

Wise Persons Group on Challenges faced by Customs

Minutes of the 4th meeting

Date: 16th and 17th December 2021

Venue: Conference Centre Albert Borschette 36, rue Froissart, 1049 Brussels

Participants: 11 members of the Wise Persons Groups were present in person or via online connection on 16 December. 12 members were present on 17 December. Secretarial support to the Wise Persons Group was provided by DG TAXUD.

Invited experts are listed in Annex 1.

1. Approval of the agenda and the minutes of the third meeting

The members approved the minutes of the third meeting and the agenda of the fourth meeting.

2. Market authorities

The Group discussed the cooperation and complementarities between the Customs authorities and Market Surveillance Authorities (MSAs). **Cooperation is not working optimally and the conformity of goods to safety and other rules (for instance environmental requirements) is not adequately checked and therefore cannot be guaranteed.**

There is a high level of complexity in the organisation of tasks and responsibilities between customs and market surveillance authorities. In the majority of the Member states, Customs ask MSAs to determine whether the imported goods are dangerous/compliant and then act upon their decisions. In two Member States, Customs act themselves as “market surveillance authorities” and have therefore the power to intervene at the border. The former model implies the intervention of two authorities whereas the later requires that Customs have the means and expertise to intervene.

There are 2 main regimes for controlling goods – food and health products and non-food products – which differ in their settings. The former is more structured and more uniform with MSAs executing the whole or most of the elements of controls. If goods have to be presented at a border post, controls are carried out by the relevant MSA(s) who send a message to Customs when a consignment can be released. There is a central EU warning system (RASFF) to share information on non-compliant cases. In the non-food sector, there is less uniformity. Controls are carried out by Customs, which are in the front line. MSAs, which are articulated differently depending on Member States, are notified by Customs of suspected non-compliance and serious risks and take a decision that will then be enforced by Customs. Control priorities are defined at national level and information on dangerous goods is shared in the EU database RAPEX. **The system in the non-food area suffers from a multiplicity of measures and different regimes of controls depending on the type of goods which hinder controls. Only information on dangerous goods seem to be better spread thanks to the centralised system.**

The organisation of Customs and MSAs also widely differ, creating a constellation of rules and interlocutors that do not collaborate enough. Customs are in the front line with 27 national administrations, usually organised within one national Ministry (Finance, Economy) and an integrated set of rules (UCC, integrated tariff, etc.). MSAs are the second line of defense but are constituted of more than 600 bodies, under the responsibility of a dozen of concerned Ministries (Environment, Industry, Health, etc.) and a regulatory framework that depends on the topic, with limited cooperation. It was noted that the EU has tried to improve the situation (e.g. via the new market surveillance regulations, ICSMS/RAPEX (Internet-based Information and Communication System for Europe wide cross-border Market Surveillance of technical products) to alert about non-compliant and dangerous goods, but Member states remain responsible for the implementation and they are reluctant to let the EU legislate on this. **Gradually, the EU is developing a more integrated approach (REACH for chemicals, new market surveillance regulation, etc.), which are first steps to prioritise and coordinate but more is needed.**

In addition, the number of regulations related to products has increased exponentially in recent years (there are currently 350 EU laws on different products) and require high standards and compliance measures to be respected by EU business. If goods coming from third countries do not respect those standards, this generates unfair competition for legitimate EU business. **This massive increase of laws and scope widening has also increased the complexity of the tasks of Customs and MSAs which have too few resources to cope with this development.**

The combination of varying measures and increase in regulations leads to a number of problems.

First, differences of organisation and competences have led in the past to misunderstandings and confusion in bilateral cooperation between authorities of different Member States (asking the wrong authority to intervene) or with stakeholders (trade blocked at the border).

