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Report

drawn up on behalf of the Legal Affairs Committee

on the proposal from the Commission of the European Communities to the Council (Doc. 1-937/80) for a directive on the harmonisation of provisions laid down by law, regulation or administrative action concerning the exercise of the right of appeal in respect of customs matters

Rapporteur: Mr J. JANSSEN VAN RAY

By letter of 19 February 1981, the Council of the European Communities requested the European Parliament to deliver an opinion on the proposal for a Council directive on the harmonization of provisions laid down by law, regulation or administrative action concerning the exercise of the right of appeal in respect of customs matters.

This proposal was referred to the Legal Affairs Committee on 9 March 1981 as the committee responsible and to the Committee on Economic and Monetary Affairs for its opinion.

On 18 March 1981 the Legal Affairs Committee appointed Mr Janssen Van Raay rapporteur.

At its meeting of 26 and 27 October 1981 the Legal Affairs Committee considered the draft report and adopted it unanimously.

Present: Mr Ferri, chairman; Mr Luster and Mr Chambeiron, vice-chairmen; Mr Janssen Van Raay, rapporteur; Mr Goppel, Mr Prout, Mr Tyrrell and Mr Zecchino (deputizing for Mr Gonella).

The opinion of the Committee on Economic and Monetary Affairs is attached.

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The Legal Affairs Committee hereby submits to the European Parliament the following amendment and motion for a resolution together with explanatory statement:

AMENDMENT No. 1

Proposal from the Commission of the European Communities to the Council for a directive on the harmonization of provisions laid down by law, regulation or administrative action concerning the exercise of the right of appeal in respect of customs matters (Doc. 1-937/80)

Article 16:

Delete this article.

MOTION FOR A RESOLUTION

embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a directive on the harmonization of provisions laid down by law, regulation or administrative action concerning the exercise of the right of appeal in respect of customs matters.

The European Parliament,

- having regard to the proposal from the Commission of the European Communities to the Council, (COM(80) 860 final)¹,
 - having been consulted by the Council of the European Communities pursuant to Article 43 and Article 100 of the EEC Treaty (Doc. 1-937/80),
 - having regard to the report of the Legal Affairs Committee and the opinion of the Committee on Economic and Monetary Affairs (Doc. 1-665/81),
1. Welcomes this step, which constitutes progress towards achievement of the customs union;
 2. Approves the provisions laid down by the proposal for a directive for the purpose of harmonizing the various provisions governing the exercise of the right of appeal in respect of customs matters and approves also the information supplied by the Commission to the Legal Affairs Committee in connection with Article 6(2) concerning the production of further evidence on lodging an appeal at the administrative stage and the relevant time-limit;

¹ OJ No. C 33 of 14.2.1981, p. 2

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3. Notes that this proposal for a directive excludes criminal proceedings;
 4. Considers it necessary ~~having regard to the need for the full~~ attainment of the customs union and for the uniform application and interpretation of Community law not to exclude from this proposal for a directive appeals seeking the annulment or revision of decisions by customs authorities taken on the basis of provisions of criminal law and that it is ~~advisable~~ to create a Community customs authority;
 5. Approves the proposal for a directive subject to this reservation;
 6. Invites the Commission to amend its proposal in accordance with the second paragraph of Article 149 of the EEC Treaty.
 7. Instructs its President to forward this resolution and the report and opinion of its Committees to the Council and Commission of the European Communities.

EXPLANATORY STATEMENTI. INTRODUCTION

1. The harmonization of the provisions concerning the exercise of the right of appeal in respect of customs matters is one of the features of the 1981 programme of the Commission of the European Communities for the achievement of the customs union¹.

This harmonization is also included in the points of the resolution of the European Parliament adopted on 16 October 1980² on this Commission programme, which is multiannual.

Full achievement of the customs union is in fact an important objective which the Community institutions must pursue without delay.

This proposal for a directive aims firstly to harmonize in this field a number of differences which may distort the conditions of competition within the Community and lead to deflection of trade and secondly to provide harmonized legal protection for traders.

