagraph of Article 12(1) of Regulation No 120/67 was not valid for several reasons, including the breach of fundamental rights. The plaintiff argued that the Council or the Commission did not have the competence to impose sanctions of a penal nature, since the loss of the deposit,[336] which is the consequence of failure to fulfil the obligation to import or export, was substantially a fine or a penalty. This passage deserves some attention because it is fundamental to understand the reasoning of the Court. In those years, the ECtHR case law on the criminal limb was not firmly established like it is nowadays. Thus, the Court was being just and fair in declaring that the system of deposits could not be equated with a penal sanction since it was merely the guarantee that an undertaking voluntarily assumed would be carried out. But, one aspect must be borne in mind: in this case, the Court was urged and more focused on legitimising the

[335] C Case C-199/92P, Huels v. European Commission, [1999] ECR 4287, paragraph 150
[336] Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967

sanctioning competence (more than evaluate the nature of the loss of a deposit), within a legal framework which was far from searching the substantive core of sanctions.

Following this approach, in *Maizena*, the dispute was over whether Article 38(1)(c) of Regulation No 3183/80, which required the provision of fresh security after the release of security lodged earlier in connection with an export licence, was to be regarded as having a criminal nature. In that regard, the Court, finding that the loss of security did not have a criminal purpose, held that operators can freely decide to benefit from the special arrangements involving advance restitution of their security:

> "The penalty is thus no more than a counterbalance to the early release of the security, which is not released definitively but merely provisionally and on condition that the undertaking to export is carried out within the, timelimits laid down. Its only effect, if the time-limit for exportation is not complied with, is to place the trader having had the benefit of the early release of his security in the same economic position as a trader who opted for the general rules, under which the security lodged in connection with the export licence is released only after the actual exportation within the time-limit of the goods at issue. Thus in a system involving advance release of the security, the penalty constitutes the corollary of the system of security and is intended to achieve the same objectives as the security itself. That sanction is imposed at a flat rate and is independent of any culpability on the part of the trader. It is therefore an integral part of the system of security at issue and is not criminal in nature."

In reaching this conclusion, the Court has not clearly delineated the factors relevant to reject the criminal nature and seems to extrapolate the criminal nature on the grounds of the absence of subjective elements (contrary to what the ECHR's jurisprudence[337] emphasized many years later: that the lack of subjective elements does not necessarily deprive an offence of its criminal character since criminal offences based solely on objective elements may be found in the laws of the contracting states).

In *Commission vs Germany*[338], the Court consolidated the abovementioned approach despite the fact that the type of administrative measure in question was different from the loss of security or deposit.

The issue of the nature of these sanctions became somewhat more complicated recently, due to the adoption of Regulation 2988/95 and the exegesis of the ECHR which conceives of a specifically autonomous concept of "criminal" to make them fall

[337] see the *Salabiaku v. France* judgment of 7 October 1988, Series A no. 141-A, p. 15, § 27, confirmed by *Västberga Taxi Aktiebolag And Vulic V. Sweden*

[338] C-240/90 *German v. Commission (Sheepmeat).*

under its competence. In undertaking the "criminal nature" inquiry, the Court does not seem to adopt the same generous approach of the ECHR which tends to expand the criminal sphere. The ECJ's view does not seem to correspond either with the classification given by the Regulation 2988/95 on the protection of European financial interests or substantively with the view of the ECtHR. The case of *Kaserei*[339] can be regarded as one of the most pertinent examples of the blurring between the penal and the non-penal models of sanctions. The dictum in *Kaserei* reflects an understanding of the criminal charge which is apparently in accordance with the requirements articulated by the ECtHR. Indeed, the conclusions are based on the same premises drawn by the ECtHR but the results are not alway coherent and might be disputed. For instance, the Engel test gives relevance to the purpose as one of the main factors to be taken into consideration in disclosing the true core of penalties while it is interpreted differently by the ECJ. The *Bundesfinanzhof* made a reference to the ECJ enquiring, *inter alia*, the nature of the administrative measures imposed when an exporter requested a higher export refund. More specifically, the first, third and eighth subparagraphs of Article 11(1) of Regulation No 3665/87 provide as follows:

> Where it has been found that an exporter, with a view to the granting of an export refund, has requested a refund in excess of that applicable, the refund due for the relevant exportation shall be the refund applicable to the actual exportation reduced by an amount equivalent to:
>
> (a) half the difference between the refund requested and the refund applicable to the actual exportation;
>
> (b) twice the difference between the refund requested and the refund applicable, if the exporter has intentionally supplied false information.

Here, the value-based sanction deprives the exporter more than his/her illicit value since he was demanded to repay the excess and, additionally, to pay half the difference between the refund requested and the refund to which he was entitled. Thus, theoretically, the sanction goes beyond mere reparation.

In a case such as this, the Court, having prior rulings about the nature of sanctions established under the Common Agricultural Policy, expressly rejected the punitive nature. In making such a finding, the Court basically reaffirmed the interpretation

[339] C-210/00

adopted in *Maizena*[340] and *Germany vs Commission*[341], according to which the criminal nature was denied in case of the loss of security, imposed at a flat rate and independently of any culpability on the part of the trader, and the temporary exclusion of a trader from the benefit of a scheme of aid.

Thus, according to the Court, it was equally clear to determine the nature of the sanctions in question. The Court argued that there were no reasons to provide a different response and to assert the criminal nature of the sanctions, but without adducing evidence to prove it. The rationale behind this reasoning can be disputed. It is difficult to read this *ratio* as anything other than consolidating the previous case-law and avoiding the application of stronger guarantees.

As previously mentioned, the earlier legal scholarship which scrutinised Regulation 2988/1995 proposed a reconstruction that distinguishes two kinds of administrative measures to be imposed in case of irregularities that have the effect of prejudicing the European budget: reparatory measures and punitive measures. This inference is drawn from the basic fact that the punitive measures are subject to different principles, according to the Regulation, because the imposition of punitive administrative penalties would go further than estoration. Above all, the distinction is significant because the imposition of the latter may cause the offence in question to constitute a criminal charge, according to Article 6.

As it will be shown later, the Court does not seem to have adhered to the reconstruction proposed by the legal scholarship. Indeed, the Court, among other things, invoked the preamble to Regulation 2988/95 providing that "Community measures and penalties laid down in pursuance of the objectives of the Common Agricultural Policy form an integral part of the aid systems" and that "they pursue their own ends" whilst glossing over the fact that, according to it, the measure represented by "exclusion from the

[340] Para 13
[341] Para 25

advantage for a period subsequent to that of the irregularity" falls under those measures classified by the legal scholarship as punitive administrative measures.

Instead, the trend evinced in earlier decisions appears to be the main factor on which the decision is based but this line of argument is not at all convincing. In undertaking the inquiry on the criminal nature, the Court, referring to the earlier judgment of *Germany vs Commission*, restated that the temporary exclusion from the benefit of a scheme of aid is designed "to combat the numerous irregularities which are committed in the context of agricultural aid, and which, because they weigh heavily on the Community budget, are of such a nature as to compromise the action undertaken by the institutions in that field to stabilise markets"[342]. Interestingly, this legal reasoning expressed in *Germany v Commission* was re-adopted in a different historical context.

It can be argued that last arguments are not sufficient to demonstrate non-criminal nature, neither is the fact that Regulation 3665/87, as modified by Regulation 2945/94, states in the first recital in its preamble that:

> the Community rules provide for the granting of export refunds on the basis of solely objective criteria, in particular concerning the quantity, nature and characteristics of the product exported as well as its geographical destination; whereas in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified; whereas, to that end, provision should be made for the recovery of amounts unduly paid and sanctions to encourage exporters to comply with Community rules.

The fact that the amount of the penalty was calculated on the basis of the amount which would have been unduly received by the trader if the irregularity was not found out was rationally sufficient, according to the Court, to conclude it was an integral part of the export refund scheme in question and thus not of a criminal nature.

The later decision of *Bonda*[343] is the key-case through which the Engel parameters were adopted as a starting point for determining whether criminal guarantees were applicable. The Court's assessment was carried out on the nature of those measures, envisaged by Regulation 1973/2004, consisting in the exclusion of an aid scheme for the year in which the farmer submitted a false declaration About the eligible area and,

[342] C-240/90 *German v. Commission (Sheepmeat),* para 39.

[343] Katalin Ligeti, Vanessa Franssen**,** *Challenges in the Field of Economic and Financial Crime in Europe and the US*, 2017.

simultaneously, a reduction of the aid he could claim within the following three calendar years by an amount corresponding to the difference between the area declared and the area determined, in order to establish whether they constitute truly criminal penalties. The Court insisted on the potential imposition of the penalties only to economic operators who have applied for an aid scheme set up by that Regulation, and that the purpose of those measures is not punitive, "but is essentially to protect the management of European Union funds by temporarily excluding a recipient who has made incorrect statements in his application for aid". The latter argument is not persuasive in denying the punitive character of the sanction. Again, the suspicion arises that this is a deterrent mechanism rather than a reparatory one. Legal scholarship,[344] in strong criticism of the decision, noted that the non-punitive character of this penalty was not beyond all doubt by arguing that it is not convincing to consider the administrative measure in question less severe than an administrative fine since the economic activity of economic operators is significantly influenced by financial aid schemes. Protecting the management of European funds and fighting the numerous irregularities which are committed in the context of agricultural aid seem to be objectives difficult to reconcile with a neutral and non-punitive response. It is evident from these judgments that opposite conclusions, in favour of the punitive nature, could have been reached by simply applying the same motivations.

15.1 Brief remarks

As a result, it is hard to seek to specify the kind of measures identifiable as having a pure deterrent or punitive purpose. The ECJ remains oddly unclear in its statements on the nature of the sanctions established within the agricultural field, merely alluding to

[344] Katalin Ligeti, Vanessa Franssen, *Challenges in the Field of Economic and Financial Crime in Europe and the US*, 2017, p.219: "Since the income of economic operators (farmers, producers etc) crucially depends upon the benefits to be granted by financial aid schemes, it seems doubtful whether the exclusion from such aid scheme can be considered less severe than an administrative fine. The non-punitive character of this penalty, thus, is not beyond all doubt. The Court of Justice, however, clearly favoured a restrictive understanding of ne bis in idem principle in order to mantain the effectiveness of the double-track law enforcement system, ie a parallel application of criminal and administrative sanctions"

tautological arguments. When ruling on authentically European sanctions such as those adopted in the Common Agricultural Policy, the Court seems too insistent on following earlier decisions. The key takeaways of the case-law can be summarised as follows:

- The Court generally emphasizes the central role and decisive functions of the penalties system, imposed in the context of the Common Agricultural Policy, as the specific administrative instruments that form an integral part of the scheme of aid and which are intended to ensure the financial management of Community public funds.

- The Court's intention seems to be to consolidate the pre-existing jurisprudence of the ECJ and affirm the status quo with regard to sanctions adopted in the context of the Common Agricultural Policy, without operating any sort of distinction between the different types of penalties. The ECJ evidently favours a restrictive understanding of the punitive nature in this context.

- As far as penalties provided in agricultural policy, the ECJ seems to have developed an inflexible legal doctrine of its own, without changing its overall orientation (despite the process of revisionism affecting the true or not true nature of administrative sanctions). The final outcome is a standardized position which labels and bolsters the non-criminal nature of the European administrative sanctions within the Common Agricultural Policy, irrespective of a substantive assessment of the nature of the sanctions.

As a consequence, when it comes to sanctions intended to protect interests within Common Agricultural Policy, the reasons are not always coherent. The hermeneutical discourses proceed in such a way that they arrive at the opposite conclusions, based on the same premises of the ECtHR. One of the weaknesses in these judgments is the Court's failure to draw a clear distinction between punitive and non-punitive measures. This view seems deeply grounded in previous case-law in that it disregards any other assessment of the nature of the sanctions. The foregoing issues therefore make it more

difficult to apply the Engel test since the content of the "punitiveness" of the measure is still controversial and unsettled.

15.2 Tapping the potential punitive nature of customs penalties: which scenario to imagine?

The ECJ's ambiguous arguments in decisions involving the nature of the abovementioned penalties make it difficult to ascertain its impact on the structure of customs penalties as it is hard to infer and speculate on the potential nature of customs penalties. No conclusive argument allows to establish the precise nature that customs penalties would and should have. In theory, one might arguably arrive at a mixed conclusion. Nonetheless, the foregoing consideratons might be helpful in seeking the potential function of customs penalties function and conceptualizing their structure. Grasping their nature seems of crucial importance for the European legislator since the key principles of customs penalties will differ radically, depending on their punitiveness. But this is also the most pressing difficulty. While currently each legal system has been left to puzzle about the penalties to be inflicted to protect financial interests, the harmonization of customs infringements and penalties seems to be predictable. This will require the European legislator not only to coordinate the complicated system of interacting norms but also take a decision on the substantive core of customs penalties. Depending on the core of penalties, the theoretical model of sanctions might be required to incorporate a more robust view of fundamental rights protection in this context. However, predicting the logic behind the evolution of the customs principles is rather difficult. One might rely on the approach taken within the agricultural sector, frequently mentioned as the outstanding example for customs legislation. The above case-law on the European sanctions within the Common Agricultural policy is bound to create confusion in light of the distinction that is drawn between punitive and non-punitive. In fact, the common denominator among the two penalties regimes is to be found in the protection of financial interests. In other words,

the substantial interest in expressing condemnation for the irregularities affecting, potentially or directly, the European budget is the same underlying the customs penalties or the penalties within the Common Agricultural Policy. However, the legal consequences from this parallelism seem difficult to justify. It is hard to imagine how a non-punitive response[345] could be justified in case of customs infractions in terms of efficiency and effectiveness. Indeed, in this particular instance, considering the fiscal nature, a more pressing social need[346] to ensure the effectiveness of the customs penalties regime appears inevitable. As suggested by scholarship,[347] the sanctioning policy is likely both to punish those responsible for unlawful conduct and prevent the recurrence of the same, and to deter other traders from engaging in prohibited conduct. Reaching the opposite conclusion, it would be hard to imagine such as scenario based on reparatory measures.

