

INFRINGEMENTS AND SANCTIONS IN ALBANIAN CUSTOMS CODE

LL.M Jetmira Rragami

General Custom Directory, Drejtorian e Pergjithshme e Doganave, Rruga Dritan
Hoxha,1001,Tirane,Albania

ABSTRACT: *The importance of customs legislation is not only in the financial aspect, but also in the aspect of national and international security. Albanian Customs Code, (The Code) has been in the most part harmonized with the European Union Customs Code (UCC).It is important to underline that some of the provisions have been adapted to national legislation and to national trade development. Even in the EU, member states have harmonized customs legislation, but the enforcement, including supervision, control, investigation, prosecution and application of customs sanctions remains in the will of Member States. The interpretation of the customs rules may vary between countries and the practical application differs, based upon historically developed national principles, habits and local guidelines. That's why customs legislation may remain significantly fragmented along states, which in many cases can create additional costs for economic operators and consumers. Albania, in order to approach and modernize the customs legislation and align it with the UCC, has adopted Law no. 102/2014 "Albanian Custom Code". From 1st of June 2017, the Code is totally into force with all the provisions that are compatible and partially compatible to the UCC, based on the specified characteristics listed above. Sanctions for custom infringements currently remain a national matter. These sanctioning systems are based upon national legislation, national policies and legal culture with respect to controls, prosecution and sanctions.*

KEYWORDS: Custom Legislation, Sanctions, Infringements.

INTRODUCTION

Infringements against custom legislation are harmful to the security borders of a country, but also to its economical, fiscal, social and cultural interests. Illegal trafficking of narcotics, drugs and psychotropic substances poses a risk to public health and society. Also the threat of organized international crime and terrorist groups with their essential resources as well as the need to effectively combat them, make it more imperative strengthening the borders, but at the same time maintaining the balance between free trade.

But, how to maintain a balance between border protection and trade facilitation?

In the light of the measures to be taken into account, of high importance is the accurate assessment of customs duties and other collected taxes on export or import of goods, including the exact determination of the value and origin of the goods, as well as the provision of exercising appropriate measures on the prohibition, restriction and control. To prevent infringements of customs legislation and ensure the correct collection of import and export duties, taxes and other charges a lot of efforts are made. What helps, are effective collaboration between different Customs Authorities, based and provided on clear legal provisions. At the same time, it should be taken under consideration the need to simplify customs formalities and

control of goods, passengers and cargoes. This is based on the promotion of international instruments of mutual assistance, and in particular the Recommendation of the Customs Cooperation Council, (known as the World Customs Organization) of 5th December 1953," On Mutual Customs Assistance".

LITERATURE

During the last 27 years Albanian Custom Legislation has been subject to significant legislative changes. Albania is already a country ready to become part of the European Union, where one of its main tasks is the acceptance and adaptation of EU law in its entirety. The scope of Albania's Stabilization and Association Agreement with EU is to approach the "Acquis" with the law in Albania. Albania may decide on several occasions to maintain, for various and objective reasons, some domestic provisions without harmonization with EU law. The rationale for such a decision must be conscious, taken from a political-social situation, but not in terms of negligence. Albania has been obliged since 2009 to "ensure that its existing laws and future legislation gradually go towards compliance with the "Acquis communautaire" (Article 70 of the SAA). For this reason, the Albanian Customs Code, and its implementing provisions are aligned with the Union Customs Code as well as its implementing and transitory provisions.

Furthermore, the Albanian Criminal Code and customs offenses have been subject to stricter punitive measures.

METHODOLOGY

The object of this research is the problematics on implementing and enforcing the sanctions for custom infringement in Albania and underlying the importance of this instrument as a base for the safety and the financial interest of a country. Based on that, this paper is focused in some major particularities affecting and helping to better understand the importance of this tools, and how they are implemented in the Code (Albanian Custom Code). This study was based in qualitative descriptive and comparative methods and literature. Using these methods, the paper is written in an understandable way, observing deeply through the provisions defining infringements and sanctions, in the field of custom legislation. In the focus of this paper is not only the Albanian Custom Code, but even the Union Custom Code. This research tried to go more in-depth, at the legislation in the context of infringements and sanctions in the Code, with the main objective to understand the meaning and the importance of them.