2. In fact, the exercise of the right of appeal varies considerably from one Member State to another as regards the time-limits within which appeals must be lodged, the nature of the competent authorities, the respective powers of the administrative and judicial bodies and the consequences of the exercise of the appeal on the application of the contested decision.

The proposal for a directive from the Commission sets up a procedure for appeals subject however to the narrow limits of Community jurisdiction.

II. ORGANIZATION OF APPEALS

3. The proposal for a directive makes a distinction between the first stage (which may be likened to the administrative stage) and the second stage (which may be likened to the judicial stage) of the exercise of the right of appeal.

A. General principles

4. The proposal for a directive sets out the rules which must be included in the provisions laid down by law, regulation or administrative action in the Member States concerning the right of persons affected by a decision applying law on customs matters to enter an appeal for the annulment or amendment of that decision (Article 1).

¹ OJ No. C 106 of 8.5.1981, p.2

² OJ No. C 291 of 10.11.1980, p.43

5. The concept of law on customs matters means all Community and national customs and agricultural provisions on the importation, exportation, transit and storage of goods between the Member States and between the latter and non-member countries.

Any person who considers that his rights have been encroached upon by a decision regarding the application of law on customs matters or any person who has requested a decision from the competent authority and has not obtained a ruling on that request is entitled to exercise the right of appeal.

The time-limit for exercising the appeal may not be longer than three months except where there is good reason for this. In that case, the appellant must be notified of the extension in advance and of the grounds upon which that extension is based as well as of the new time-limit given to him (Article 2(2)).

B. The administrative stage

6. The lodging of an appeal has two effects which should be considered.

The fact that a person has accepted part or all of the decision of the customs authority has no effect on the retention of the right of appeal (Article 4).

In addition, the lodging of an appeal does not cause implementation of the contested decision to be suspended except where the customs authority has good reason to believe that the contested decision is inconsistent with the customs rules. Suspension of enforcement may, where appropriate, be subject to the lodging of a security (Article 7).

As far as traders are concerned, this is a basic provision harmonizing the conditions for the implementation of Community customs law.

(a) the time-limits

7. The appeal must be lodged within two months of notification of the decision of the customs authority.

This time-limit is extended to six months where the person entitled to lodge an appeal is not the person to whom the decision was notified or was not informed or was misinformed as to his right of appeal by the customs authority which took the decision (Article 5).

These time-limits may be extended only if the appellant shows that he has been prevented from lodging an appeal within the specified time-limits as a result of an unavoidable accident or force majeure.

(b) the procedure

8. The appeal must be lodged by means of a written request addressed to the competent customs authority (Article 6) and there is no charge for lodging it (Article 11).

The request must contain all points of fact or law adduced by the appellant in support of his appeal.

The appellant may supply further evidence within a time-limit prescribed by the competent customs authority, provided that he mentions it in his appeal (Article 6(2)).

Your rapporteur asked the Commission to clarify what was meant by 'further evidence' and the time-limit laid down by the competent customs authority.

It appears from the information supplied by the Commission that the notion of further evidence is confined to the production of new evidence as such and excludes the admissibility of new grounds of appeal.

The time-limit may not exceed six months since Article 12 of the proposal for a directive provides that thereafter the absence of a decision is to be deemed as a decision rejecting the appeal.

Your rapporteur is willing to accept these two interpretations by the Commission.

The appellant may withdraw his appeal in writing (Article 9).

The competent customs authority must conduct such investigations as may be necessary to enable it to give its decision and may in particular submit the case to independent experts (Article 8).

The appellant must assist the customs authority in its investigation of the facts and supply, within the time-limits specified by the authority, any information or documents at his disposal which are necessary to assess the situation correctly (Article 8).

(c) the decision

9. The customs authority must give its decision in writing. The decision must state the grounds upon which it is based and be notified to the appellant (Article 10).

The decision may impose greater constraints on the appellant than those contained in the decision which was the subject-matter of the appeal.

Where the decision goes against the appellant, the competent customs authority must inform the appellant of the opportunity available to him of initiating the second stage of the right of appeal.

