



EUROPEAN COMMISSION

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*Mr Anġlu FARRUGIA
President of the
Kamra tad-Deputati
The Palace
MT – VALLETTA VLT 1115*

Dear President,

The Commission would like to thank the Kamra tad-Deputati for its Opinion concerning the Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions {COM(2013) 884 final}.

The elements of reply provided below are based on the Commission's initial proposal, which is currently in the legislative process involving the European Parliament and the Council, where your government is represented. They do not prejudge the outcome of that procedure and its impact on the final content of the Directive.

Concerns are expressed in the Opinion that the proposed harmonised penalties regime is inflexible as it would provide no scope for administrative or judicial discretion in terms of how to respond to customs infringements. It is feared that this could disproportionately affect smaller Member States, which would be obliged to instigate proceedings irrespective of cost-effectiveness.

The Commission would first stress that the very choice of legal instrument (directive instead of a regulation) is aimed at allowing Member States the necessary flexibility without compromising their legal obligation – under Art. 4 of the TEU – “to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”.

The purpose is to ensure that the same type of behaviour constituting a breach of customs rules qualifies as the same type of infringement throughout the customs union and is sanctioned in an effective, proportionate and dissuasive way, as required by Article 42(1) of the Union Customs Code¹. Therefore, the Directive would provide for a common list of customs infringements and common scales of customs sanctions, thus ensuring a level playing field for European businesses regardless of where they choose to carry out customs formalities. As far as sanctions are concerned the Directive therefore would impose on Member States an obligation of results, without interfering with the way this obligation would

¹ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269, 10.10.2013, p.1.

be implemented in terms of administrative and judicial procedures. Member States could then maintain their legal systems and procedures while adapting the customs sanctions within the proposed scales. In the customs union, however, the existence and the level of the sanctions for certain types of infringement should not depend on the size of national economies.

The Kamra tad-Deputati considers that the penalties would be determined solely on the basis of the value of the goods involved and expresses concern that this could have a disproportionate effect on weaker economies.

The Commission would like to clarify that the value of the goods would not be the sole criterion for determining the sanctions to be applied to customs infringements. Under Articles 9 to 11 of the proposed Directive (see paragraph (b) in each case), where the customs infringements are not related to specific goods, the pecuniary fines to be imposed would be determined within a specific range in EUR.

The Kamra tad-Deputati's argues that it would be more proportionate to base the pecuniary fines on the amount of duty endangered. While recognising the relevance of the amount of duties endangered, the Commission is of the opinion that determining the sanctions on the basis of the value of the goods would represent a more comprehensive approach. Nevertheless, the financial impact of the duties endangered should be taken into account as a relevant circumstance when determining the sanction to be applied to a customs infringement, as foreseen in Article 12(c) of the proposed Directive.

The Kamra tad-Deputati states that the objective of harmonisation is unlikely to be achieved to any significant degree in the absence of EU-wide definition of certain legal concepts (such as 'negligence' or 'strict liability') that are not recognised in a number of Member States' jurisdictions.

The Commission considers that the legal concepts used in the Directive would not require EU-wide definition as they are general legal concepts widely used in the majority of Member States and in the case law of the Court of Justice of the European Union.

The Kamra tad-Deputati has difficulties in envisaging how the Directive would either promote customs cooperation or improve the functioning of the Single Market. The Commission would highlight the cross-border nature of the customs infringements, which requires a degree of cooperation between customs authorities that would be very difficult without a common list of customs infringements.

Furthermore, the Union Customs Code has been conceived for a multinational electronic environment where a decision taken by a Member State is applied in all other Member States, which requires deeper customs cooperation. The common list of customs infringements and the approximation of customs sanctions would enable the proper enforcement of the Union Customs Code, allowing Member States' customs sanctioning systems to be more comparable than they are currently due to the divergence of rules among Member States. Such comparable customs sanctioning systems would, therefore, allow a more efficient customs cooperation.

The current divergences with regard to customs sanctions allow non-compliant economic operators to benefit from more lenient rules in some Member States, thus jeopardising the

proper functioning of the customs union and the internal market by leaving loopholes in law enforcement.

Finally, the Kamra tad-Deputati's considers that the interpretation of the proposal's legal basis – Article 33 of the Treaty on the Functioning of the European Union – is stretched to its limits by proposing harmonised common rules applicable Union wide with little room for manoeuvre, despite the fact that the chosen legal instrument is a Directive.

The Commission would underline that the proposed Directive provides common reference points to strengthen customs cooperation. The proposal sets out a common list of customs infringements based on the harmonised rules and obligations established by the Union Customs Code, which would allow more consistent cooperation between Member States and between Member States and the Commission on the basis of a common terminology. Moreover, the proposal also sets out a scale of effective, proportionate and dissuasive sanctions to be applied, depending on the infringement. However, the proposal leaves Member States sufficient flexibility for its application. In line with the principle of proportionality, it does not go beyond what is necessary to reach the objective. The proposal would harmonise only to the extent that it provides a common list of customs infringements and common scales of sanctions, while leaving flexibility for Member States to organise their judicial and administrative procedures, when implementing the Directive.

The Commission hopes that these clarifications address the concerns raised by the Kamra tad-Deputati and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*