RESULTS

Determining the nature of a custom infringement and sanction has its own importance for a number of reasons. One of them is the consequence the sanction may have for the operators. Customs sanctions may have a direct impact on economic operators for example: obtaining the AEO-status. (Authorized Economic Operators). One of the requirements for obtaining and maintaining the AEO status is that the operator has not committed a serious infringement or repeated infringements to customs rules.

Regarding the infringement, we have administrative infringement, and offences, that are provided from the Criminal Code in Albania.

In some countries in which only criminal offenses are applied, acquiring or maintaining AEO status may be more difficult.

The disadvantage of only criminal offenses applied, is that legitimate operators might be occasionally caught by such infringement (due to legal complexity, mistakes or divergent interpretation of law), in particular when customs authorities are stricter under budgetary pressures.

The current Albanian Custom Code system is based too, on ex-post controls and customs sanctions.

The size of illegal importation activities indicates its inefficiency, despite significant administrative and business income it generates.

Relating to that, in the Code, are clearly determined a list of actions or in-actions that constitute an infringement of custom rule in the Republic of Albania.

In the Code generally the infringements are differentiated by the way how:

- *the offender's behavior is,*
- *the rigorosity in infringement*
- *based on whether there was any intent or negligence.*

Depending on the infringement, the Code rates the sanctions effectivity, proportionality and the discouraging mass. Albanian administration takes into account, when the sanctions are applied, the nature and circumstances of the infringement, including the frequency and its duration, if a "trusted trader" is involved and practically the amount of duty avoided or was trying to be avoid.

The new Code determines new appeal deadlines to be followed for the administrative infringements and also determines that, administrative procedures should be suspended in the case a criminal procedure is in the same time being processed for the same infringement. The Code (Art.263 AC) also provides time limits within infringements should be followed and sanctions may be imposed.

The infringements in the custom field (Art.250 AC) are classified in:

a) Administrative offenses;

b) Smuggling.

An administrative offense is an infringement of the legal or subordinate legal provisions in the customs area, committed by acting or in acting, and for which the Code provides an administrative penalty.

Smuggling are criminal offenses sanctioned in the Criminal Albanian Code that violate the social relations that are established for the normal functioning of customs in the Republic of

Albania and for the protection of its economic interests.(in accordance with the provisions of Articles 266 and 267 of the Code).

We need to clarify that the payment of the fine applicable to customs offense, in any case, is not a reason to exclude the infringer for the payment of the import or export duties, payable on the goods subject to the offense. The imposition of sanctions, according to the provisions of the Code, shall not prevent the customs administration of submitting criminal charges for criminal offenses provided for, in the Criminal Code in Albania. Sanctions imposed under the customs legislation shall be applied, notwithstanding the application of sanctions provided for in other law provisions.

Administrative offenses are classified as we mention above, by several elements, like the offender's behavior, the rigorosity in infringement or on whether there was any intent or negligence. Administrative infringements are classified as:

- *Administrative infringements of objective responsibility (Art.251 of the Code);*
- *Administrative infringements committed in negligence (Art.252 of the Code);*
- *Administrative infringements committed intentionally (Art.253 of the Code);*

The Code also provides as an infringement the collaboration or assistance by means of encouragement, or any other form, by acting or in acting. Also a tentative to commit, by acting or in acting, a legal violence is considered an infringement. When the infringements are related to a mistake done from the custom authorities, no sanction is provided for the operators and is not considered an infringement.

The classification and the sanction for the infringements are in the same standpoint as the European Legislator. Sanctions are reduced and the articles provided administrative custom infringement are simplified and specified. Sanctions are provided to be more effective, to be proportionated and discouraging for the future operation for the operators. Even that, we should say that being in the same standpoint as the EU legislator, within the new Code , sanctions and fines are lower than the previous Custom Code in Albania.