(C) The judicial stage

1. The proposal for a directive provides only for limited harmonization of the judicial stage because of the autonomy of the Member States in the organization of their judicial structures.

The essential characteristic of this stage is to enable an appellant to introduce a fresh appeal before an authority which is independent of the customs authority and which is empowered 'by virtue of its structure'

to refer the matter to the Court of Justice of the European Communities pursuant to Article 177 of the EEC Treaty (Article 12).

It is specified that this authority may be a judicial authority or a specialized body (specialized for example in customs disputes).¹

11. The concept of the rejection of an appeal is also specified. It may be a total or a partial rejection and a decision may be an express or an implied decision.

When no decision has been taken upon expiry of a time-limit to be laid down in each Member State which must not exceed 6 months (except where there is good reason for doing so and provided that the authority notifies the appellant beforehand and sets out the grounds on which the extension is based, as well as the new time-limit which it needs to decide on his appeal), an appeal lodged shall be deemed to have been rejected.

III. A NEW DEFINITION OF COMMUNITY JURISDICTION

12. The proposal for a directive encounters the limits of Community jurisdiction at various points.

a) Criminal proceedings

13. The view generally accepted hitherto has been that criminal proceedings fall outside the Community's jurisdiction.

However rules of national criminal law enacted for the purpose of applying Community rules in matters of customs or revenue law no longer wholly escape the Community's jurisdiction.

The full attainment of the customs union requires the uniform interpretation and application of Community law. Whether he sits in a national court or the Community Court of Justice, a judge confronted with the various kinds of barriers which continue to exist in the Member States is duty bound to give to Community law its full effect in accordance with the Treaties, as can be discerned in the development of the case law of the Court of Justice of the European Communities².

¹The case law of the Court of Justice has clarified the substantive, organizational and procedural criteria regarding the concept of jurisdiction - Case 61/65, G. Vaassen (née Göbbels) (a widow) [1966] ECR 261.

²Judgment of 15 December 1976 - Case 41/76 DONCKERWOLCKE V. Procureur de la République [1976] ECR 1941 in which the Court ruled that there would be a breach of Article 30 of the EEC Treaty if the omission or inaccuracy of a declaration as to the country of origin on a customs declaration document were to attract penalties disproportionate to the nature of a contravention of purely administrative character.

Judgment of 9 October 1980 - Case 823/79 CARCIATI - [1980] ECR 278 in which the Court held that the rules of the EEC Treaty relating to the free movement of goods do not preclude the imposition by national rules on persons residing in the territory of a Member State of a prohibition subject to criminal penalties on the use of motor vehicles admitted under temporary import arrangements and thus exempt from payment of value added tax.

National criminal proceedings are a part of the Community process as a means of giving full effect to Community law in municipal law and are becoming increasingly bound up with Community law which they are intended to implement.

For these reasons your rapporteur is not convinced that the proposal for a directive must necessarily exclude decisions taken by customs authorities on the basis of rules governing criminal matters (Article 16). He proposes to recommend to the Legal Affairs Committee and to the European Parliament the adoption of an amendment seeking the deletion of Article 16. Article 16 would appear to ignore the real progress achieved by Community law and the need for the full attainment of customs union.

(b) The lodging of an appeal before a judicial authority or a specialized body

14. The proposal for a directive does not prejudice the right conferred by the laws of the Member States on any person who considers himself adversely affected by a decision regarding the application of the customs rules to refer that decision at any time to the competent judicial authority, in accordance with the provisions of those laws (Article 13 (1)).

Thus the judicial autonomy of each Member State is preserved. By virtue of the same principle, where the judicial stage of the exercise of the right of appeal must be exercised before a specialized body the Member States may provide that, in certain cases, an appeal must be lodged directly with that authority (Article 13 (2)).

15. In any case, Article 177 of the EEC Treaty establishes, particularly in this sometimes complex and delicate field, close collaboration between the national courts and the Community court.