Second, it is reported that the control performance across EU border posts is not equivalent which leads to “border shopping” and allows fraudulent products to enter the EU. The control pressure depends highly on available means, the size of the customs point and the scale of the traffic. Customs and MSA lack resources. In recent years, the range of risks that customs must address has increased exponentially with no corresponding matching of resources. It leads to differences in prioritisation. Customs might give priority to financial and security risks (organised crime, terrorism, drugs) and product safety and compliance only comes after. MSAs have also critical lack of resources and consequently recent analysis have shown a very low rate of response from MSA to customs requests (only 1/4th of the requests are followed up). **Interlocutors expressed that it is not acceptable that the quality and type of controls depends on the border post where goods enter.**

Third, the power of national MSAs is limited vis-à-vis operators located in another Member State. This is a problem since once approved in one Member State, the goods can be distributed across the entire EU. For dangerous goods, MSAs must notify dangerous goods found on their market to the EU RAPEX database. The notification is sent to all EU

MSAs who then have to act. However, the only MSA that can act is the one of the Member State where the operator is located, as MSAs from other Member States do not have jurisdiction on non-resident operators. This leads to a situation whereby each national MSA has exclusive right to act on resident operators and other EU MSAs have little power to act on dangerous goods coming from other Member States. For issues related to a lack of conformity, there is a cooperation mechanism whereby MSAs may contact the economic operator, even if it is situated in another Member State. If the operator does not want to comply, the MSA of the country where he is located need to take over the case. This creates complexity, additional delay and possible failures in implementation and controls.

Fourth, this problem is exacerbated by the fact that control priorities are neither the same across Member States nor across MSAs of the same Member State. Generally, MSA have a product-based risk approach. They combine reactive (determining priorities on the basis of feedback from previous controls, product found on the market) and proactive (targeting vulnerable people such as children, elderly etc.) approaches. **But ultimately each national MSA decides on its priority and there is no central body empowered to decide on common ones at the EU level and rarely at Member States' level. There is no centralisation of cooperation and prioritisation mechanisms at EU level. It includes data and information sharing. This leads to non-compliance, raising both safety and competitiveness issues for EU businesses.** A recent EUIPO report shows that in 2020, fake goods with a value of almost €2 billion were seized in the EU's internal market and at external borders.

Fifth, the information collected by Customs is largely insufficient to assess the compliance of products. Important information is not available in the customs declaration (such as a reference to the manufacturer or access to conformity documents). **To add to the difficulty, there is little if no match between the customs nomenclature and product classification.** For instance, the existing nomenclature could not classify face masks, it was necessary to make a quick update to rectify the situation. Also, it is not possible in the current nomenclature to identify toys for children of less than 3 years old. The nomenclature is not dynamic enough and not connected to the reality of business world.

E-commerce is a catalyser for these problems as it puts into question the current logic of controls. Controls can indeed be performed either at the border or in the single market. The main logic to carry out controls at the border instead of in the internal market is/was that it is easier (and more efficient) to stop big bulk consignments at the border before they are split between thousands of consignments to retailers or final consumers. With e-commerce, goods and products are increasingly sent in small consignments via post or express (e.g. seeds for plants, food supplements) and neither customs nor MSA are sufficiently equipped to respond to this boom of traffic. **The regulatory framework has been originally developed for trade in cargo and it is not fit for the explosion of billions of e-commerce small packages. Customs and MSA have then to deal with an impossible burden of controlling all risks.**

The problems related to compliance and e-commerce is threefold. Firstly, consumers are not always aware of the legal obligations (e.g. what can or cannot be imported, what needs to be presented to border posts for control). Secondly, it is very difficult to identify illegal consignments in e-commerce (e.g. description of goods is not conform, country of origin not

always traceable). Lastly, authorities cannot act at the source: if goods are non-compliant they may be destroyed, but there is no simple way to act on the third country operator.

Several participants expressed the principle that when it comes to conformity and safety, **the main responsibility should be with operators**. They expressed the wish that the EU regulator should **shift a proportionate responsibility to the marketplaces as advocated by the Digital Services Act**. Today, there is an issue of incentives and non-compliance as marketplaces can intermediate non-conform goods from sellers in third countries without any penalty neither for the seller nor for the marketplace.

More broadly on compliance issues, the Members discussed **whether priorities for controls could be better coordinated and managed at EU level**. There have been recent improvements of EU rules (e.g. agreement on minimal powers, designation of a unique representative in each Member State) but it does not cover priorities. Defining common priorities is tricky because each Member State has its own national priorities. If it is impossible to define EU priorities, the EU could at least define common criteria on how to prioritise. Members also discussed the opportunity to consider a dispute settlement mechanism to address divergence of approaches between Member States and allocate responsibilities for non-compliance.