On the other side, the interventions by the ECtHR do bring a stark change in conceiving criminal and administrative law, by adopting a reading of the 'criminal matter' detached from formal labels to focus instead on the character of the sanction, on its severity, and on its repressive and general-preventive purpose. The conclusions that have been drawn from the case-law have emphasized that classificatory labels like "administrative" and "criminal", along with variants such as "semi", "quasi", "purely",

[345] On this point, see M. Scuffi - G. Albenzio - M. Miccinesi, *Diritto doganale, delle accise e dei tributi ambientali*, Milano, 2013, p. 851 "Il sistema sanzionatorio in materia di dazi e accise rispecchia la fisionomia generale degli istituti punitivi. Tuttavia, trattandosi di tributi che incidono sugli scambi nel Mercato interno dell'Unione Europea, la funzione sanzionatoria asserve interessi trascendenti le logiche puramente o prevalentemente finanziarie che ispirano altre tipologie di tributi. Nel caso specifico dei dazi, peraltro si è in presenza di prelievi costituenti "risorse proprie" dell'Unione Europea, caratteristica che impone agli Stati Membri di reprimere le condotte illecite incidenti sugli interessi finanziari dell'Unione Europea con modalità pari a quelle impiegate per contrastare gli illeciti rilevanti su un piano puramente interno. In questo scenario, pur nell'autonomia riconosciuta agli Stati membri nell'individuazione dei regimi sanzionatori, nonché delle procedure per la relativa applicazione, si profila un interesse "comunitario" alla corretta attuazione delle sanzioni, presidio, esse stesse- per i profili deterrenti, ex ante, e repressivi, ex post alla più corretta attuazione dei trobuti europei". Actually, the terminology adopted by the French Code of Douanes regulates customs offences and penalties under the heading "Dispositions répressives, Section 1: Classification des infractions douanières et peines principales" in Chapter VI. See: E. Belfayol, *Le contentieux pénal douanier*, 2016.

[346] On tax evasion and deterrence, see: p.1115, *Dimensions of tax design*, Oxford. "The canonical economic model of tax evasion (deterrence model) presumes that the taxpayer's actions are not motivated by morality or duty but are restrained only by the possibility of punishment. The seminal formulation is due to Allingham and Sandmo (1972), who, in the context of an income tax, modelled the punishment as a fixed probability that any income understatement would be detected and and subjected to a proportional penalty over and above payment of the outstanding tax liability".

[347] M. Scuffi - G. Albenzio - M. Miccinesi, *Diritto doganale, delle accise e dei tributi ambientali*, Milano, 2013

attached to the domestic penalties[348] do not susbstantively connote the charge or its nature. Most of these ambiguities have been exposed in several landmark decisions.

The academic literature[349] has been committed to the long-standing issue of the nature of adminstrative penalties and regulatory offences and, in this field, Feuerbach[350] is one of the main pioneers. Significantly, in the 20th century, Goldschmidt entitled his monograph *Das Verwaltungsstrafrecht*[351] which means "the administrative penal law". The truth is that the range and the variety of penalties does not allow their nature to be qualified on the basis of their categorization. On the other hand, the rejection of the traditional classification has led the jurisprudence to determine the substantive content of the "criminal charge". Many attempts to demarcate the boundary between criminal

[348] *Surcharges and Penalties in Tax Law: 2015* EATPL Congress Milan, 28-30 May 2015, (ed. by Roman Seer, Anna Lena Wilms) IBFD, 2016.

[349] F. Bricola, "La depenalizzazione nella legge 24 novembre 1981, n. 689: una svolta «reale» nella politica criminale?", in *Scritti di diritto penale*, I, 2, edit. by S. Canestrari ed A. Melchionda, Giuffrè, Milano, 1997, pp. 1439 ss. F. Bricola, "Tecniche di tutela penale e tecniche alternative di tutela", in *Scritti di diritto penale*, I, 2, edit by S. Canestrari ed A. Melchionda, Milano 1997, pp. 1475 ss; M. Delmas-Marty, *I problemi giuridici e pratici posti dalla distinzione tra diritto penale e diritto amministrativo penale*, in *Riv. it. dir. e proc. pen.*, 1987, pp. 731-776; E. Dolcini, *Sui rapporti fra tecnica sanzionatoria penale e amministrativa*, in *Riv. it. dir. e proc. pen.*, 1987, pp. 777-797; Aa.Vv., *L'illecito penale amministrativo. Verifica di un sistema (Profili penalistici e processuali)*, Atti del Convegno (Modena, 6-7.12.1985), CEDAM, Padova, 1987; E. Dolcini, "Sanzione penale o sanzione amministrativa: problemi di scienza della legislazione", *in Diritto penale in trasformazione*, edit. by G. Marinucci ed E. Dolcini, Giuffrè, Milano, 1985, pp. 371 ss; L. Eusebi (edited by), *La funzione della pena: il commiato da Kant e da Hegel*, Giuffrè, Milano, 1989 L. Eusebi, *La pena in "crisi". Il recente dibattito sulla funzione della pena*, Morcelliana, Brescia, 1990 L. Eusebi, "Può nascere dalla crisi della pena una politica criminale? Appunti contro il neoconservatorismo penale", in *Dei delitti e delle pene*, 1994, pp. 83 ss. L. Eusebi, "Appunti critici su un dogma: prevenzione mediante retribuzione", in *Riv. it. dir. e proc. pen*., 2006, pp. 1157 ss. L. Eusebi, "Appunti minimi di politica criminale in rapporto alla riforma delle sanzioni penali", in *Criminalia*, 2007, pp. 185 ss. L. Eusebi, "La riforma ineludibile del sistema sanzionatorio penale", in *Riv. it. dir. e proc. pen*., 2013, pp. 1307 ss. G. Marinucci-E. Dolcini, *Diritto penale in trasformazione*, Giuffrè, Milano, 1985; P. Nuvolone, voce Reati (Depenalizzazione di), in Noviss. Dig. it., Appendice, VI, Utet, Torino, 1986, pp. 294 ss; T. Padovani, "La distribuzione di sanzioni penali e sanzioni amministrative secondo l'esperienza italiana", in *Riv. it. dir. e proc. pen*., 1984, pp. 952 ss.; T. Padovani, "Teoria della colpevolezza e scopi della pena", in *Riv. it. dir. e proc. pen*., 1987, pp. 798 ss. T. Padovani, "La disintegrazione attuale del sistema sanzionatorio e le prospettive di riforma: il problema della comminatoria edittale", *in Riv. it. dir. e proc. pen.,* 1992, pp. 419 ss. F. Sgubbi, "Depenalizzazione e principi dell'illecito amministrativo", in Indice pen., 1983, pp. 253 ss.; G. Vassalli, *La potestà punitiva*, Utet, Torino, 1942; G. Vassalli, "Funzioni e insufficienze della pena", in *Riv. it. dir. e proc. pen*., 1961, pp. 297 ss.

[350]See: P. Johann Anselm Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (1812), § 22; P. Johann Anselm Feuerbach, *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts*, Vol. II (1800), 221–223. For a study on the divide between traditional criminal law and the law governing regulatory offenses, in the light of philosophical developments: D. Ohana, "Regulatory Offenses and Administrative Sanctions: Between Criminal and Administrative Law", (Edited by Markus D. Dubber and Tatjana Hörnle), *The Oxford Handbook of Criminal Law*, 2014.

[351] James Goldschmidt, *Das Verwaltungsstrafrecht* (1902). See also: James Goldschmidt, "Begriff und Aufgabe eines Verwaltungsstrafrechts," (1903) *Goltdammer's Archiv für Strafrecht*; James Goldschmidt, "Das Verwaltungsstrafrecht im Verhältnis zur Moderne Staats- und Rechtslehre," in *Festgabe für Richard Koch* (1903); James Goldschmidt, "Was ist 'Verwaltungsstrafrecht'?," (1914) *Deutsche Strafrechts-Zeitung*.

and non-criminal nature have led to the formulation of certain parameters, even though the use of a case-by-case approach seems to have prevailed. Despite the Engel test, there is controversy about the conditions that must be satisfied to qualify sanctions as punitive and categorize them as truly criminal. In this context, the challenge of the European legislator will be to ensure an internal and external coherence of customs penalties, with specific regard to the true nature to assign. A theory of customs infractions and penalties must be sensitive to these considerations by predicting the nature of the punishment. In fact, once a penalty has been labelled as having a truly criminal nature, the legal rules and principles applicable to it clearly and drastically change. In conclusion, despite the European competence with respect to the creation of not only administrative and civil law provisions, but also criminal administrative sanctions, it remains nevertheless fundamental to identify the potential nature of customs sanctions since the punitive area requires the application of criminal law provisions. Hence, the resolution of this point is not without any important implications. It implies the application of substantial rights. For these reasons, the political choice of weighing the importance of the involved interests must be done by the European legislator.

16. Distinction as distortion to the competition of traders within the Internal Market

In response to the need for compliance and harmonization due to the enforcement deficit within the Member States, who are individually accountable for ensuring compliance with customs rules, since 1980 the European legislator has increasingly devoted attention and attempted to intervene in the harmonizing process of customs penalties. But there are obvious reasons why Member States have been reluctant to take this further step. There has been no acceptance of European interference in national sanctioning autonomy and the issue was left in limbo until the recent proposal. The preceding analysis based on a theoretical differentiation between antisocial and

punishable behaviours regarding customs rules brings up a number of questions. Chief among these is: what are the consequences of this differentiation?

Knowledgeable commentators[352] have stressed the negative consequences of this "disharmonization" for an an effective system based on a single market. The greater the extent of the diversity, the greater the chances of the Internal Market being affected by distortions subject to different sanctioning interventions. The distortions to the Internal Market constitute the greatest failure of this system. Anaboli[353] has persuasively criticized the current system, emphasizing how different offences and penalties that do not correspond to the economic reality might generate additional costs for companies and oblige them to engage in 'penalty shopping'. The combination of these phenomena is destructive of the integrity and unity of the Customs Union. There are obvious commercial reasons why traders may be reluctant to carry out import-export business in some jurisdictions rather than others. Given that States offer alternatives in terms of penalties, which directly affect business activities, it is not hard to imagine that the pendulum swings firmly in favour of the most attractive solution to minimise potential risks and costs (or avoid reputational damage). The effect of the distinction heavily impacts upon certain trade markets. By allowing states to enjoy the discretionary power in structuring their sanctioning policy, some Member States have run the risk of losing jobs in customs administration due to the distinction of trade policies.

The generalised perception that this system which is based on different penalties is not suited to the customs sector is cause for widespread concern. Other differences in the customs policy which give rise to potential tensions between Member States have been

[352] See the detailed arguments in: T.Lyons in *Why Europe needs a legal framework for customs sanctions Session 2: The impact of the absence of an EU legal framework for customs sanctions on the single market and on the economic operators*.; Maurizio Gambardella, Davide Rovetta, 'A New Creative Ruling of the Italian Supreme Court of Cassation on Customs Penalties: Time for a EU Harmonized Customs Regime?' (2013) 8 *Global Trade and Customs Journal*, Issue 9; P. Muniz, "EU harmonization of customs infringements and sanctions is needed, but the EU must proceed with caution", *Global Trade and Customs Journal* (Issue 7/8, 2018); H.M. Wolffgang, Kerstin Harden, Harmonisierung der Sanktionen in der Zollunion, *in AW-Prax* 2014, S. 1.

[353] P. Anaboli, "Customs Violatons and Penalties in Europe: Harmonization on the Horizon?", *GTCJ* 2010, Vol. 5 No. 9, S. 389–393; "Sanctions douanières dans la perspective du Marché Intérieur", *Revue du Marché Commun*, n°351, p. 727 – 733, 1991; P. Anaboli-Alegre, Les sanctions douanières dans la perspective du marché intérieur, RMC S. 727 (1991).

outlined by the Commission's report, which represents the first effort to address the fragmentation of the status of customs law. The current customs rules which permit distortions as well as the creation of safe havens are grounded in several provisions of the new Customs Code. Another manifest incongruence derives from the Customs Code's use of "serious infringement" to deny the status of an authorised economic operator. In fact, under Article 39 of the UCC, the criteria for granting the status of authorised economic operator include[354] the absence of any serious infringement or repeated infringements of customs legislation and taxation rules, including no record of serious criminal offences relating to the economic activity of the applicant. Ironically, the concept of "serious infringement" depends on differing approaches of Member States and on what a serious infringement is deemed to be in each jurisdiction. This is an absurd result which leaves the granting of authorised economic operator status in disarray.