Although not automatic, this collaboration represents a substantial guarantee that Community customs law will be uniformly applied.

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16. The Legal Affairs Committee welcomes the view put forward in the opinion of the Committee on Economic and Monetary Affairs that it is advisable to set up a Community customs authority (in point 4 of the conclusions).

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

Draftsman: Mr R. DELOROZOY

On 13 May 1981, the Committee on Economic and Monetary Affairs appointed Mr Delorozoy draftsman.

At its meeting of 20 October 1981, the committee considered the draft opinion and adopted it by 14 votes with 3 abstentions.

Present: Mr Moreau, chairman; Mr De Ferranti, Mr Macario and Mr Deleau, vice-chairmen; Mr Delorozoy, draftsman; Mr Albers (deputizing for Mr Wagner), Mr Beazley, Mr von Bismarck, Mr Caborn, Mrs Desouches, Mrs Forster, Mr Giavazzi, Mr Herman, Mr Hopper, Mr Nihl, Mr Purvis and Mr von Wogau.

1. By virtue of its terms of reference, the Committee on Economic and Monetary Affairs has on many occasions stressed¹ the need to complete the establishment of the internal market and the customs union, which form the very basis of the Community and constitute an essential prerequisite for the implementation of a common policy in numerous other fields.

The customs union is still by no means fully established. For example, in the specific area covered by this proposal for a directive, there are still differences in the conditions governing the exercise of the right to appeal against individual decisions taken by the competent authorities of the Member States in application of Community customs rules.

The scope and effects of the right available to natural and legal persons to appeal against decisions by national customs authorities may in fact vary quite considerably from one Member State to another with regard to the time limits for lodging an appeal, the nature of the authorities empowered to give a ruling on an appeal and the question of whether or not lodging an appeal results in suspension of the implementation of the disputed decision.

Admittedly, this proposal for a Directive deals mainly with the legal aspects of the question and primarily concerns the establishment of the customs union by approximation, pursuant to Articles 27 and 100 of the EEC Treaty, of the provisions laid down by law, regulation and administrative action in respect of customs matters. The aim is to ensure, from the legal point of view, that the EEC Treaty is properly implemented and at the same time to afford adequate and uniform protection in the matter of customs regulations for natural and legal persons in the Community.

However, the provisions governing the right of appeal in respect of customs matters have not only legal but also economic implications which in some cases may be considerable. The imperfections and disparities in the procedures applied by the different Member States make it impossible to derive full economic benefit from the establishment of the customs union and the differences in the treatment of individuals or firms (or Member States) lead to distortions of competition which must be counteracted if such individuals and firms are to be protected against arbitrary action.

The opinion of the Committee on Economic and Monetary Affairs includes an analysis of the content of the proposal for a Directive and an assessment of its implications.

¹ - Report by Mr von Wogau on the multiannual programme for the attainment of the customs union (Doc. 1-339/80);
- Report by Mr von WOGAU on the 1981 programme for the achievement of the customs union (Doc. 1-241/81)

I. ANALYSIS OF THE CONTENT OF THE PROPOSAL

- Scope

2. The purpose of the proposal for a Directive is to bring about the approximation, pursuant to Article 100 of the Treaty, of provisions laid down by law, regulation and administrative action concerning the conditions for exercising the right of appeal in respect of customs matters.

To this end the Commission proposes harmonization at Community level of the rules concerning the right of appeal in respect of customs matters at the administrative stage. The Commission has seen fit at the present stage of development of the customs union, to exclude the harmonization of national provisions relating to the right of appeal against decisions by customs authorities 'imposing penalties for failure to observe Community law'. Such provisions are governed by the criminal law of the Member States and are not covered by this proposal for a Directive. Similarly, the harmonization of the procedure for lodging an appeal may not undermine the organization and operation of the Member States' legal systems.

3. The Commission's proposal is confined to the administrative stage of the appeal procedure and covers the following main aspects:

- time limit for lodging an appeal (Article 5)

In order to speed up the settlement of disputes, the time limit laid down for lodging an appeal will be two months in principle, but in certain cases it may be extended to six months (if the person concerned was not informed as to his right to appeal or the conditions for doing so; if no reply is received from the customs authority).

