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Challenges of Customs Law during the Paradigm of "Facility and Security" in International Trade

Abstract: Changing conditions within international trade as well as the implementation of the facilitation and security paradigm have significantly impacted the structure of customs law. Both the SAFE Framework as well as the Trade Facilitation Agreement had indicated the need to maintain a balance between regulations introducing simplifications and those ensuring safety and security. One example of such a solution is the institution of the authorised economic operator (AEO), which grants those entities opportunities to take advantage of a number of simplifications, such as the filing of the simplified customs declaration, making entries in a registry, or performing self-assessments, but, at the same time, maintains the requirement of safety and security (through a detailed audit of the enterprise before AEO certification). However, by allowing authorised economic operators to perform self-assessment in respect of goods that have entered into the customs territory of the European Union and are to be released for trade, EU legislators have created significant challenges concerning the realm of safety and security, especially concerning the institution that is the most important within that area – that of customs controls. Despite all this, its importance to safety and security remains distinctive and may be seen in the emergence of new types of customs controls which concern only this particular sphere.

Keywords: customs control, facilitation, paradigm, security, trade

Introduction

Through the impact of terrorist attacks in the United States followed by others in various parts of the world, the beginning of the 21st century brought about significant changes in the rules governing the international trade of goods. The world of today is both globalised as well as kept apart by regional economic integration organisations, countries' growing economic self-centredness, and considerable threats to international security. These conditions shape the contemporary model of trade policy with an emphasis on two priorities – facility (simplification) and security.[1] This model greatly impacts the shape of contemporary regulations concerning the international trade of goods, including EU customs law. Changes introduced since 2005, first into the Community Customs Code (CCC)[2] and then into the Union Customs Code (UCC)[3], strictly adhere to two basic rules: facilitate trade and ensure security. This is especially visible in the current Union Customs Code, where EU legislators aimed to achieve a balance between institutions simplifying trade and solutions ensuring safety and security.

Taking the above into consideration, the aim of the article is the identification of the established direction of changes within customs law in the context of the trade 'facility and security' paradigm. The above-stated goal inspired the formulation of the following hypothesis: it should be assumed that together with the solutions introducing simplifications in the international trade of goods, EU lawmakers simultaneously established sufficient measures to ensure the security of that trade constituting the realisation of the 'facility and security' paradigm. The realisation of the goal established in the article has become possible thanks to the use of the following research methods: the method for the analysis and critique of literature and the dogmatic method.

1. Trade 'Security and Facility' Model as a Determinant of Changes within EU Customs Law

Within the past several decades the shaping of customs policy and customs law has been closely connected both to events from the economic sphere as well as those dealing with security which have significantly impacted trade. This has caused the

1 W. Czyżowcz, V. Gafrikova, Bezpieczeństwo ekonomiczne i ryzyko celne w przedsiębiorstwie działającym na międzynarodowym rynku towarowym, (in:) S. Wojciechowska-Filipek, J. Klepacki, A. Jackiewicz (eds.) Przedsiębiorczość i zarządzanie w rozwoju ekonomicznym, "Przedsiębiorczość i Zarządzanie" 2017, vol. XVIII, no. 9, part II, p. 309.

2 Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, pp. 1–50).

3 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, pp. 1–101).

role of the traditional financial-based paradigm governing customs policy and law – a collection of duties and other public levies – to be diminished over the years. Significant in this respect were decisions made on the international forum as early as the end of World War II, first as part of the General Agreement on Tariffs and Trade (GATT) and then through the World Trade Organization (WTO), initiating activities meant to liberalise trade. These began with decisions concerning rules and procedures intended to reduce barriers for the trade of industrial goods, and then, with the conclusion of the Uruguay Round, efforts were made to liberalise other areas of trade (agricultural products, services, aspects of intellectual property).[4] Other than the reduction of customs duties on goods, there were also activities aimed at facilitating trade related to the transparency and effectiveness of international trade procedures. Their goal was to shorten the time needed for and reduce the costs of international trade transactions.[5] Thus, at the end of the 20th century, the activities described above brought about the creation of a new pattern – that of facility and security in trade. Within literature, it is clearly stated that the paradigm of facilitation focuses mainly on the simplification and harmonisation of trade procedures through the reduction of transport costs[6], efficient customs procedures[7], transparent and harmonised regulations, and improved telecommunication infrastructure[8]. Implementation of these aspects was visible in the numerous changes to the Community Customs Code and is continued in the Union Customs Code. It must also be stressed that the introduction of the latter was premised on, among others, the computerisation of customs administrations and its contacts with entities engaged in international goods trading in other countries as well as the simplification of customs law and the standardisation of the service of foreign trade within EU member countries through greater harmonisation of rules for information exchange.[9]