Similarly, it is important to consider another contradictory point: since the preconsolidation legislation on customs debt, it has been the case that "[t]he rules governing the incurrence of customs debt, the determination of its amount, when it becomes due and its extinction are so important for the proper functioning of the Customs union that it is essential to ensure that such rules are implemented as uniformly as possible in the Community".[355] In this regard, Article 103 regulates the limitation on the customs debt's incurrence by providing that no customs debt can be

354

(b)the demonstration by the applicant of a high level of control of his or her operations and of the flow of goods, by means of a system of managing commercial and, where appropriate, transport records, which allows appropriate customs controls;

(c)financial solvency, which shall be deemed to be proven where the applicant has good financial standing, which enables him or her to fulfil his or her commitments, with due regard to the characteristics of the type of business activity concerned;

(d)with regard to the authorisation referred to in point (a) of Article 38(2), practical standards of competence or professional qualifications directly related to the activity carried out; and

(e)with regard to the authorisation referred to in point (b) of Article 38(2), appropriate security and safety standards, which shall be considered as fulfilled where the applicant demonstrates that he or she maintains appropriate measures to ensure the security and safety of the international supply chain including in the areas of physical integrity and access controls, logistical processes and handling of specific types of goods, personnel and identification of his or her business partners.

[355] Second Recital to Council Regulation (EEC) 2144/87 of July 1987 on customs debt OJ L2101/15

notified to the debtor after the expiry of a period of three years from the date on which the customs debt was incurred. However, the time limit established for the notification varies where the customs debt is incurred as the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings. In this case, the three-year period laid down is extended to a period of a minimum of five years and a maximum of 10 years in accordance with national law. The issue here is that the time to collect the customs debt depends on a variable – the classification of the customs misconduct as one of those giving rise to criminal court proceedings. This has potentially acute consequences in terms of the collection of customs duties since Member States are not applying a unitary mechanism for the recovery of own resources.

It remains a challenge for the EU to guarantee the coherence and plurality of diffent forces of customs law in the articulation of this important objective. This involves not only coexistence in the European and supranational spheres but also the particularities of customs law, whose role explains the devations from the orthodoxy of the principles method. A principles-based construction of customs penalties is required to maintain the fragile balance between financial interests and proportionality to the procedural protection fixed by the public action.

17. Proposal for Directive 2013/0432: An important but weak departure point in the pursuit of European customs interests

The previous sections have outlined the significant questions and difficulties which must be addressed if harmonization is achieved. It is therefore important to reflect more generally on the concepts of infraction and sanction at the European level but also the potential implications this choice has for domestic legislations. First, a remark on terminology: it will not have gone unnoticed that terms like sanctions and penalties are

used synonymously, as are infringements and infractions. This is because the terms sanction and infringement are adopted within the proposal for their harmonization[356].

The formation of customs penalties policy strategy is challenging for such a multi-faceted policy area to handle as it requires taking into account not only fiscal but more broadly economic, commercial, social, public health and cultural interests.[357] This spurs an intense reflection on the appropriate sanctioning policy rules to protect European financial interests and preserve the budget. On the other hand, the microcosm of customs law always finds the opportunity to push the perimeters of European competence until it penetrates deeply into national legal systems. In 2015, as the EU institutions started to debate the legal framework to be applied to customs sanctions, it became clear that since the differences between sanctioning systems persisted, so would the potential distortions. Furthermore, it was inevitable that, due to constitutional, historical, cultural, social and political characteristics of each Member State, the "do-it-yourself approach" was likely to cause significant divergences in the design of each country's own system of penalties.

In 2015, the European Commission endeavoured to comprehensively reform the enforcement of customs legislation and presented the Proposal for a Directive of the European Parliament and of the Council on the Union Legal Framework for Customs Infringements and Sanctions. Initially, this proposal was treated with enthusiasm by commentators but this was followed by inaction. The Commission opted for a simpler policy proposal based on the approximation of non-criminal sanctions after an impact assessment of policy alternatives. On the one side there was: A – baseline scenario; B – a modification of the legislation within the Union legal framework in force; C – a legislative measure on the approximation of the types of customs infringements and non-criminal sanctions; and D – two separate legislative measures aiming at

[356] Although the reader should be aware that terms like penalties and infractions are appropriate in the context of tax and customs area.

[357] G. Radu in L'Union douanière européenne: bilan et perspectives d'avenir, *Revue internationale de droit économique*, 2014/4 (t. XXVIII); E. Natarel, *La Douane face aux enjeux de la protection de l'environnement*, Alger, Éd. Itcis, 2012, 197 p.

approximation of customs infringements and non-criminal sanctions. On the other were was criminal customs infringements and sanctions.

The proposal is based on Article 33 of the TFEU, which states that customs cooperation between Member States and between the latter and the Commission should be strengthened within the scope of the application of the Treaties. More interestingly, the article dedicated to the legal basis issue does not mention the objective of protecting financial interests, and thus, Article 325 TFEU.

Remarkably, the choice of the weaker legal basis reflects the concerns around the hamonization and consequent curtailment of Member States' competences. As mentioned, the approximation of customs infringements and sanctions is adopted with a view to requiring customs cooperation between Member States but also contributing to the correct and uniform application and enforcement of the Union customs legislation. There is, however, a reference to the protection of financial interests. The proposal aims to set out a common legal framework for the treatment of customs infringements and sanctions, bridging the gap between different legal regimes through a common platform of rules and thus contributing to an equal treatment between economic operators in the EU, as well as the effective protection of the Union's financial interests and law enforcement in the field of customs. Furthermore, Recital n. 5 reads:

> The legal framework for the enforcement of Union customs legislation provided for in this Directive is consistent with the legislation in force regarding the safeguarding of the financial interests of the Union. The customs infringements covered by the framework established by this Directive include customs infringements that have an impact on those financial interests while not falling under the scope of the legislation safeguarding them by means of criminal law and customs infringements that do not have an impact on the financial interests of the Union at all.

This passage reflects an ambivalence towards the formulation of breaches of customs rules. It is argued in this research that customs matters and protection of financial interests can hardly be put into separate doctrinal boxes. However, despite the blurred line, theoretically they represent different objectives to pursue. Lyons[358] used the relationship between the Customs Union, the own resources and the protection of

[358]T. Lyons, *EC Customs Law*, Oxford, 2008, P.61

customs duties from fraud as a fundamental starting point, arguing that "one should not identify the objectives of the customs union with the essential requirement that own resources be preserved", on the grounds of the ECJ's dictum on the legal basis of the mutual assitance and cooperation in customs and agricultural matters. Indeed, the ECJ[359] established that:

> the protection of the financial interests of the Community does not follow from the establishment of the customs union, but constitutes an independent objective which, under the scheme of the Treaty, is placed in Title II (financial provisions) of Part V relating to the Community institutions and not in Part III on Community policies, which includes the customs union and agriculture (…) The Council considered that, in the context of the customs union and the common agricultural policy, specific rules additional to the generally applicable legislation had to be adopted in order to protect financial interests.

It is, however, difficult to draw a line between the breaches of customs rules of each category and this is the reason why the proposal covers both categories. As a consequence, there is considerable overlap between the two objectives (customs union and protection of financial interests) and there might be overlap between the various offences within each category. This symbiotic link between the establishment of customs union and the protection of financial interests will be discussed later.

Interestingly, the Explanatory Memorandum recommends a structural change of the customs system, while criticizing the anomalous structure which characterizes the customs law enforcement. Incoherently, customs legislation enforcement relies upon shaky foundations, following 27 different sets of legal rules and different administrative and legal traditions.[360] Member States have a wide sanctioning discretion since they can freely impose sanctions that seem adequate to them as penalties for infringements of certain obligations stemming from the harmonised Union customs legislation.

Thus, the proposal cautions against the considerable differences in nature and severity. The customs penalties are very diverse and the asymmetries concern fundamental and substantive issues such as the definition of the offences, the nature of national sanctions for customs infringements, defences, range of seriousness, financial thresholds to

[359] Case C-209/97 *Commission v Council*, para 29.

[360] Carsten Weer, *Customs Sanctions of the EU-27: A Detailed Analysis and a Preview on the Modernized Customs Code of the EU and the European Union Customs Code,* Global trade and Customs Journal, Volume 8, Issue 2, 2013

distinguish between criminal and non-criminal infringements and sanctions, time limits, liability of legal persons, and settlement. The differences are so consistent that the range of penalties imposed may vary from the imposition of fines to the imprisonment, from confiscation of goods, temporal to permanent disqualification from the practice of industrial or commercial activities, and even when assuming the same type and nature, such as, for example, fines, there remain material differences in terms of different levels between Member States.

Such great differences in the Member States' customs sanctioning systems seem difficult to square with the unity and integrity of the customs system. Specifically, problematic issues include:

- from an international point of view, the different sanctioning systems in the Member States raise some concerns in certain WTO Member States regarding the compliance of the EU with its international obligations in this field;

- within the EU, the different enforcement of customs legislation makes the effective management of the customs union harder as the same non-compliant behaviour may be treated in very different ways in each Member State as the previous table shows;

- for the economic operators, the differences in the treatment of infringements of Union customs legislation have an impact on the level playing field which should be inherent to the Internal Market, thus providing an advantage for those who breach the law in a Member State with lenient legislation for customs sanctions. This situation also has an impact on the access to customs simplifications and facilitations or to the process of being granted authorised economic operator status as the criterion referring to compliance with customs legislation and the absence of serious infringements as a condition for obtaining this status is interpreted in a different way by national legislations.

With regard to the second warning, the issue is not merely linked to the asymmetry arising from non-compliant behaviours which are punished in different manners. The

Customs Code requires traders to comply with a multitude of obligations. The customs compliance framework depends on the own evaluation of the States. However, the implementation and the adherence to the obligations stemming from the Customs Code is carried out on the grounds of pre-existing offences and archaic customs penalties. Thus, the methodology of harmonization is also needed to ensure national systems capture and incorporate the same offences, in accordance with common intentions set out at the European level.

Breaches of customs rules, elevated to be infringements, tend to cover very specific categories.[361] In summary, these infringements fall into three categories. The infringements set out in Articles 3, 4 and 5 appear in an order which reflects a sort of hierarchy of infractions, starting with those based on a strict liability. In fact, the first category of behaviour embraces customs infringements which do not require any element of fault, considering the objective nature of the obligations involved and the fact that the persons responsible for fulfilling them cannot ignore their existence and binding character.

The second and third categories of behaviour are fault-based, including customs infringements committed by negligence or intentionally, respectively, where that subjective element has to be established for liability to arise. Very specific categories of infringements are covered. Strict liability infringements cover 17 types of offences, including the failure of the person to lodge a customs declaration, temporary storage declaration, entry summary declaration, exit summary declaration, re-export declaration or re-export notification to ensure the accuracy and completeness of the information given in the declaration, notification or application in accordance with Article 15(2)(a) and (b) of the Code and the removal of goods from customs supervision. The breach of the specific customs rule suffices for the penalties to be imposed.

[361] See: Timothy Lyons, "EU Harmonization of Customs Penalties: Work on the EU's Foundations", Global Trade and Customs Journal, Issue 7/8, 2018; Panayota Anaboli, "Customs Law Violations and Penalties in Europe/Where Do We Stand After fifty Years of Customs Union?" *Global Trade and Customs Journal*, Issue 7/8, 2018, pp. 274–280.

Additional general rules regarding the extension of liability, such as incitement, aiding, abetting and attempt, are set out under Article 6. These forms of extensions are, however, specifically provided for the commission of certain infringements. More specifically, Member States are required to take the necessary measures to ensure that inciting or aiding and abetting an act or omission are regarded as customs infringements in case the customs infringement was committed intentionally. Additionally, Member States must ensure that an attempt to commit an act or omission referred to in points (b) or (c) of Article 5 is a customs infringement.

More interestingly, Article 12 provides the requirement to grade the effective application of sanctions, within the exercise of powers to impose sanctions by competent authorities. This approach is of great importance since it has the important advantage of providing different sanctioning levels for different degrees of liability, and thus individualizing the liability.

To avoid a single liability level being applied without distinction to all, aggravating or mitigating factors shall be applied to respectively increase or decrease the base penalty amount. In fact, the competent authorities are required to determine the type and the level of sanctions for the customs infringements referred to in Articles 3 to 6, taking into account all relevant circumstances, including the seriousness and the duration of the infringement; the fact that the person responsible for the infringement is an authorized economic operator; the amount of the evaded import or export duty; the fact that the goods involved are subject to the prohibitions or restrictions referred to in the second sentence of Article 134(1) of the Code and in Article 267(3)(e) of the Code or pose a risk to public security; the level of cooperation of the person responsible for the infringement with the competent authority; and previous infringements by the person responsible for the infringement. This subjectively graded scheme is laudable because a precise definition of those (subjective and objective) circumstances that aggravate or attenuate the liability is essential in determining the precise culpability level of the infringer.