- non-suspensory effect of an appeal

Article 7 provides that 'the lodging of an appeal shall not cause implementation of the disputed decision to be suspended.' This provision, which makes the non-suspensory effect of an appeal at the administrative stage into a general principle, has very important economic implications, as we shall see later.

- conditions for giving a ruling on an appeal (Articles 8 and 10)

The competent customs authority, which may seek the opinion of independent experts, must notify the appellant in writing of its decision and of the grounds on which it is based, to enable him to exercise his right of appeal at the judicial stage. Furthermore, Article 11 establishes the principle that the right of appeal at the administrative stage is to be exercised free of charge.

- the right to lodge an appeal with a body which is independent of the customs authority and which is empowered to refer the matter to the Court of Justice pursuant to Article 177 of the EEC Treaty

Lastly, Article 12 of the proposal for a Directive, while not dealing with the broader aspects of the problem at this stage, nevertheless establishes the principle of the right of judicial appeal, with the possibility of referral to the Court of Justice pursuant to Article 177 of the EEC Treaty.

II. ASSESSMENT OF THE ECONOMIC IMPLICATIONS OF THE PROPOSAL FOR A DIRECTIVE

- Positive aspects

4. Leaving aside the question of improved protection for appellants, which falls within the terms of reference of the Legal Affairs Committee as committee responsible, this proposal should be approved because it will help to make a substantial reduction in the distortions of competition and the inequalities in the treatment of traders at the administrative stage of appeal, notably by harmonizing the time limits and the conditions for lodging an appeal.

The most important provision from the economic viewpoint is without doubt the principle of the non-suspensory effect of an appeal, established in Article 7. Most appeals against decisions by customs authorities are decided in favour of the latter. This has given traders who have been granted suspension of enforcement an unfair advantage over those who have not. In the same way suspension of enforcement affects the assessment of Community own resources, since the amount of duty taken into account after an appeal is rejected is not adjusted to offset any monetary erosion which may have occurred.

- limited scope of the proposal

5. This proposal, however, is merely a first step towards the creation of a judicial area in respect of customs matters common to the whole of the EEC. As the Committee on Economic and Monetary Affairs and the European Parliament have had occasion to stress in the past¹ the attainment of the customs union involves, inter alia in the legal and administrative spheres, a consolidation of Community customs legislation, which provides for possible penalties, and the establishment of a common customs administration. The Commission should therefore continue with its efforts to harmonize customs rules and procedures with a view to including certain

¹ Report by Mr von WOGAU (Doc. 1-339/80 - Paragraph 7(d) and (e) of the resolution)

aspects of the judicial stage. Indeed, the Commission concedes in the explanatory memorandum to its proposal that it 'would certainly be desirable to draw up Community regulations governing all the conditions for exercising the right of appeal against decisions taken by Member States' customs authorities for the purpose of implementing Community customs law'¹.

In order to do this the Commission should not be afraid of having recourse to Article 235 of the Treaty if necessary.

Conclusions

1. Notes that the imperfections and disparities in current appeal procedures relating to customs matters undermine the economic benefits attaching to the attainment of the customs union and give rise to inequality of treatment and distortions of competition between individuals and firms in the Community;
2. Considers it essential, therefore, that the rules governing the exercise of the right of appeal in customs matters in the Community be harmonized, in particular as regards the time limit for lodging an appeal, the non-suspensory effect and the conditions for giving a ruling on the appeal;
3. Considers that the proposed harmonization, which is confined to the administrative stage of appeal, is merely a first step and calls on the Commission to continue with its efforts to harmonize some aspects at least of the judicial stage of appeal in respect of customs matters, if necessary on the basis of Article 235 of the Treaty;
4. Points out that in order to attain the customs union the Community must draw up common customs legislation which provides for penalties and for the establishment of a common customs administration;
5. Approves the proposal for a Directive subject to the above reservations.

¹ Doc. 1-937/80