Security of economic interests and fair competition, protection of life and health, support of economic development as well as the need to ensure the safety of people as a result of terrorist attacks occurring in various places in the world has created a necessity of increasing the security of the international trade of goods. Apart from

4 A. Głodowska, Liberalizacja handlu towarami przemysłowymi na forum wielostronnym GATT/WTO. Implikacje dla Polski, (in:) S. Wydymus, A. Hajdukiewicz (eds.) Liberalizacja handlu a protekcjonizm : korzyści i zagrożenia dla wymiany handlowej Polski, Warsaw 2015, pp. 36–39.

5 A. Portugal-Perez, J. S. Wilson, Why trade facilitation matters to Africa, "World Trade Review" 2009, vol. 8, no. 3, pp. 379–416.

6 A. Behar, A. J. Venables, Transport Costs and International Trade, (in:) A. de Palma, R. Lindsey, E. Quinet, R. Vickerman (eds), Handbook of Transport Economics, Northampton 2011, pp. 97–115.

7 P.A. Messerlin, J. Zarrouk, Trade facilitation: Technical regulations and customs procedures, "World Economy" 2000, vol. 23, no. 4, pp. 577–593.

8 J. Wilson, C. Mann and T. Otsuki, Trade Facilitation and Economic Development: Measuring the Impact, The World Bank, Washington 2003, p. 6

9 E. Gwardzińska, M. Laszuk, M. Masłowska, R. Michalski, Prawo celne, Warsaw 2017, pp. 17–18.

activities facilitating international trade, measures have also been taken to ensure its security ('facility and security' paradigm). This necessitated the development of global norms[10] which would ensure the safety and security of the supply chain.

Changing conditions within international commerce did not lead to the elimination of implemented conveniences and simplifications. They continued to be applied but now with consideration for the need of ensuring safety and security. The establishment of the Framework Standards to Secure and Facilitate Global Trade (SAFE Framework)[11] drawn up by the World Customs Organization (WCO) in 2005 and intended to advance facility while maintaining the greatest possible level of security was a consequence of the above-mentioned transformations. This document falls within the area of *soft law*.

The SAFE Framework is supported by two pillars. The first devotes particular attention to the cooperation between customs administrations based on commonly accepted standards aimed at maximising security and facility in trade. The second rests on the need for customs authorities to establish partnerships with the business sector through the creation of an international system for the identification of enterprises that provide a high level of guarantees for the safety and security of the international trade supply chain. These companies are treated as partners and have been classified as 'authorised economic operators' entitled to numerous measurable benefits.[12] The first pillar includes the introduction of risk management or advanced technology for information exchange, while the second pillar encompasses the institutions of authorised economic operator, simplified customs procedures, and customs self-assessment. At the level of the EU, these solutions find their basis within the Union Customs Code and earlier, to a limited degree, in the Community Customs Code.

The above solutions have also found confirmation in the Trade Facilitation Agreement (TFA) concluded during the Ninth WTO Ministerial Conference (Bali, 2–6 December 2013) that became binding on 22 February 2017. Its goal was the establishment of harmonised trade security and facility norms.[13] The Agreement contains resolutions facilitating the transport, exemption and clearing of goods, including those covered by transit procedures. Just like at the WCO level, the above-mentioned Agreement emphasises the need for the introduction of a safety

10 H.M. Wolffgang, C. Dallimore, The World Customs Organization and its role in the system of world trade: an overview, "European Yearbook of International Economic Law" 2012, vol. 3, p. 628.