The potential outcome of this proposal, to put it mildly, is still unconvincing,[362] not only in terms of the weak approach adopted but also the substantive content. The approach proposed, although it can be applauded as a first attempt at an approximation, is still unsatisfactory because it still places a key discretionary determination (especially on the nature of offences and penalties) in the hands of each Member State, a mechanism that is not aligned with the objectives of a single functioning market. States essentially maintain a substantial amount of leeway in how to design penalties. As such, it does not constitute a jump towards a common and shared level of disapprobation of breaches of customs rules, and thus a precise identification of customs infractions and offences. There is therefore is a need for Europe to challenge the fear of the largest harmonization that threatens national traditions and take a more binding stance on customs penalties. In fact, the Directive intends to lay down the list of "punishable" behaviours which should be considered as infringing Union customs legislation but it does not determine whether Member States should apply administrative or criminal law sanctions in respect of those customs infringements.[363] This point seems to nullify any efforts to unify the customs penalties because it substantively reiterates the same fragmented approach, in terms of disapproval of the breaches. Nor does it appear that anything could be gained by providing the choice to Member States to decide the administrative or criminal nature. Consequently, no new ground is substantively added by this proposal. If a harmonizing approach is to be

[362] For a critical evaluation see: C.J. Berr, "L'harmonisation européenne des sanctions douanières. Observations sur un projet de directive du 13 décembre 2013", *Observatoire des réglementations douanières et fiscales* (ORDF), 2 avril 2014; Arnoud Willems & Nikolaos Theodorakis, "Customs Sanctions Harmonization in Europe: Why the Commission Is Taking the Wrong Approach", *Global trade and Customs Journal*, Volume11, Issue 7 & 8, 2016.
The authors criticize several points, in particular: "(a)Strict liability is introduced, criminalizing honest mistakes. (b) Customs authorities are exempted from all liability, which treats corporations unfairly or provides them with a loophole to avoid liability in cases of corruption. (c) Fines will be calculated as a percentage of the value of the goods and not in relation to the evaded duties. (d) In terms of procedure, no benchmark is defined for classifying an infringement as criminal (or administrative). Many of the listed infringements would thus be dealt with criminally. (e) In terms of judicial review, Member States are given aggravating factors to consider when imposing sanctions, but no clear guidance on how these factors should be applied during the procedure". See also: P. Muniz, "EU harmonization of customs infringements and sanctions is needed, but the EU must proceed with caution"in *Global Trade and Customs Journal* (Issue 7/8, 2018).

[363] See in the recitals: "A list of behaviour which should be considered as infringing Union customs legislation and give rise to sanctions should be established. Those customs infringements should be fully based on the obligations stemming from the customs legislation with direct references to the Code. This Directive does not determine whether Member States should apply administrative or criminal law sanctions in respect of those customs infringements."

taken, such discretion in classifying the measures as administrative or criminal is clearly nappropriate. Reasonably, the right to good administration[364] should mean that persons engaged in punishable behaviours affecting financial interests should be treated in the same way throughout the territory of the EU.

Another reason for criticising the proposal, is the provision of strict liability with specific regard to two cases: in case of inaccuracy and incompleteness of the information given in the declaration, and in case of removal from customs supervision. With regard to the inaccuracy and incompleteness of the information, the difficulties arising from such a rule are again connected to the risk of undermining any subjective criteria in establishing the liability. In addition, this expansive notion of "inaccuracy" and "incompleteness" presents considerable ambiguity. Infringements of this nature impose a positive obligation upon someone to prevent any form of inaccuracy and incompleteness, despite any subjective criteria. This strict and rigid approach can be presumably explained by the fact that evasion of customs debt mainly occurs through trade mispricing and misreporting. The legislative proposal seems to penalize these types of infringements. According to a report by the European Court of Auditors,[365] the reduction of customs duty liability occurs by:

1. undervaluation, i.e. when the importer declares a value of imported goods which is lower than the actual value, often accompanied by the presentation of fake commercial documents;

2. misdescription of origin, i.e. where the importer declares a false country of origin of the imported goods;

3. misclassification, i.e. by shifting to a product classification with a lower duty rate; or

[364] Rob Widdershoven, Milan Remac, 'General Principles of Law in Administrative Law under European Influence', *European Review of Private Law*, Issue 2, pp. 381–407, 2012

[365] Special Report No 19/2017, Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU, https://www.eca.europa.eu/Lists/ECADocuments/SR17_19/SR_CUSTOMS_EN.pdf

4. a combination of the above.

According to recent estimates by the European Court of Auditors, losses in customs revenue mainly arise because of these infringements, alongside inefficiencies and legal vacua in conducting customs controls.

Despite the fact that customs declaration is a vulnerable tool in terms of losses of customs duties, the strict liability still raises concerns as it might penalize honest mistakes. Theoretically, we might hypothesise its application to impose the liability stemming from the breach of the rule to the indirect representative and the importer.

Even less persuasive is the absence of the minimum culpability for imposing liability in case of removal from customs supervision. The debate has largely ignored the application of strict liability in this case which is surprising. It may occur in combination with another genuine sanctioning measure, represented by customs debt liability, and this would raise the threat of a double deterrent effect stemming from the imposition of two punitive measures, especially in those cases where the infraction is merely formal. The case of *Hamman* illustrates well that the concept of "removal from customs supervision", despite its surface appearance, does not correspond to the concept of smuggling and does not necessarily imply the entrance of extra-EU goods in the European economic network. Instead, it groups together misconducts that are different in their nature and effects.

In summary, it is possible to distinguish two separate inquiries that may arise where infringements and penalties are created. The first is concerned particularly with which customs rules are vulnerable to breaches and which breaches have a substantive impact. In other words, it should logically cohere with the demands of reality. The second focuses on how it could cohere with the specific structure of customs debt liability. Consequently, a negligence-based liability in these cases, as a rule requiring a minimum presence of fault, is to be preferred also in terms of allowing greater coherence. Hence, if harmonization is to be achieved, the EU should regulate customs

law systematically and thouroughly.[366] There is a pressing need for uniformity in the face of the chaotic legislation. In support of this, it has been held[367] that other uncertainties emerge from Directive 2017/1371 in the fight against fraud directed to the Union's financial interests by means of criminal law. In particular, it is established that fraud affecting the Union's financial interests will constitute a criminal offence when committed intentionally. However, the abovementioned Directive does not require a threshold to make the evasion of customs duties worthy of criminal punishment. This conflict of legal bases, once again, derives from the piecemeal approach adopted in the customs legal framework. Additionally, there are the criticisms[368] raised by the European Court of Auditors over the current system that does not prioritize the importance of customs duties as a source of financing of the EU budget. The protection of financial interests is likely to be sufficient to find the European competence as a basis for a complete enlargement and development. At the same time, as has been proved, attempting to regulate separately "those infringements" falling under the proposal of the Directive and those falling under the *telos* of protection

[366] "Harmonization must take a global approach, rather than addressing only some of the pieces, in order to form a coherent sanctions system, and must take certain minimum guiding principles into account. First, it is necessary to harmonize both criminal and administrative sanctions for customs infringements. This will ensure that customs infringements are not sanctioned only as criminal acts, which is unfortunately the case in some EU Member States, and that the scope of application of criminal and administrative sanctions is uniformly defined throughout the EU". Pablo Muniz, *EU Harmonization of Customs Infringements and Sanctions Is Needed but the EU Must Proceed with Caution,* Global trade and customs journal, Volume 13, Issue 7 & 8.

[367] Pablo Muniz, *EU Harmonization of Customs Infringements and Sanctions Is Needed but the EU Must Proceed with Caution,* Global trade and customs journal, Volume 13, Issue 7 & 8. "Finally, the distortions created by having failed to follow a global approach in the past will need to be corrected. This is the case for example of the recently adopted Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law.1 Fraud affecting the Union's financial interests will constitute a criminal offence when committed intentionally. Although customs infringements may not have been the main target of this Directive, some of those infringements will fall within its scope of application since customs duties are part of the Union's financial interest. The Directive has not however foreseen a threshold of evaded duties which must be exceeded for legal persons to be criminally liable in case of intentional infringements. Any proposal to harmonize customs infringements must therefore correct this anomaly and ensure that customs infringements, even in cases of intent, remain subject to criminal sanctions only when certain thresholds of evaded duties are reached".

[368] See also: Special Report No 19/2017, *Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU*, https://www.eca.europa.eu/Lists/ECADocuments/SR17_19/SR_CUSTOMS_EN.pdf: "The current system does not prioritize the importance of customs duties as a source of the financing of the EU budget. The report of the High Level Group on Own Resources The Commission has not made an estimate of the customs gap highlights TOR as a benchmark of true EU revenue. However, the EU has not yet carried out an estimate of the customs gap, there are disincentives for Member States to carry out controls, and the financing of the EU customs programmes does not fully ensure the financial sustainability of the Customs Union or is not always linked to the protection of the EU financial interests."

of financial interests leads to problems of disharmony. Instead, the virtue of a unified customs sanctioning structure would encompass all issues in determining and coordinating liabilities. In turn, proportionality should serve as a fundamental factor that unifies the sanctioning system so structured. If read together with the case-law generally, it seems to be the only principle able to be the key-lens under which liabilities and penalties should be scrutinized.

Leaving legal standing issues to be legislated by Member States lead to unsatisfactory results both in terms of avoiding distortions to the competition in the Internal Market and protection of financial interests, due to the different legal tools and policies underlying each domestic measure. As regards the issue of remedies, other sanctions might be considered. A common European legal regime on customs administrative liability can not only serve to protect financial interests but far beyond that a mental nexus has to be established to hold somebody liable. Therefore, strict liability offences might preserve financial interest in absolute terms but they are obliged to serve the principle of proportionality, not as an abstract idea but as a concrete concept able to adjust the power structure. Despite its substantive character and its normative direction, the central issue of any theory regarding liability should contain a vision, derived from a dependency of principles. A fault-based liability regime should be adopted in a context such as customs law. More specifically, one of the concerns of note is related to the double-punishment of the removal from customs supervision. The removal from customs supervision, which might be also a formal and not substantive infringement, would give rise to the customs debt liability (this is irrespective of whether goods have entered into the economic network) and to administrative (or criminal, depending on Member States' choice) liability.

18. *Nulla poena sine culpa*: An eroded principle in favour of the strict liability

Many scholars and lawyers[369] have voiced their concerns regarding the strict liability for customs infringements as it is deemed to be an aggressive enforcement-instrument that is incompatible with European principles. On 25 October 2016, the European Parliament (EP) plenary session decided not to adopt a first reading position on the European Commission proposal for a Directive of the EP and of the Council on the Union legal framework for customs infringements and sanctions, but instead to introduce amendments to the Commission proposal and to refer the matter back to the Lead EP Committee under Rule 61(2). One of the main issues regards the strict liability.

However, the inquiry into the approach adopted by the European courts regarding the value of this principle in relation to the offences reveals that its nature is not unchallenged or absolute due to the existence of justifiable infringements of the presumption of innocence.

It is difficult to frame the principle of no liability without fault in a few sentences. As far as the theoretical basis of strict liability is concerned, its roots go back to Roman law. Instances of strict liability[370] were provided under the quasi-delictual liability (*obligationes quasi ex delicto*) which was based on the idea of vicarious liability,[371] vicarious liability and liability for damages done by animals. However, Zimmermann[372] reminds us that the dispute between the Justinian attempt to ingrain culpa elements in the forms of a *culpa in eligendo* or a *culpa enim penes eum est* and the classical lawyers who, in turn, overemphasize the objective element in the law and assert the need to take these models of liability for what they were. But quite apart from such a picture, Justinian's strengths of "carving out culpa as the cornerstone for delictual liability" reflects the the importance attributed to the "fault" on which

[369] Arnoud Willems & Nikolaos Theodorakis*, Customs Sanctions Harmonization in Europe: Why the Commission Is Taking the Wrong Approach,* Global trade and Customs Journal, Volume11, Issue 7 & 8, 2016; Pablo Muniz,
[370] See R. Zimmermann, *The Law of obligations,* Oxford, 1990, p. 95
[371] Buckland/Mc. Nair, pp. 395
[372] See R. Zimmermann, *The Law of obligations,* Oxford, 1990, p.17.

Aquilian liability was based. By his time, the notion of culpa[373] was determined by the question of whether the defendant exercised the care of a *bonus paterfamilias* and intended in the same technical way as the "negligence" implanted in the modern legal systems. In the academic discussion, in the 19th century, the concept of liability presents itself as fault-based, with rare exceptions regarding the damages done by animals. The principle of no liability without fault remained at the centre of the 19th century legal science[374] until the Industrial Revolution overshadowed the principle because of the need for an expansion of no fault liability.