It was proposed that this should be accompanied by **more investment in MSAs/Customs cooperation** by linking people (mentoring programme, building mutual understanding) and systems (creating interface between MSA, customs and IP by identifying interoperability needs between existing systems). Also there could be options to **put together testing facilities** for products to share expertise which is not available everywhere with the same high level of quality.

When it comes to **incentives for an increased compliance and responsibility**, several **avenues** were discussed within the Wise Persons Group: the possibility to increase the cost and penalties of non-compliance, the need to remind operators of their responsibilities, the role of the consumer (better inform preventively, target specific consumers in specific context), zero tolerance for non-compliant and dangerous goods, the need to review the control approach for e-commerce goods.

One additional element is the need to ensure the **right data is available** to allow customs to carry out proper **risk management and controls** (add a binding reference to the manufacturer in the customs declaration, ask operators to indicate the legal act to which the goods refer, increase information sharing on risks). In the same vein, it was suggested to **optimize the use of the digital product passport** currently under development.

3. Consumers

The Members were informed of **alarming recent studies showing that consumers are confronted with a constant increase of dangerous and counterfeit goods due to the lack of compliance of safety standards or the use of chemicals in products**. A study by BEUC members on **250 tested products (toys, electric devices, cosmetics) from e-commerce platforms shows that 66% do not comply with basic product safety rules and are unsafe**. The European chemical agency reported in another study **that 78% of the products sold on-**

line and tested for REACH restrictions were non-compliant (phthalates in toys, cadmium in jewellery, etc.). Most of the products entered the EU in small parcels. A study by CEFIC reported that **80% of non-compliant articles containing banned or restricted chemicals comes from outside the EU/EEA, which indicates a problem in terms of fair competition with compliant EU products. Children’s toys account for more than a third of all reported cases of non-compliance.** This is a global issue as similar rates of non-compliance are identified outside of the EU.

Participants reported that there is **very little incentive for operators to improve compliance** because there are very few adverse consequences on operators in case of non-compliance.

The discussion revolved around the need for the EU to set up **a robust legal framework with a high level of consumer protection, strong enforcement architectures, and clear liabilities.** Customs and enforcement authorities need to be empowered and be able to act, including against online marketplaces. Three major EU safety legislation have been or are being reviewed: the General Product Safety Regulation, the Digital Services Act (on platform regulation) and the Product Liability Directive (which deals with what happens when a defective product harms a person). The new **Digital Services Act will have a positive effect by requesting online marketplaces to apply the “know your customer” principle.** Further, it was suggested that the revision of the **Product Liability Directive could make it clear that all professionals involved in the supply chain (including online marketplaces) are jointly liable when products are not compliant and that online marketplaces should no longer be seen as passive intermediaries as they have an important role when it comes to limiting the circulation of defective products.**

The discussion also highlighted that enforcement authorities are severely under-resourced and therefore not able to effectively enforce EU legislation.

The members also pointed to the **opportunities created by new technologies**, as possibility to increase the traceability of products. However, a system of QR code and scanning that shows the ingredients of a product on the package is not available for on-line products.

Consumer representatives also mentioned the need **to enhance cooperation between authorities.** There have been recent improvement: for instance the new market surveillance regulation in force since July 2021 provides that when customs authorities have a doubt regarding the level of safety of a product, they need to alert the MSA and block the product. The MSA needs to come back to customs within 4 days, otherwise customs have the legal obligation to release the good for free circulation. A reporting system requires to provide statistical data covering controls performed by the authorities with regards to product safety and compliance. **This can shed some light on controls performed and their results.**

Lastly, Members heard about **increased cooperation between sectoral bodies at EU level** (consumer, data protection, specific products etc.) and at international level, for instance via cooperation agreements between the EU and third countries’ customs authorities and authorities in charge of market surveillance, chemicals and consumer protection (e.g. administrative agreement signed between the EU and Canada that allows the exchange of data and joint

investigation). One additional idea flagged is the **need for the EU to include the issue of product safety when negotiating trade agreements.**