We summarize as the following:

Administrative infringements of objective responsibility

- *when the offense/infringement relates to goods (changes in quantity, value, origin, type) and brings about differences in the payment of the duties payable on the goods, the operator shall be subject to a sanction of 1 time the amount, than the duty missed;*
- *When the offense/infringement does not relate to goods, according to the definitions above, the sanction applies in the amount of 20 000 Albanian Lek to 50 000 Lek.*

Administrative infringements committed in negligence;

- *when the offense/infringement relates to goods (changes in quantity, value, origin, type) and brings about differences in the payment of the duties payable on the goods, the operator shall be subject to a sanction of 2 times the amount, than the duty missed;*

- *When the offense/infringement does not relate to goods, according to the definitions above, the sanction applies in the amount of 50 000 Albanian Lek to 500 000 Lek.*

Administrative infringements committed intentionally;

- *when the offense/infringement relates to goods (changes in quantity, value, origin, type) and brings about differences in the payment of the duties payable on the goods, the operator shall be subject to a sanction of 3 times the amount, than the duty missed;*
- *When the offense/infringement does not relate to goods, according to the definitions above, the sanction applies in the amount of 1 000 000 Albanian Lek.*

The current Albanian Custom legislation and the EU customs system are also based on ex-post controls and customs sanctions. When an economic operator has been found to have violated the customs law and underpaid import duties (e.g., by not using a correct customs value), the unpaid import duties will be levied from the economic operator by the customs authorities, together with legal interest.

In order that the provisions about infringement and sanction, work and lead to the desired results (i.e. a uniform enforcement of customs legislation concerning customs infringements and sanctions), it is a prerequisite that enforcement should be considered in all of its dimensions.

DISCUSSION

The mission of the Albanian Customs Administration is to safeguard the financial and economic interests of Albania, to guarantee the safety and protection of society and of business partners, by relying on risk management, efficient and effective controls facilitating trade by implementing modern working methods and technology and cooperating at national and international level with all relevant actors. Analyzing custom infringement and sanctions applied, and their scope, we go through several questions.

- *What sanction do we have to apply because of an act that according to the law of time when it was committed had a minimalist/maximalist sanction?*

The retrospective power of the law is primarily related to material law and it is not in the nature of the procedural law. Generally, it is the procedural law itself that must determine how to act upon its entry into force. Given the fact, there is no transitional provision in Law no.102/2014, "Albanian custom Code", which in itself is a law which contains material and procedural provisions. As well as the fact that legal relations or infringements have occurred before its entry into force, the applicable law regarding the sanction to be used, should be the law in force in the time when the infringement, the act was made. The parties could not foresee that the law would change and that the rules set would change. A dangerous precedent would be created, that by normative acts violating custom law will benefit from the change of law in different times. So, it exists a juridical practice that determines that, regarding the material law, we will refer to the material law into force at the moment that the infringement of law occurred. Only the procedures, the procedural law, has to be applied based on the new procedural provision of the law. (deadlines, deadline for compliance or appeal etc..)

- *What about if an act that according to the law of time when it was committed was considered an infringement, and does not constitute an administrative infringement, or criminal infringement or the vice-versa?*

We should accept that in administrative and civil law compared to the criminal Law, exists different rule. In Criminal Law, no one can be convicted of an act that, according to the law of time when it was committed, did not constitute a criminal offense.

The new law that does not punish the offense has retrospective effect. If the person has been convicted, execution of the sentence cannot commence and, if it has commenced, ceases.

In criminal theory, if the law at the time when the offense is committed and subsequent law to follow are different, is applicable the law whose provisions are more favorable to the person who committed the offense.

- *The sanctions against individuals vs. sanctions against businesses*

The discussion above, applies both to sanctions imposed on companies and to sanctions imposed on individuals. However, only individuals can be sanctioned with imprisonment. It may be difficult for companies to control the actions of their employees and this lack of alignment in owners' and managers' incentives implies that sanctions directed at the owners may be ineffective or have considerably diluted effect on managers. This provides an argument for individual sanctions.