Nowadays, the status of *nulla poena sine culpa*[375] is still quite tormented. This is due to an ideological reticence of several jurisdicions to accept the development and erosion of the principle at the European level. The fact is that the principle is deep-seated in the punitive law of several Member States. Not only criminal law but the branch of law known as administrative-punitive law is centrally concerned with the proof of subjective requirements. The best illustrative example[376] is provided by tax offences and penalties. Indeed, several jurisdictions repeal not only offences but infringements (of an administrative nature) of strict liability. Within the Spanish legal system, Article 183 of *Ley General Tributaria* (General tax law) provides that only negligent or intentional acts or omissions may be sanctioned.[377] More recently, the ruling of the TS of 15 January 2009, rec. 4744/04, estimated that "the requirement of fault of penalties derives not only from the Ley General Tributaria and from Article 24.1 of Real Decreto 2063/2004, but also from constitutional guarantees, among which

[373]See R. Zimmermann, *The Law of obligations,* Oxford, 1990 p. 1007; Schipani, *Lex Aquilia*, pp. 439 sqq.

[374] P. Giliker, *Vicarious Liability in Tort: A Comparative Perspective*, Cambridge, 2010.

[375] R. Sicurella, "Nulla pena sine culpa: un véritable principe commun européen?", *Revue de Science criminelle et de droit pénal comparé*, 2002, pp. 15-33.

[376]López López, Hugo*, El principio de culpabilidad en materia de infracciones tributarias*, 2009; J. Pedreira Menéndez, "La evolución jurisprudencial del principio de culpabilidad en el procedimiento sancionador tributario" in *Principios, Derechos y Garantías constitucionales del régimen sancionador tributario, Documento de trabajo* del IEF, núm. 19/01; Mercedes Ruiz Garijo in "Principio de responsabilidad en materia de infracciones tributarias. causas eximentes"in *Jornadas de estudio sobre la nueva ley general tributaria*, 22-25 Nov 2004, Madrid, España.

[377] See also: Tribunal Constitucional in its judgment 76/90 of April 26, 1990 and more recently in the dictum nr. 164/05 of June 20, 2005, on the prohibition of sanctioning conducts without proving the existence of a minimum of guilt. The abovementioned article 183 of the LGT assumes the requirement of subjective requirements, in the form of intent and any degree of negligence, exclude the imposition of strict liability for tax offences.

we must highlight, (...), the principle of presumption of innocence recognized in Article 24.2 CE".

Not far from the Spanish legislation, the German Act on Regulatory Offences establishes under Section 10 that: "If the law does not expressly impose a regulatory fine on negligent acts, then only intentional acts may be sanctioned as regulatory offences". The scope of this article is extended to tax-related administrative offences through Section 377 of *Abgabenornung*, according to which the provisions of the first part of the Act on Administrative Offences shall apply to tax-related administrative offences unless otherwise specified. In fact, the provisions dedicated to tax administrative offences[378] under the second chapter of *Abgabenordnung* specify that "an administrative offence shall be deemed to be committed by any person who intentionally or recklessly"[379]. The pivotal principle of Italian tax penalties[380] is the principle of culpability, established by Article 5 of Legislative Decree no. 472/1997 according to which, in case of violations punished by means of administrative sanctions, any person shall be responsible for his/her own action or omission, whether classed as conscious and voluntary, malicious or negligent. Since the imposition of administrative sanctions is legitimate in the presence of the subjective element, the infringer cannot be sanctioned if any degree of guilt can be imputed.

It is worth emphasising that the presumption of innocence has been elevated to a constitutional right in many Member States within the criminal field. However, the

[378] For a comprehensive analysis of the German tax penalties: *German national report*, Klaus-Dieter Drüen/Philipp J. Butler, LL.B, in "Surcharges and penalties" in Tax Law, EATPL Congress 2015, IBFD (Ed by Roman Seer, Anna Lena Wilms). See also: D. Ohana, "Regulatory Offenses and Administrative Sanctions: Between Criminal and Administrative Law", (Edited by Markus D. Dubber and Tatjana Hörnle), *The Oxford Handbook of Criminal Law*, 2014.

[379] *German national report*, Klaus-Dieter Drüen/Philipp J. Butler, LL.B, in "Surcharges and penalties" in Tax Law, EATPL Congress 2015, IBFD (Ed by Roman Seer, Anna Lena Wilms): "In any case, the type and amount of the sentence shall depend on the offender's guilt as laid down in sentence 1 of section 46(1) of the StGB.90. This principle (*Schuldgrundsatz*) is constitutionally guaranteed and applies to all criminal penalties, even to regulatory offences."

[380] For a detailed analysis of Italian tax administrative penalties: L. Del Federico, Le sanzioni amministrative nel diritto tributario, Milano 1993; R. Cordeiro Guerra, Illecito tributario e sanzioni amministrative, Milano 1996; D. Coppa E S. Sammartino, Sanzioni tributarie, in Enc. Dir.; S. Sammartino, "Il procedimento di irrogazione delle sanzioni amministrative", in AA. VV., L'evoluzione dell'ordinamento tributario italiano, coord. V. Ukmar, Padova 2000; M. Pierro, Il responsabile per la sanzione amministrativa tributaria: art. 11 D. Lgs. n. 472 del 1997, in Riv. dir. fin. 1999; N. De Renzis Sonnino, in AA. VV., La riforma delle sanzioni amministrative tributarie, (edited by G. Tabet), Torino, 2000; B. Assumma, "Il principio di personalità della responsabilità negli illeciti tributari amministrativi con riferimento alla posizione del dipendente", in *Giur. imp*., 2000;

principle has become a contentious issue because of its not crystal-clear recognition[381] by the international and European legal sources. In fact, the inter-relationship between the presumption of innocence and the principle of no liability without guilt element is ambiguous. The right to be presumed innocent identifies two questions which need to be addressed: are strict liability offences a violation of the presumption of innocence? is the principle of the presumption of innocence applied differently, depending on the criminal or administrative nature?

The answer to the second question is linked again to the truly criminal nature of the offence in question. As such, it is more questionable to determine whether the offence should be construed to impose penalties by incorporating the *culpability requirement*, at least in the form of negligence.

While it is worth emphasising that the presumption of innocence[382] has been elevated to a constitutional right in many Member States, the principle of culpability has not developed in the same direction at the European and international level.

It is possible to interpret the judgment of *Salabiaku*[383] as asserting the contention that the principle of *nulla poena sine culpa* is not absolute and foundational. The Court held that the criminal customs offences of strict liability, under the French Law, did not infringe Article 6(2) on the presumption of innocence. The applicant had been found in possession of a locked trunk containing cannabis. In the beginning, the accused was charged with two offences: a criminal offence of illegally importation of narcotics and a 'customs offence' of smuggling prohibited goods. On appeal, the conviction of importation of narcotics was not confirmed and, thus, only the conviction of smuggling, an offence relating to any act of importing prohibited goods, was upheld. Pursuant to the French law, a person in possession of contraband goods 'shall be

[381] Giuseppina Panebianco, The *Nulla Poena Sine Culpa* Principle in European Courts Case Law in Human Rights in European Criminal Law.
[382] For instance, in Italy and Germany.
[383] P. Plowden, K. Kerrigan, *Advocacy and Human Rights: Using the Convention in Courts and Tribunals*, 2002**;** A. Stume, *The Presumption of Innocence: Evidential and Human Rights Perspectives*, Oxford, 2010**.**

deemed liable for the offence'. The only defence was that of *force majeure*[384] resulting 'from an event responsibility for which is not attributable to him and which it was absolutely impossible for him to avoid'. On this basis, the applicant claimed that the presumption of innocence was infringed since the 'almost irrebutable presumption' was deemed to be incompatible with Article 6.

> Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law (….) Article 6 para. 2 does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[385]

This passage indicates that limitations to the presumption of innocence are tolerable.

> Even though the "person in possession" is "deemed liable for the offence" this does not mean that he is left entirely without a means of defence. The competent court may accord him the benefit of extenuating circumstances (Article 369 para. 1), and it must acquit him if he succeeds in establishing a case of force majeure.[386]

This seems to be central in the legal reasoning. The court found that the limitation on the right to be presumed innocent is, in any case, assisted by *force majeure* which exculpates the person presumed to be legally liable but arises only as a result of an event beyond human control which could be neither foreseen nor averted.

Theoretical objections, suggested by the body of literature,[387] have critized the way the principle has developed and thus suggest a more robust view of the principle's protection. From this judgment, in essence, it can be derived that strict liability (criminal) offences can be adopted under the condition[388] that the rights of defence are

[384] According to the judgement, "the *force majeure*, which exculpates any person presumed to be legally liable and arises only as a result of an event beyond human control which could be neither foreseen nor averted, was not "found in the express wording of the Customs Code, but has evolved from the case-law of the courts in a way which moderates the irrebuttable nature previously attributed by some academic writers to the presumption laid down in Article 392 para." para 29

[385] Para 28

[386] Para 29

[387] M. Jeffereson, *Criminal Law*, 2009, p. 126; Ignatius Adeh, *Corruption and Environmental Law: The Case of the Niger Delta*; P. Plowden, K. Kerrigan, *Advocacy and Human Rights: Using the Convention in Courts and Tribunals*, 2002; N. Kofele-Kale*, Combating Economic Crimes: Balancing Competing Rights and Interests in Prosecuting the Crime of Illicit Enrichment*, Abingdon, Routledge, 2012; N. Kofele-Kale, "Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes" in *International Lawyer* (ABA) Vol. 40, No. 4, 2006; A. Stume, *The Presumption of Innocence: Evidential and Human Rights Perspectives*, Oxford, 2010.

[388] In Falk vs Netherlands, the Court specifies the justifiable reasons to admit the infringement of the presumption of innocence, by stating that "In employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed

ensured in the form of *force majeure*. *A fortiori*, it might be inferred that administrative offences of a truly criminal nature might be based on objectively sanctionable facts, irrespective of whether it results from intent or negligence.

The issue of determining the application of *nulla poena sine culpa* to non-criminal offences has been considered by the Court of Justice.

With regard to the ECJ's case-law, the point of comparison for the application of the principle to customs infringements, once again, derives from the agricultural policy. There is no case-law on fiscal sanctions but some significant suggestions come from the penalties adopted in the context of agriculture, which share the common objective of protecting European financial interests.

The case of *Kaserei*, discussed in the section above, is commonly cited as illustrative of the nature of the right to be presumed innocent within European administrative sanctions.[389] In fact, the Court has ruled that a system of strict liability penalising breach of a Community regulation is not in itself incompatible with Community law since the irregularities might weigh heavily on the Community budget. Thus, the ECJ has confirmed the legitimacy of Article 11, n. 1, first paragraph, lett. (a) of Regulation 3665/87 which provides a penalty even if, through no fault of his own, an exporter has applied for an export refund exceeding that to which he is entitled (because of a breach of contract since the composition of goods manufactured by a third party differs from that stipulated in the contract). As seen below, the *Kaserei* claimed that the penalty laid down in Article 11 of Regulation 3665/87 was of a criminal nature due to the fact it was not merely aimed at annulling the consequences of an unlawful act. For this reason, the applicant continued by arguing that the imposition of a penalty, despite the absence of any fault, was contrary to the principle *nulla poena sine culpa*, deemed to be part of the general principles of Community law. The company emphasized that this principle

have to be reasonably proportionate to the legitimate aim pursued (see Västberga Taxi Aktiebolag and Vulic v. Sweden, no. 36985/97, § 113, 23 July 2002)"

[389] J. P. Schneider, "Regulation and Europeanisation as Key patterns of change in administrative law" in The Transformation of administrative law in Europe, Munchen, 2007; J. Schwarze, *European administrative law*, Andover, 2006.

was recognised by Article 6(2) of the ECHR, by the law of the Member States, and by Community law itself. Additionally, it was contended that, according to the ECtHR case law, the principle *nulla poena sine culpa*, established in Article 6(2) of the ECHR, was not limited to criminal penalties but also applied to administrative penalties.

In the Court's reasoning, there are a series of passages worth mentioning. While assessing the criminal nature of the penalty in question, it did not accept that the criminal nature could even be decisive to uphold the absoluteness of *nulla poena sine culpa.* In other words, the Court did not justify the strict liability exclusively on the fact that the sanctions in question were not of a criminal nature.

The first argument that the Court confronted was the alleged criminal nature of the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87.

Previously, it has been discussed the argument supported by the Court to justify the non-criminal nature. The Court reached the conclusion by holding that a strong indication that those penalties did not have a criminal nature could be gained rom the previous case-law on the Common Agricultural Policy's legislation. In this regard, with regard to measures such as the loss of security, imposed at a flat rate and independently of any culpability on the part of the trader, and the temporary exclusion of a trader from the benefit of a scheme of aid, the Court has concluded that such penalties are not of a criminal nature[390].

Interestingly, the Court also rejected the arguments of the applicant, and in particular, that it was imperative to apply the principle to the offences of criminal nature.