4. Business and industry

EU traders need to import and export goods in a seamless way. This is particularly the case for SMEs, which struggle to comply with increasingly complex rules. Businesses are concerned that the market is very fragmented and that EU standards are not applied in the same way by all member states. The pandemic has increased the pre-existing problems of a lack or poor level of digitalisation, the increase of e-commerce small consignments, and new innovative products for which current customs rules do not fit. **Businesses plead for modern customs rules.**

The following points were particularly underlined by businesses:

Supporting a strong domestic industry is important by **protecting it from unfair competition practices. It means to focus on the enforcement of rules for trade coming from third country and to achieve the UCC implementation without any further delay.**

E-commerce is both the source of problems for controls and compliance but also a business opportunity. Spot checking of small packages turns out to be inefficient and fraudsters use these to intentionally abuse IP and product compliance requirements. Therefore, speaking about level playing field means that **the issue is to submit e-commerce actors to the same rules/standard as the traditional trade** by increasing the role and responsibilities of intermediaries. They have most of the information on the parties in the transaction and the product they sell.

Traditional trade also encounters issues of fragmentation of implementation of controls, complexity of enforcement and lack of compliance. Trade consider that a major issue is the poor implementation of the UCC by Member States Customs authorities, which is fragmented. Some EU entry points are easier than others, sanctions and penalties for infringements are not uniform, fraudsters will go where the cost of non-compliance is the lowest. There are also, according to businesses, differences across Member States in the level of requirements. In some Member States, operators have to indicate that their product are compliant with REACH, but it is not in other Member States. An alignment across Member states would help enforcement. The EU should also set up disincentive to triangular shipping (goods are shipped via a country with less stringent controls and then to the end user in another Member State). When it comes to ensuring an equal level playing field, uniformity must be ensured within the single market as well as at import for the implementation and enforcement of measures.

Customs policy has a big impact on business competition. Digitalisation and simplification reduce bureaucracy, costs, and lead-time. Interoperability is essential but is at the moment not optimal neither at national nor at EU level. **Fulfilling the IT implementation would be a major progress.**

Businesses are also particularly concerned with the multiplication and complexity of the rules. For instance, free trade agreements remain complex with their variety of rules of origin. **The existing combined nomenclature is not fit for new technology and new products and**

leads to tariff conflicts and unequal application of law. Most EU regulations on products require specific expertise (and there are often divergent interpretation of the same measures). Compliance can put a disproportionate burden on trade. Therefore making the legislation clear and coherent (“better written rules”) is vital to allow for good faith compliance by all traders. Customs legislation must be more dynamic and future-proof to adapt to new technology products and new business processes. Furthermore, the EU could consider issuing binding tariff information at central level to resolve tariff classification issues. Lastly, the EU should assume its standard-setting role with other jurisdiction (e.g. for IPR). **In the absence of clear, dynamic and modern rules, it is impossible to ensure uniformity of application of rules which is damageable for trade,** especially SMEs who may have to bear disproportionate costs for non-conformity, even when the import was made in good faith. When rules are complex, guidance and due diligence instructions could help companies to know what needs to be done.

Businesses also claim that EU should restore the balance between security/control and trade simplification. In the past years, priority has been given to risk management systems and controls, at the expense of trade simplifications. Businesses plead for a better exploitation of the existing possibilities for simplifications in the UCC (AEO, central clearance and self-assessment). In addition, the tools for simplification are fit for large companies but too costly for SMEs. Businesses ask for more possibilities to apply self-assessments and when operators are compliant (e.g. have a strong internal control system), they should benefit from periodical submission of data and automatic release of the goods instead of having to submit for every transaction. Businesses also think that controls do not necessarily have to occur at the border (unless there is a risk for health) and could occur at the importer premises to avoid trade disruption and overload at border posts. Another suggestion relates to the fact that Customs often lack the specialised knowledge to inspect goods and controls could be delegated to national market authorities at the operators’ premises. Finally, it was suggested that businesses have expertise that could be of good use for customs officer to identify non-compliance (e.g. counterfeits).

The business representatives also pointed that the industry has to comply with new regulations which require new skills (security, sustainability, CBAM etc.), which is very costly or for which they may not be equipped (e.g. SMEs having to check the absence of forced labour).