There are some arguments suggesting that sanctions for individuals should be less severe than for economic operators, because individuals may be affected by internal and external sanctions. By internal sanctions we mean sanctions imposed on the employee by the company that could include job loss, wage cuts and demotion to a lower position. On the other hand, external sanctions include, sanctions imposed by other parties, for example courts. Both internal and external costs affect the expected private costs associated with offending activity for employees. Secondly, the same penalty has a stronger deterrent effect on individuals than on businesses. Thirdly, like the loss of reputation may act as a deterrent for companies; social stigma associated with individual sanctions may also act as a strong deterrent; particularly for employees with high incomes and significant social capital.

Implication to Research And Practice

This study, being of an exploratory and at the same time at interpretive nature, raises a number of opportunities for future research, both in terms of practice development and concept validation. More research are actually necessary to refine and further elaborate the field of custom infringement and sanctions applied.

First, it generates a number of new and conceptual classifications of infringements, administrative ones and criminal ones.

Second, it offers the opportunity to go through the concepts and the mission of Albania Custom Authorities, and the mission of all custom authorities in general. The topic discussed could also be used to generate a number of hypotheses for further testing using a broader sample and quantitative research methods. Questions could include the following:

- Is there a statistical correlation between the effects of the old classification of offenses related to the new classification in the latest Custom Code?
- Is there a statistical correlation between practices of jurisprudence and how the new procedures and deadlines entered into force, have affected the economic operators?

The study could also be extended in longitudinal and comparative ways. For example, how Albanian domestic law like the legislation of other countries of international community lacks harmonization and very often needs a significant approximation with EU Law.

In many cases, many shortcomings are seen as a result of different application standards. This study tries to prove it wrong, considering the change of the provisions as one of the main reasons, to not apply different standards.

Third, a deep and comparative analysis between norms of domestic law and norms of European law in the field of custom legislation, would underline many shortcomings, a major part of which have been also the focus of this paper.

Finally, as discussed in recommendations, an updated IT system is needed to be implemented, so the provision regarding the real mission of custom authorities can be entered into force in Albania. This is not only needed for Albania, but is related to the other countries, which Albania develops trade.

CONCLUSIONS AND RECOMMENDATIONS

Steps made on the harmonization of customs sanctioning systems in Albania Legislation, should take into account broader context of the overall customs legislation

In that respect, a new customs IT framework in Albania based on business process modelling, could create the basis for a more integrated approach. This would create a solid foundation based upon which a common customs sanctioning framework will have the desired functionality. An integrated Albanian customs IT system with automated data input based upon administrative figures from businesses may change customs compliance into ex-ante system, reducing or largely eliminating the level of human errors or mistakes, minimizing costs borne and barriers experienced by businesses, in particular SME-s and leading to a customs sanction system which does not focus on infringements without intent.

A modern IT system or a single window progress in Albania will offer possibilities of real-time compliance allowing for meaningful trade facilitation and reduction of costs and barriers. Ex-ante compliance can define in real time flows of legitimate trade, automate formalities and cut costs, at the same time allowing customs authorities to focus on controlling customs operations outside this flow.

The way forward is to establish a common enforcement framework which can be aligned in an efficient manner, especially as the trade facilitation aspect will then link almost every main player in business. In view of all above, taking all individual observations and conclusions into account and concluding that in the light of the overall customs reform, there are good grounds to aim for harmonization of the customs sanctioning systems of Albania with the union members. The harmonization of the customs sanctioning systems of Albania should be aligned with the overall modernization and computerization of customs under the UCC. This means

that the UCC, its delegated and implementing acts, still need to be fully harmonized into the Albanian legislation.

The appliance of sanctions and measures should be based upon best custom practice in all over the countries surrounding Albania and based in common factors interesting to custom authorities.

Suggestion

The provisions of the Law No. 102/2014 “Custom Code of Albania Republic” do not provide the retrospective effect of the new provisions regarding the infringements and the sanctions.

Maybe the prediction of retroactive effects, regarding the questions mentioned above should be foreseen in the “Transitional measure” art.286 of the Albanian Customs Code.

Future Research

Future research in this field will be in a comparative specter. The focus will be in a method that goes through the provisions of Albanian Custom Code fully compatible to the Union Custom Code. Also see the difference between the provision partially compatible and totally incompatible to UCC. It will be interesting to see the differences, the approach and the obstacles why Albanian legislation can not be totally approached to the EU legislation.

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