In support of its conclusion, the Court quoted the earlier decisions[391] regarding other areas in which a system of strict criminal liability penalising a breach of a Community regulation has not be declared incompatible with European law. In fact, the Court held that: "In other areas, the Court has accepted that a system of strict criminal liability

[390] *Maizena*, cited above, paragraph 13, and *Germany* v *Commission*, cited above, paragraph 25
[391] *Hansen*, paragraph 19; Case C-177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I-1111, paragraph 36

penalising breach of a Community regulation is not in itself incompatible with Community law".

Furthermore, the Court had to confront the limits and the core principles of Regulation 2988/95 since Käserei Champignon Hofmeister GmbH & Co. KG insisted on several changes to the state of Community law and in particular to the fact that penalties would have to be based on the cumbersome Article 5 which requires the fault element. The Court, following the conclusions of the Advocate General, reasoned that the existing measures did not need to be adapted since Article 5(2) clearly demonstrated that the system of penalties established by that regulation applies without prejudice to the provisions laid down in the sectoral rules existing at the time of its entry into force, which was the case with Article 11 of Regulation 3665/87, as it stood after amendment by Regulation 2945/94. The Court also added that:

> although Article 5(2) of Regulation No 2988/95 provides that irregularities which are not intentional or negligent may give rise only to those penalties laid down in Article 5(1) which are not equivalent to a criminal penalty, there is no indication that, when examining that condition, criteria are to be applied which differ from those used by the Court in paragraphs 35 to 44 of this judgment.

This latter point is unsound and does not seem to provide precise and sufficient grounds for refusing the criminal nature of the penalties in question, which shoud be fault-based.

Also, the question of the requirement of the principle of culpability, according to the Regulation 2988/1995, has not been fully tested.

Ultimately, the Court has tried to get around the issue of legal protection by the principle of proportionality, noting that the fact that the principle *nulla poena sine culpa* is not applicable to penalties such at those at issue in the main proceedings does not leave the person subject to the regulation without legal protection. The language used here seems to suggest the influence of the ECtHR's case-law. The Court's insistence on the proportionate nature of the penalty can be inferred from several elements: first, the existence of both intentional and unintentional irregularities, the several situations in which the article states that the penalty is not to apply, such as *force majeure*, and, last, the correlation established between the amount of the

penalty and the amount of loss which the Community budget would have sustained had the irregularity not been discovered.

It is in this light that these judgments seem to make clear that the existence of the defence of *force majeure* would suffice to reconcile strict penalties with the fair trial rights.

In none of the presumption of innocence cases did the absolute status of *nulla poena sine culpa* principle emerge. This means that the European legislator would theoretically be free to deviate from the principle of culpability. This view, in itself, would not appear to conflict with the overall interpretation of the presumption of innocence. In fact, as proved, the absolute value of this principle is rather weakened by the frequency of its breach. This approach is vigorously criticized by the literature,[392] according to which such a rule leads to very unfair results and a general impairment of the presumption of innocence as it would lose any utility. Surely, such a trend that legitimizes the erosion of the presumption of innocence as long as a *force majeure* defence is provided would transform it into an euphemism rather than a vigorous fair trial right to preserve.

19. Towards a punitive customs (fiscal) law in search of principles: the decline of subjective elements within liabilities

In concluding an analysis of customs law, it seems to be clear what is the motivating factor behind both the legislation and case-law and what are the current struggles for a reformation. As this study of customs liabilities has progressed, the gradual decline of subjective elements in the imposition of customs liability and liabilities for violation

[392] The difficulties arising from such approach are well expressed by: Giovanni Grasso, Rosaria Sicurella, *Lezioni di diritto penale europeo*, p.171: "In conclusione, allora, alla luce della giurisprudenza comunitaria, in linea con la giurisprudenza della Corte Europea dei diritti dell'uomo, si può affermare che il principio di colpevolezza non assurge alla dignità di diritto fondamentale nell'ordinamento comunitario. Tale orientamento éconfermato dal mancato accoglimento di tale principio dalla Carta dei diritti fondamentali dell'Unione; una grave lacuna in contrasto con le tradizioni costituzionali comuni agli Stati Membri, in cui il principio di colpevolezza si è ormai affermato come diritto fondamentale del diritto punitivo"; A. F. Masiero, L'adesione dell'Unione Europea alla Cedu. Profili penali Parte seconda: i riflessi dell'adesione sui principi di legalità e colpevolezza in materia penale, *Diritto penale contemporaneo,* 7/8 2017.

of customs rules has become clear. The acceptance of objective forms of liabilities threatens to tamper with the subjective elements, which are believed to be an adequate basis on which to attribute any form of liability.

The timid attempt to uniform the customs penalties by restating the Member States' obligation to ensure proportionality, effectiveness and dissuasiveness does not remedy this significant shortcoming. Surely, there are ideological reasons[393] behind this policy choice which are linked to the idea that *ius puniendi* (what and how) is a component inherent in statehood. But these concerns make the customs sanctioning system extremely controversial: it is accepted that domestic rules determine not only what categories of behaviour should be punishable but the "amount" of punishment, theoretically reflecting the beliefs and values of each State but, and here is the contradiction, in relation to the protection of interests, which by their nature are purely European. These requirements, which are to be applied to the penalties to induce compliance with customs, give rise to a series of objections. First, the fact that this sanctioning obligation is binding on the Member States still makes it unclear which wrongful conducts should fall within those irregularities to be deterred. Precisely, general obligation on the Member States to make sure that penalties which are effective, proportionate and a deterrent are imposed for "infringements of Community rules" is not adequate to ensure the coordination of national sanctioning policies because it does not provide any additional criteria to proscribe common wrongful conducts.

Second, what makes this general obligation in this area even more contestable is the question: how could a customs irregularity punished by an administrative measure convey the stigma intrinsic in criminal law? Logically, the criminal mechanism display major disincentive effects. To use the words of Advocate-General Mazak, criminal law can be perceived as "a barometer of the importance attached by a community to a legal

[393] See: T.C. Fischer, *The U.S., the European Union and the globalization of the World Trade*, London, 2000, P.83 where the author describes European Union as "group of nation states that seek the benefits of customs union without a proprtional delegation of sovereignty"

good or value".[394] If the EU has a unique interest in condemning those infractions affecting, also potentially, the European budget, it is hard to see how alternative responses of a different nature could be appropriate in the context of customs law. Even assuming the common punitive nature of administrative and criminal means, the "condemnation" expressed by criminal reactions has an even stronger expressive function.[395] Controversially, the same wholly European interest is susceptible to different degrees of punishment depending on the Member States' assessment on what that customs wrongful conduct deserves. The value[396] that a punishment by criminal response produces, in terms of a stigmatizing effect, is not the same as the administrative or civil one. The weakness of the system is this: the fact that the adequate degree of punishment of European offences is conferred on the Member States' monopoly. Only the attainment of a common sanctioning strategy, designed to send an uniform message, can complete the realization of a customs union. Otherwise, it seems problematic to justify the existence of an instrically European interest alongside the absence of a common disvalue or disapproval for the offences which undermine that common value.

At the same time, finding a common sanctioning system is a complex process. Due to the great diversity of legal traditions, capturing a single trend towards criminalization or decriminalization of the sanctioning system of tax law seems illusory. Instead, Member States, and not only they, seem to share the dilemma of whether and which financial offences, including tax and customs, should give rise to criminal or administrative liability, and thus be or not be criminalized. Scholars have reached no

[394] Opinion of A.G. Mazák in Case C-440/05, Ship Source Pollution, para 95.

[395] J. Feinberg, "The expressive function of punishment" in "Doing and deserving". Princeton University Press, 1970, p.95; C.R. Sunstein, On the Expressive Function of the Law, (1996) 144 University of Pennsylvania Law Review 2021; D.M. Kahan, Social Influence, Social Meaning, and Deterrence, (1997) 83 Virginia Law Review 349

[396] An interesting reflection on criminalizing EU competition rules is conducted by Wouter P.J. WILS in *"Is Criminalization of EU Competition Law the Answer?"*, World competition rules, 28(2) 2005, Wolters Kluwer where the author theorizes six distinguishing characteristics of criminal law, as opposed to public law enforcement of a civil or administrative nature, on the basis or a comparison of legal systems (of the EU Member States, and of third countries, in particular English-speaking third countries). One is the moral condemnation evoked by the criminal law: *"Third, the imposition of criminal sanctions carries, and is designed to carry, a stigma effect. Criminal enforcement has a stronger message-sending role or expressive function than civil or administrative enforcement."*

consensus about the scope and limits of the criminal sanctions in case of economic offences. But this points to a mounting, fragmented and inadequate customs sanctions regime. Fragmented because the discretion left to the Member States, despite the common general principles, places the protection of certain truly European values, namely the European financial resources and the attainment of the customs union, on autonomous assessments of the degree of threat that it deserves. Here one may take into consideration the way the parameters of principles come into play in the customs field but more generally in the financial field.

For instance, changes have been made to national tax enforcement systems, with a shift from criminal enforcement towards administrative enforcement, e.g. in Italy, in the light of the proportionality principle. It has been found that France[397] and Poland mainly employ a system of criminal sanction. Logically, the threat of criminal penalties may be a more efficient deterrent and more effective than administrative sanctions. It is this emphasis on diversity which exposes the need for a unique approach.

Against this backdrop, the system is portrayed as not adequate because States are free to evaluate which breaches of customs legislation deserve to be categorized as infringements or offences and "how" reprehensible customs misconducts are. The need to place the importance and the effects of the infringing customs legislation on the same level of the scale of disapproval is evident. The more substantial are the differences between Member States, the more persuasive are the grounds that justify a harmonization of customs penalties. Arguably, ranking the value of genuine European interests,[398] such as those intended to be secured by customs enforcement, presupposes a shared and common valuation[399].

[397] Freddy Desplanques, Amélie de Franssu, "Overview of the French Customs Infringements and Sanctions and the Question of Possible Harmonization'", *Global Trade and Customs Journal*, Issue 7/8, 2018, pp. 304–309.
[398] S. Ibanez Marsillia, "La protección penal de la Hacienda comunitaria*", Crónica Tributaria*, vol. 86, 1998, p. 75-95, en colaboración con José Luis Bosch Cholbi.
[399] For a valuable discussion on the European and Supranational wrongs and shared wrong, see: ", Stephen Coutts, 'Supranational public wrongs: The limitations and possibilities of European criminal law and a European community', *Common Market Law Review*, Issue 3, pp. 771–803, 2017: "All law involves valuation; a judgement of how we stand in relation to acts, relationships and objects. The criminal law is the judgement of the community of certain acts, or in

In terms of values to protect, as previously mentioned, the protection of financial interests bears greatly on any hypothetical shape of customs infringements and penalties. For this reason, the drawing-up of this sanctioning system will be a fundamental turning point that offers an occasion for a reorientation of the European status of the tax penalties' regimes.

However, if one has to consider what the ideal shape or structure would be for a customs penalties system, one should consider not only if they are designed to fit the demands of the European objectives but also if they can be incorporated into the legislation of the various Member States., without any collision. In this regard, Harlow defined the EC legal order as a parasitic construction which fastens itself to the branches of the national legal orders.[400] The "parasitic construction" is fundamental to ensure that European law, and in this case European customs penalties, should be developed in harmony with national punitive law heritage. Otherwise, any sanctions regime might require States to abandon certain deeply-entrenched or constitutive principles, such as culpability.

Furthermore, the proportionality principle seems to be fundamental in giving coherence to a system of customs liabilities and penalties. As seen before, the provisions on customs debtors, also as interpreted[401] by the ECJ, show that one of the functions served by the design of customs debt liability is to secure the collection of customs debt liability. Frequently, customs debtors might be economic operators, even if they have not been in a position where they ought to have been aware of others' wrongdoing or if they were unaware of others' wrongdoing.

more limited cases omissions, it deems to be publicly wrongful. It therefore involves an assessment of conduct according to its wrongfulness and necessarily involves a normative valuation of that act".

[400] C. Harlow, *A common European law of remedies.* In: Kilpatrick, Claire and Novitz, Tonia and Skidmore, Paul, (eds.) The Future of Remedies in Europe. Hart Publishing, Oxford.

[401] See also: C-378/2003 Commission vs Belgium in which the Court held that "The legislation concerning the recovery of customs debts must be interpreted in the light of the aim of securing efficient and rapid availability of the Community's own resources", para 48.

In my view, proportionality is weakened if subjective elements are progressively cut off within both customs liabilities and penalties. The principle of proportionality should, instead, be applied so as to allow the the minimum level of culpability or subjective criteria (to impute any kind of liability) to regain the ground lost as a consequence of financial purposes. The system of several liabilities of a different nature must be coordinated and formulated so as to give express effect to the proportionality. It is the entire system as a whole that should come under scrutiny in the pursuit of singling out the persons to put the blame on. Currently, the emphasis on objective forms of liabilities is occasioned by the objective of protecting European public interests and the need to facilitate the recovery of duties. Instead, liabilities, as far as possible, should be coextensive with the judgement of each individual's conduct. The customs system should seek to distribute the wide gamut of liabilities in proportion to the personal blameworthiness of each trader.