Finally, businesses suggested **to optimise as much as possible international regulatory cooperation.**

5. Single Windows

The Member learned about the opportunities and pitfalls of Single Windows. Their implementation require a convergence of alignment for change to bring all aspects together implementing ‘A Whole of Government Approach’. A Single Window should bring better value for money, improved trade competitiveness, enhanced confidence in border management, an increased compliance across all border agencies, as well as increased transparency & predictability.

Among the lessons learned, the implementation is a long-term and complex goal. The automation needs to be appropriate, customised for the context and must include all stakeholders. It often needs a change champion to initiate the project, with a clear mandate and leadership to insure that all shareholders share the same vision. In terms of the planning, it needs to be realistic (it takes years) and pragmatic. The project requires a good sequencing, usually starting with a Trade Information Portal.

Its ultimate goals (and indicators of success) are (1) single submission of data, (2) single and synchronous processing, and (3) single decision for release and a single mechanism for trader communication

6. Environmental protection

The members specifically discussed environmental protection. Environmental concerns are getting a primary political interest in recent years. The green deal is a central strategy of the EU, which represents a vast area of policy and legislative initiatives to strengthen standards, protect the environment, increase the safety of products, and address consequences of climate change.

Product-based legislation that is currently being developed under the European Green Deal covers the whole supply chains and aims at limiting the impact on the environment at different stages from production, through use, reuse, recycling and disposal. The aim is to reduce the environmental and climate footprint of products by harmonising single market rules. **Customs already have to check a significant number of environmental compliance rules such as safety standards of chemicals, waste shipments, timber import rules, wild life trafficking, etc. Their role will further increase in the future** next to the market surveillance and enforcement authorities. The upcoming sustainable product initiative will bring forward an overarching framework for **sustainable products** that will specify what are the characteristics that a product should have to be considered as sustainable (reparability, reuse, upgrading, recycling, etc.). The intention is to have the same rules for goods coming from outside and produced in the internal market so as to encourage third country producers to adopt sustainable production patterns. This will be supported by a digital tool, **the digital product passport**, which should allow to trace information about products for different purposes. In order for these systems to be effective, **interoperability, including the customs systems, is key.**

It was also noted in the discussions that the bulk of seizures of environmentally non-compliant products or wildlife is made by a limited number of Member States and that several Member States do not make any seizure. Sometimes, the focus on these risks simply depends on the knowledge/interest of the officer to detect such cases and tackle them. **There is no common priorities set across Member States, very few joint actions and large differences in knowledge and expertise from one Member State to another.**

Environmental crime is recognised as one of the ten priority areas of the current and the next EMPACT¹ (the European Multidisciplinary Platform Against Criminal Threats) cycle. Environmental crime presents big opportunities and low risks for fraudsters generating thus high profits in the areas of medicinal products, food supplement, live animals, reptiles, corals etc.). To this effect, e-commerce trade and its ever growing traffic of small consignments is also a vector used by illicit fraudsters.

Participants discussed possible avenues for solutions, ranging from the **need to increase resources and efficiency and an increased use of the potential offered by technology** (AI, big data, e-permitting system), the set-up of **specialized units / knowledge hubs** to be called upon when cases requiring more insight are identified by frontline officers, focused training and knowledge by institutionalising **training** and make it centrally available at EU level (CEPOL), **setting up joint priorities and EU targets** to ensure a common approach at EU level, with the use of data/intelligence (EU-level analyses/trends) to monitor Member States performance, the **promotion of risk analysis** to focus on issues with high impact, on organised crime and on high value commodity (as money is the driver of criminals), as well as the need to **include controls on export**.

7. Security risks

The Members of the Group discussed security risks at borders, which requires multidisciplinary cooperation. Customs authorities are an essential partner for police forces, border guards and other law enforcement bodies, notably via the control of the supply chain of goods at the EU's external borders.