Most importantly, the adherence to the principle of proportionality should govern the sanctioning intervention as an organizing rule of the whole system. Proportionality is widely believed to reverse both the tendency for more forms of strict liability and the overlap of liabilities of a different nature.

Chapter IV

20. A comparative approach

The reason of this brief comparative section is mainly occasioned by two different facts. The first is that, despite the profound different philosophies behind the trade and justice's policies, overseas legal systems have more affinities than expected with regard to the wider debate and constestation over appropriate models of enforcement and liabilities discussed within the European member States. Secondly, the dispute over

minimum culpability requirements is not an European isolated issue but, instead, rather shared in terms of the arguments and counter-arguments. The comparative analysis aims to display features of a customs legal framework such as the one adopted in Australia, selected in light of the peculiarities of its customs sanctioning systems and for the specific meaning given to the "strict" and "absolute" liability.

20.1 An outline of Australia'customs sanctions system

As regards Australian Customs system[402], the most relevant legislation dealing with Customs laws in Australia is the following: Customs Act 1901, Customs Regulation 2015, Customs (International Obligations) Regulation 2015, Customs Tariff Act 1995. Other relevant legislation is represented by Crimes Act 1914 and Criminal Code. The date of the legislation is the date it was originally made law in Australia. It includes amendments made over the years and the the current legislation. The Australian customs law enforcement consists of two remedies for failure to observe the rules: the infringement notice and the prosecution. Where an alleged breach has occurred, the ABF will decide on the treatment to impose on an entity based on (among other things) the nature of the offence, the seriousness of the breach and the compliance history of the person or organisation. The administrative enforcement remedy that Australian Customs and Border Protection Service may issue under certain circumstances is the infringement notice. Infringement notice can be described as a regulatory tool as it can accelerate the proceedings to impose penalties but providing as well benefits for the person that is the subject of an investigation. Indeed, while penalties are issued without the Australian Border Force having to prove a breach of the Customs Act, a significant reduction[403] of the penalties apply. The Division 2 of Customs Regulation 2015 set out the general discipline applicable to Infringement Notices. Furthermore, Schedule 8 lists the offences for which an infringement notice may be issued. The customs offences

[402] B. Bernard, J. Malbon, *Australian Export: A Guide to Law and Practice*, Cambridge, 2006.
[403]. CUSTOMS ACT 1901 - SECT 243X

and penalties' regime is rather complex. The central factor to distinguish the nature of offences, in terms of gravity, derives by whether an infringement notice scheme may be issued or not. There is another characteristic, within Australian legal system, regarding the gradations of liability: penalties can be imposed under absolute, strict or subjective liability offences. These concepts have been developing, within Common law's jurisdiction in different ways[404].

In this context, eligible offences for issuing an infringement notice scheme are strict liability offences under the Customs Act 1901 (the Act) listed in Schedule 8 of the Customs Regulation 2015. In fact, the general discipline is provided by Section nr. 243X stating that a regulation may make provision enabling a person who is alleged to have committed an offence of strict liability or of absolute liability against this Act to pay to the Commonwealth a penalty specified in a notice (an infringement notice) as an alternative to prosecution.

Subsection 243X (2) provides that the maximum penalty under the scheme must not exceed either: one-quarter of the maximum penalty a court could impose on a person for that offence, or either 15 penalty units for a natural person or 75 penalty units for a body corporate. A note at the end of new subsection 243X (2) emphasizes that subsection 4B (3) of the Crimes Act 1914 allows a court to impose a fine on a body corporate that is up to five times the maximum that could be imposed on an individual convicted of the same offence. This note is included for the purposes of new subsection 243X(2)(a) to clarify that the corporate multiplier applies to infringement notice penalties. Subsection 243X (3) provides an exception to maximum penalties in paragraph 243X(2)(b). In some circumstances under the Customs Act, the maximum penalty a court can impose for a strict or absolute liability offence is determined by

[404] For istance, according to Black's Law dictionary (mainly designed taking into account the U.S. jurisdiction), absolute liability is intended as an archaic term to indicate strict liability or a type of strict liability based on causation alone, without any other limiting factors. Merriam Webster's Dictionary of law does not provide an autonomous definition of absolute liability, referred to strict liability (intended as a form of liability without a finding of fault such as negligence or fault). According to Robinson, in Criminal Law, p. 254 "*In Canada, strict liability allows the defendant to rebut the presumption of culpability, while absolute liability does not.* See Regina v. City of Sault Ste. Marie 85 D.L.R.3d 161 (S. Ct. 1978)."

reference to the amount of duty or value of the goods. Section 243T of the Customs Act is an example.

The Customs Regulation 2015, under Regulation 136, states the conditions under which an infringement notice may be given. The decision-maker must have reasonable grounds to believe that that the person has committed a prescribed offence before issuing an infringement notice. Even if the concept of "reasonable grounds" is not specified, in determining whether an infringement notice is an appropriate enforcement response, the ACBPS takes into account a broad range of factors[405]. Circumstances where ACBPS is more likely to give an infringement notice rather than prosecute for an offence may include: where the alleged offence is isolated or non-systematic; where remedial or risk mitigation action was taken following ACBPS bringing the issues of concern to the person's attention (for example, through a formal warning); where the facts that led to the alleged offence are straight forward and are not in dispute; where the alleged offence does not pose a significant risk to the border or the collection of revenue; where ACBPS considers the infringement notice is necessary to form part of a broader industry or sector compliance and enforcement program.

Instead, circumstances where prosecution is deemed to be an appropriate enforcement response may include: where ACBPS has previously taken action against the person for similar breaches of the law; where the alleged offence is more serious in nature and the consequences to the community could be severe; where the alleged offender has a substantial record of non-compliance and recidivism, for which an infringement notice would not be an effective deterrent; where the person has, as a consequence of alleged offences, obtained a financial or other advantage, to the detriment of others.

The list of strict offences subject to infringement notice scheme, include *inter alia*:

- false or misleading statements;

[405] http://www.commercialcustoms.com.au/tmp/INSGuide2014.pdf

- moving, altering or interfering with goods subject to Customs' control without authority;
- failure to meet various reporting requirements;
- entering goods that have already been entered for home consumption;
- breach of conditions of a depot licence;
- breach of conditions of a broker's licence; and
- offences in relation to prohibited imports and exports.

The inquiry of whether strict liability could be provided by a Common law's jurisdiction such as Australia is rather problematic[406] since, at common law, principles of liability rarely are codified.

Customs legislation has been the source of fertile debate about the significance of the "presumption of no conviction without fault" and thus, the value of the culpability principle. This issue was addressed first of all in the mid-1980s before the High Court of Australia when common law principles applied and the recent Criminal Code (Cth) did not exist. The High Court's decision in *He Kaw Teh v The Queen* (1985) 157 CLR 523 has been regarded as fundamental for understanding the history and legitimacy of strict liability. The accused was charged with importing heroin and possessing a prohibited substance under former ss 233 BB (1)(b), 233 B (1)(c) of the Customs Act[407].

Generally, the common law[408] requires that offence be constituted not only by the prohibited act or omission (namely actus reus) but also by a mental element - 'an evil

[406] Andreas Schloenhardt, *Queensland Criminal law*, Oxford, p. 95.
[407] Andreas Schloenhardt, *Queensland Criminal law*, Oxford, p. 95.
[408] See: P.J. Schwikkard, *Presumption of innocence*, 1999, p. 42. In S v Coetzee O' Regan noted that "The general principle of our common law is that criminal liability arises only where there has been unlawful conduct and blameworthiness or fault (the actus reus and mens rea). This principle is ordinarily expressed in the latin maxims *actus non facit reum nisi mens sit rea* and *nulla poena sine culpa.* At common law, the fault requirement is generally met by proof of intent (*dolus*) in one of its recognised forms, and, in rare circumstances, by the objective requirement of negligence (*culpa*)…the requirement of fault or culpability is an important requirement of our law. This requirement is not an incidental aspect of our law relating to crime and punishment, it lies at its heart. The State's right to punish criminal conducts rests on

intention or knowledge of the wrongfulness of the act'[409]. As Justice Brennan said in *He Kaw Teh v The Queen*, the requirement of mens rea '*may connote different states of mind in respect of the several external elements of the same crime'*' and it represents the *'beginning of wisdom*".

Interestingly, as noticed by scholars[410], there is little uniformity in the courts' interpretation of the severity and subject matter of strict liability. Three arguments can be distinguished[411]. The general position, also adopted by other Common Law jurisdiction, is that strict liability applies whether the subject matter of a specific breach of rule is not considered serious since it does not carry the stigma associated with conviction for a criminal offence[412]. From the opposite viewpoint, it has been held that strict liability should be imposed whereas an offence is of such serious nature as to suppress the conduct and deter others. Generally, a distinction between regulatory offences and true crimes has been drawn[413] and courts have adopted the view that it is unlikely that the legislator "intends severe consequences for committing offences that do not require proof of subjective fault: He Kaw Teh v The Queen"[414].

Importantly, when investigating the legislative history of customs penalties, Australian Law Reform Commission Reports are fundamental to ascertain the intention Parliament had.

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the notion that culpable criminal conduct is blameworthy and merits punishment. The principle has been acknolwledged by our courts on countless occasions…"

[409] Sherras v De Rutzen [1895] 1 QB 918 *Divisional Court*. Interestingly, Wright J. held:"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals . . .It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under section 16, subsection (2), since it would be as easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public house. I am, therefore, of opinion that this conviction ought to be quashed."

[410] Andreas Schloenhardt, *Queensland Criminal law*, Oxford, p. 96.

[411] See: C. Andrews*, The enforcement of regulatory offences*, Sweet and Maxwell, London, 1998.

[412] Sherras v De Rutzen [1895] 1 QB 918 Divisional Court. The court considered the need to establish mens rea where it was dealing with something which was one of a class of acts which 'are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty'. This leading case has been followed by other common law Jurisdiction.

[413] Despite the different development, an identical approach has been taken in Canada by the ruling R v Sault Ste Marie (1978) 3 CR (3d) 30 (SCC).

[414] Andreas Schloenhardt, *Queensland Criminal law*, Oxford, P.97

It should be noted that the Commission has investigated on the common law approach to legal constructions of offences, having twofold elements, physical and fault elements. The fault element seemed to be object of an intense enquiry: "The courts have taken the common law principle of intent as their starting point in the construction of statutory offences. They have, nevertheless, had to construe the statutory language of the provisions coming before them to determine precisely what fault or mental element is required. Much uncertainty and time consuming litigation has occurred in determining what mental element is required for each offence."

Within customs law, being aware of the principle[415] expressed in the maxim *actus non facit reum nisi mens sit rea*, the Commission justified the exclusion of fault because of the not criminal sense in the real sense.

"Customs environment, by its nature, requires a large number of regulatory offences which are directed to ensuring that craft, persons and goods arriving at or leaving from Australia, come or do not depart from the 'barrier', without having being processed by Customs. These offences are not 'criminal in any real sense. The Customs Act (1901) has nothing to do with what is right or wrong or virtuous. It contains certain arbitrary rules which the legislator lays down. What is wrong is wrong because the Act says so, and for no other reason. This overstates the position but it remains substantially true of a significant number of customs or excise offences. The essentially regulatory nature of offences where 'fault' is excluded or modified, is reflected in the penalty; imprisonment is not provided for. A pecuniary penalty only may be imposed. The overwhelming majority are offences which may be prosecuted in courts of summary jurisdiction."

[415] Andrew P Simester et all, Simester and Sullivan's Criminal law (5th edn, 2013), 18

There is a fundamental feature[416] that characterizes the imposition of strict liability and allows to distinguish absolute and strict liability. Neither strict nor absolute liability requires proof of a subjective element. Fundamentally, strict liability has no fault element but the defence of honest and reasonable mistake of fact is available. In contrast, the defence of mistake of fact is not available in cases of absolute liability[417]. In the customs and border protection context, examples include ss 233BABAB and 233BABAC of the *Customs Act*, which impose absolute liability in relation to whether importation of a particular good was prohibited under the *Customs Act*.

In essence, the Commission, has established that "If, on the proper construction of a particular offence, the common law requirement of fault is excluded, it will be a defence that the prohibited act resulted from an honest but reasonable mistake of fact[418] which, if true, would have exculpated the alleged offender, unless that defence has itself been excluded".

The debate on strict liability is still on-going. According to Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129), bodies such as the Australian Federation of International Forwarders (AFIF) and Customs Brokers and Forwarders Council of Australia Inc (CBFCA) expressed concerns before the Legal and Constitutional Affairs Committee's Inquiry about the application of strict liability, particularly in relation to false or misleading statements and late reporting.

Critics have been raised[419] with regard to the fact that data received from exporters are simply forwarded directly to Customs, and shipping companies are reliant on overseas

[416] Note that this seems to be a characteristic of the Australian sanctions system whether, according to C. Andrews*, The enforcement of regulatory offences*, Sweet and Maxwell, London, 1998, p. 102 (referred to Commonwealth system), the author contends that "What is an offence involving mens rea? It is one in which the prosecution must prove that the accused had a particular state of mind as to some or all the elements of the actus reus. An offence where the prosecution need prove no mens rea is a "strict liability" or "absolute" offence. Although Professor Leigh ascribes to the expression "strict liability" the meaning that it may be indefeasible by any defence, the two expressions are frequently used interchangeably and are used as such in this work"

[417] Proudman v Dayman (1941) 67 CLR 536; Jiminez v The Queen (1992) 173 CLR 572 at 581-582.

[418] New South Wales Parliament, Legislation Review Committee, Strict and Absolute Liability, Discussion Paper (8June 2006) paras 36-38.

[419] "It submitted that the first of these could be remedied with training, and contended that it 'is unreasonable that infringement notices and penalties should apply for late reports caused by the overseas source not supplying data in the time stipulated by the Australian regulatory authorities'. In relation to false or misleading statements, the Legal

exporters for the accuracy and timeliness of the reporting. Furthermore, it has held that late reporting is caused by user error, inadequate systems or operating hours and lack of data from overseas sources. With regard to false or misleading statements, the Legal and Constitutional Affairs Committee noted that a person is not liable if they make a statement that the person is uncertain about the information provided. However, it seems possible, according to commentators[420], customs brokers could be excused by a defence of reasonable mistake by fact such as the fact of a statement of supplier/ importer bolstered by the reasonableness intrinsic in a long commercial relationship.

Conclusion

Throughout the history of the EU, it has been recognised that customs law plays a fundamental role both for the proper functioning of the Single Market and in maintaining the role of customs duties as the EU's own resources. It has developed in

and Constitutional Affairs Committee noted that a person is not liable if they make a statement that the person is uncertain about the information provided."

[420] Russel Wiese, "Australia: Australian customs broker liability for false statements": "Strict liability can lead to unfair results, so there are defences provided. A key defence is reasonable mistake of fact. Generally, for an individual, a defence of mistake of fact exists if at the time of, or before, making the false statement, the person considered the relevant facts and was under a mistaken, but reasonable belief, as to those facts. Crucially, you must actually consider the relevant facts – ignorance of, or a mere assumption about, the relevant facts is not sufficient. In the asbestos context, if you simply assumed that the goods did not contain asbestos without asking the question of the importer, it would be hard to maintain the mistake of fact defence. If there are positive facts on which you have relied (such as statements from the supplier/importer), the next question is whether that mistaken belief was reasonable. Again in the asbestos context, if you have a long relationship with your importer, have informed them of Australia's asbestos requirements and the products are low risk, your belief in an importer/manufacturer declaration that the goods do not contain asbestos will be more likely to be reasonable."

a unique way in the European system in the light of exclusive competence while remaining inherently linked to international policy.

It is commonly noted that customs law displays an originality and remoteness from traditional branches of law. In addition, the preceding chapters indicate that it constitutes a significant and valuable pool of resources that can deepen the European integration process. Due to the added advantage that it falls under exclusive competence, it is viewed as a source of inspiration, and set as a marker, for the development of European tax law.

Throughout this study, it has been my intention to provide an overview of the current complexities that face the EU in the reform of customs law by focusing on a comprehensive and coherent theoretical base through which an European customs enforcement model could be constructed. Devising a harmonized customs sanctioning system poses difficulties as it would require subsuming a hybrid system of multiple legal interests. In fact, the study has demonstrated the very complex interaction that takes place between several actors and various legal bases within customs network. The reform of Union customs legislation enforcement will not only be an experiment because of its uniqueness but also the avenue through which both European fiscal and sanctioning areas can now mature. In fact, one of the objectives was the search for the conditions of reference for the legal framework. In particular, the study aimed to identify the criteria which could guide the construction of any new European sanctioning system and then develop the potential basis of EU customs legislation enforcement modelled on the characteristics of customs law.

Before focusing on customs law enforcement, it was fundamental to assess critically the characteristics of customs debt liability which remains fairly unique in its inherent European design. This is due to the pressing need to protect EU own resources at different levels in the EU: one of these is customs debt liability. More specifically, under the UCC, provisions relating to customs liability apply to a vast category of customs debtors. This model of customs debt liability, according to the scholarship,

marks a departure from traditional principles of tax law and makes it more difficult to dissect the type of fiscal liability. For customs liability to arise in cases of non-compliance, subjective and objective elements in general need to be realized. In this regard, it is possible to conceptualize the existence of forms of third-party liabilities and strict liabilities. This results in the attribution of one person's breach of a rule to another. In essence, this allows the economic operator to be considered the customs debtor (and charged with it) for someone else's conduct. As seen in the previous chapter, the structure of the customs debt liability frequently allows imputation of another's breach of a customs rule, without any culpability or knowledge, and sometimes without proof of a significant engagement, abetting, assistance or aid in the offence committed by someone else. Furthermore, when the subjective element is required, the "ought to have known" test (and thus conduct reasonably expected) is entirely a question of whether the person had a duty of care and what degree of care is required. However, this test brings to the surface one of the most difficult assessments of conduct, which is the standard of care required within the customs framework. Regrettably, the case-law is not very enlightening on this point because the ECJ has tended to leave it to the national courts to decide on the conduct expected by taking into account a number of considerations.

For this reason, one might affirm that this model of liability echoes the conceptual framework of traditional forms of responsibility. The scope of the structure of customs debt liability has raised concerns about the limits of customs liability. By extending the net to include anyone whose act is linked to the breach of customs rule, the structure serves as a fallback mechanism. The huge class of customs debtors is a reliable safeguard against the loss of customs duties. Given the breadth of application, it is not surprising that the responsibility has been extended to such an extent that, taking account of the remoteness of the connection between the acts or the erosion of subjective elements, one might wonder about the true nature underlying the customs liability. Neither did the ECJ convert this expansive application. The argument at the centre of the interpretation of provisions relating to customs debtors is based on the

legislator's intention to establish customs liability broadly with the effect that it encompasses a wide category of customs debtors. The outcome of its broad interpretation of the customs rules regarding the customs debtors led to the conclusion that these provisions have been understood to act as a tool to facilitate the recovery of customs debt. This extension of customs liability has not been without controversy and ambiguity. However, in this regard, principles of Union law appear to contain the answer to what makes the imposition of customs debt liability and other forms of liabilities legitimate.

In the second part, the objective was to address the challenges of devising a single European customs enforcement system. The reluctance consistently shown by Member States demonstrates the sensitive nature of the topic and emphasizes the complexity of customs law enforcement. It seems to be paradoxical that at the heart of European customs law the legislation regarding customs law enforcement is based solely on Article 42 of the UCC, which establishes that each Member State shall provide for penalties for failure to comply with customs legislation. The wide discretion enjoyed by the Member States when shaping the penalties again derives from this weak legal basis. However, principles at their abstract level run the risk of being sterile or neutral when transposed by Member States and do not stimulate the national legislatures.

Significantly, there are no obstacles in terms of the question over the EU's competence to adopt sanctions in this sector, *a fortiori*, after the Lisbon Treaty changes. However, there is and continues to be a tension between the historical resistance of Member States to European intervention in their domestic sanctioning policies and the need to harmonize them. This occurs even though interests behind customs legislation are wholly European. Therefore, EU law should autonomously fulfil the sanctioning function. This seems to be the natural and logical expectation from two viewpoints. From the institutional perspective, since customs law falls under the limb of exclusive competence, compliance with customs law should be developed accordingly. On the other hand, this patchy legal framework contradicts the idea of a coherent and uniform

protection of financial interests. This should move the European legislator towards common, shared customs infringements and penalties.

At the same time, concerns arise for national legal systems when Member States are obliged to transpose sanctioning measures that are not in line with the foundational principles of their sanctioning regimes. One should consider that customs infringements and penalties are a sanctioning sub-system within the framework national criminal/administrative/civil legal systems. Hence harmonizing customs penalties would lead to interfering with established national punitive law practices. But any legal difference of European matrix to incorporate would constitute a new element to justify within domestic legal system. Therefore, the fear of creating a deep rift in domestic foundational legal certainties seems a reasonable one. In other words, the risk of undermining national legal certainties creates new uncertainties in harmonizing customs infringements and penalties.

Recently, the European Commission's proposal on harmonizing customs law enforcement made clear that reforming the fragmented framework must be a key initative. It is clear that the situation conflicts with the interests of the EU. In fact, the establishment of a common customs sanctioning system goes hand-in-glove with the protection of financial interests. Despite being ambitious in its objectives, the proposed reform heralds no revolution but essentially rests on a minimum level of approximation. The scholarship's positions are significant, mainly for the caustic criticism of the proposal, which has failed to guarantee full and complete harmonization. By providing strict liability, it runs the risk of deeply undermining the minimum subjective criteria and it is not always coherent in terms of an overall sanctioning policy. For instance, it might lead to a double punishment (and potentially double application of strict liability of a different nature) in case of the removal from customs supervision.

Regardless of the proposal, there is a much more important point at stake here: balancing the protection of financial interests with the plethora of substantive

principles developed at multiple levels. Developing a theory that conflates the fundamental rights (associated with sanctions) and European principles, without clashing with domestic sanctioning systems, is the most challenging step for the EU. Furthermore, the penalties must be modelled on the basis of the overall customs framework, taking into account, for instance, the potential punitive role attributed to customs duties.

In addition, the central legal task of grasping the nature of penalties is of central importance for a coherent sanctioning system, especially if analysed in the light of the European case-law.

Criteria to guide this sanctioning policy exist. In fact, while the European legislator grapples with the needs of a uniform customs sanctiong system, searching for shared beliefs, traditions and principles, there is actually a common nucleus of legal values which can be the basis for European legislator in the formulation of customs sanctioning measures. The reference is to those common and shared principles, values and beliefs as interpreted, applied and formed by the ECtHR which has undeniably approximated national legal systems. Notably, the widening of the punitive law has taken place through its rulings. It is worth noting that the ECtHR, since the formulation of the Engel criteria, sought to grasp the substantive nature of penalties and develop an own-doctrine, which would tear away the Member States' penalties from domestic legal moorings. The Court has adopted a non-formalistic approach whereby penalties (and proceedings) are scrutinized individually to evaluate whether, in substance, they produce truly criminal effects.

Less generous is the approach of the ECJ in interpreting a truly criminal nature. For instance, it seems to be irremovable in stating the non-punitive character of sanctions adopted within the Common Agricultural policy even if the exact difference between the two remains highly uncertain.

However, despite the existence of some differences in the application of the Engel test whereas the ECHR's approach is widely recognized as being generous in enlarging the

criminal scope,[421] they both refuse the absoluteness of *the nulla poena sine culpa* principle. This trend is likely to enter into conflict with several domestic legal systems, where the principle is firmly rooted in the area of punitive law. Furthermore, it contributes to the vulnerability of the value attached to the culpability principle.

In conclusion, the need for a harmonized customs law enforcement is more and more pressing. The recent proposal confirms the view that the EU will stick to the minimum level of approximation rather than switching to a harmonized model of customs infringements and sanctions. However, in my opinion, the framework is naturally destined to empower the European legislator to harmonize the system to the greatest extent possible.

Commentators, academics and policy-makers have increasingly coalesced around the conclusion that the existence of different sanctioning systems is problematic. That said, there remains the substantive question of how infringements and penalties should be devised in harmony with national punitive law heritage. Proportionality appears to be the key principle, having both structuring and unifying functions for such a complex sanctioning policy: it will not only balance the sanctioning treatments but will also coordinate structural relations between the customs liabilities of a different nature.

Developing a harmonized system of customs infringements and sanctions is of utmost importance since, as noted by scholars, "the greater the differences between the Member States, the greater the need for substantive harmonisation".[422] However, "the greater the differences, the greater the difficulty of harmonising legal rules which can generally be regarded as the foundations within legal systems". This research reiterates the value of a comprehensive approach that is substantively able to listen and extract

[421] See: European Court of Human Rights, 1 February 2005, caso 61821/00, Ziliberberg v. Moldova, para 34, where it has considered a truly criminal "penalty" the pecuniary sanction imposed on a student for taking part in an unauthorized demonstration on the assumption that the amount of the same was still significant with respect to the recipient's income.

[422] J. H. Jans, R. de Lange, S. Prenchal, R.J.G.M. Widdershoven*, The Europeanisation of public law*, 2007, P.370. S. Cassese, *When legal orders collide: The role of courts,* 2010.

the general principles of EU law from traditions common to the Member States.[423] Finding an adequate balancing formula in order to identify penalties suitable to deter customs law infringements, without diluting significantly domestic foundational principles, will be demanding and a massive achievement. However, this undoubtedly offers a new frontier not only for customs law but, more generally, for tax and punitive law. The challenge for Europe will be, once again, "striving at unity in diversity".[424]

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[423] B. Stirn, *Towards a European public law*, Oxford, 2012, p. 96.

[424] Lenaerts, "Constitutionalism and the many faces of federalism", 1990, 38 AJLC, p. 220 where the athor describes European system as "a constitutional order which strives at unity in diversity among previously independent or confederally related component entities".

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