Nevertheless, **the differences in “corporate cultures”, overlapping mandates, and the wish to “be visible” may be hurdle to cooperation.** It was noted that it is essential to work on the “interoperability of minds” and to make people take the “leap of faith” so that they can efficiently cooperate in protecting the EU and its citizens. **Common threats require common and inclusive actions.**

To make this multidisciplinary and inclusive cooperation possible and obvious, it was suggested that one needs to **increase the use of the existing multidisciplinary frameworks and to improve interoperability.** The EMPACT platform and its operational action plans (OAPs) dedicated to the fight against the most pressing criminal threats facing the European Union was pointed to as the perfect way to cooperate effectively and act jointly against those crimes. More joint operational actions need to be developed in cross-border areas, such as joint patrols and other joint operations, as well as the production of joint analysis of cross-border crimes that are specific to border areas.

One needed development relates to **an improved interoperability and use of information systems.** Whereas systems related to the movement of people developed at EU level will soon be interoperable between each other, this is not the case for goods, which is essential to tackle

¹ EMPACT is a security initiative (permanent instrument) driven by EU Member States to identify, prioritise and address threats posed by organised and serious international crime. It is a multidisciplinary cooperation platform of Member States, supported by all EU institutions, bodies and agencies (such as, Europol, Frontex, Eurojust, CEPOL, OLAF, EU-LISA, EFCA etc.). EMPACT runs in four-year cycles.

organised crime. **It is imperative to close the gaps between customs information systems and other systems.** Making ICS2 interoperable with the Schengen Information System (SIS) and Europol Information System (EIS) goes in that direction. **It would for instance allow customs to use SIS alerts in their daily risk management and control work.**

It was also suggested to **establish a common harmonized framework to make cooperation between Customs and EU agencies working at the borders more permanent.**

The European integrated border management (EIBM) comprises notably border control, but **the control of goods and/or ensuing criminal investigations related to the detection of cross-border crime does not currently fall within the concept of EIBM.** Only customs authorities that in some Member States perform the tasks of border control functions in the meaning of the Schengen Borders Code, are formally part of the European Border and Coast Guard (EBCG). It was suggested that an option could be to involve customs in a more integrated manner, to allow customs to contribute and have access to information related to the detection of incidents under their remit.

Concerning the cooperation between customs and FRONTEX (The European Border and Coast Guard Agency), it was stressed that the founding Regulation of Frontex is a development of the Schengen acquis on the control on persons at the external borders and only those Member States bound to implement it apply that part of the Schengen acquis. Frontex is a decentralised Union Agency. The cooperation between Frontex and the EU Member States Customs authorities is provided for by the Agency's founding Regulation. Even if the implementation of the Customs Union's legal framework is outside of the Agency's mandate, it was suggested that Frontex should engage in cooperating with the Commission and, where relevant, with Member States in activities relating to the customs area, including risk management, when those activities support each other.

The cooperation between Customs and EUROPOL is more established. Europol is the 'EU Agency for Law Enforcement Cooperation' and Customs authorities form part of the 'competent authorities' which Europol supports. Member States can and do send customs officers as liaison officers to Europol. In some cases, Customs officers (or former Customs officers) also are part of the Europol staff. Customs authorities can and must have access to information exchange systems.

It was noted that the cooperation between law enforcement authorities and customs is not new and has developed and improved gradually, but that cooperation is not sufficient and there is both an opportunity and a need to work more jointly: more operational joint definition of threats, joint data analytics and joint actions. On several issues, Customs brings a significant added value with its knowledge of goods and supply chain. This expertise combined with other law enforcement capacities allows real progress in efficiently tackling organised crime.

However, it was noted that the **development of structure and systems has been quicker in the field of law enforcement policies than in Customs** as there was a political pressure to be quickly efficient and strong incentives to develop systems and mechanisms centrally. **In customs, systems have primarily developed at national level and they are interoperable**

with other national systems, but with few exceptions, they are not connected to a “centre” and trust to share data is often lacking. There is an urgent need to build incentives for connecting to the centre and a clear mandate to define common risk appetite as a guarantee to EU citizens Security.

8. Close and next steps

The Chair thanked the Members for their active participation and the Secretariat for the organisation and logistics of the meeting. The next meeting will be in January.

Annex 1: List of invited experts (invited associations)

AFSCA – Belgian Federal Agency for the Safety of the Food Chain

BEUC

BusinessEurope

CEFIC

DGCCRF – French Ministry for Economy

DG HOME (European Commission)

DG ENVI (European Commission)

DG GROW (European Commission)

Lego

SMEUnited

TRAFFIC

World Bank