11 http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/safe_package.aspx (10.03.2021).

12 M. Danet, A framework of standards to secure and facilitate global trade, https://www.porttechnology.org/wp-content/uploads/2019/05/PT25–15.pdf (11.03.2021).

13 WTO, Trade Facilitation Agreement (TFA), https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (12.03.2021).

and security declaration before the goods are brought in, the use of risk analysis, and an audit after customs clearance (post-import control) as well as facilitation of formalities for authorised operators. Attention was also drawn to the necessity for electronic payment and the use of pre-shipping inspections. Measures for the effective cooperation between customs authorities and other applicable authorities in respect to trade facilitation and issues connected with the observance of customs law with the simultaneous maintenance of introduced facilities were also defined. The implementation into practice of the above resolutions was intended to aid the improvement of transparency, increase possibilities for participation in global supply chains, and limit opportunities for the spread of corruption.[14]

Both the Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework) and the Trade Facilitation Agreement (TFA) very clearly identify the need to maintain a balance between regulations providing simplifications and those ensuring security. At the same time, they have strengthened within customs law the paradigm of 'facility and security' in which both issues are treated on an equal footing and complement one another. In referring to the international agreements specified above and emphasising the multicentric conditions of the institution of customs law, it is necessary to point out that these agreements have had an immense impact on the solutions incorporated into EU customs law. This is especially visible in the Union Customs Code. Established resolutions provide entities that trade in goods several simplifications with the simultaneous observance of requirements connected to security.

One example of an institution of customs law that maintains a balance between facility and security is the institution of the authorised economic operator (AEO).[15] The AEO scheme tries to reach a balance between simplifying trade and the safety and security of the supply chain through the use of sent-in-advance pre-arrival information, risk assessments and benefits granted to programme participants. The customs controls – one of the most important institutions within customs law – is another example. Despite the inclusion of numerous simplifications, there is a special emphasis on security, resulting in the establishment of a new type of customs control – the security control.[16] The notion of security should be understood not only as that of ensuring security and public order but also the protection of life and health of

14 W. Zysk, Umowa Trade Facilitation Agrement (TFA) szansą rozwoju eksportu produktów fair trade, "Studia i Prace WNEIZ" 2018, no. 53, p. 91.

15 E. Gwardzińska, Świadectwo AEO jako gwarant bezpieczeństwa usług celnych międzynarodowym łańcuchu dostaw, (in:) K. Pieniak – Lendzion,T. Nowogródzka (eds) Współczesny marketing i logistyka-globalne wyzwania, Siedlce 2014, pp. 165–182.

16 M. Czermińska, Strategiczne działania usprawniające i zwiększające bezpieczeństwo w transgranicznym ruchu towarowym w Unii Europejskiej – elektroniczny system celny, "Studia i Prace WNEIZ" 2015, no. 41, p. 274.

people and animals, environmental protection, and the protection of EU business (EU market).

2. Directions of Change in EU Customs Law Related to the Facilitation of Trade

The implementation of the paradigm of trade facilitation contributed to the significant expansion of the system for trade facilitation within the Union Customs Code. The Community Customs Code contained only regulations that referred to a simplified customs declaration. The UCC on the other hand includes a wide array of solutions facilitating the international exchange of goods. This is the result of simplifications introduced by the WCO and confirmed by the WTO concerning the facilitation of international trade.

The customs code of the EU displays a clear progression in these simplifications. An analysis of its regulations shows a graduation from solutions having the smallest scope and reducing the obligation of the declarant (simplified customs declaration) to those having the greatest effect and providing the declarant with great simplifications (customs self-assessment). The criterion which decides the scope of simplifications is the fulfilment by the applying entity of conditions stipulated through the law. Among the simplifications, it is possible to identify those relating to legal solutions exemplified by simplified procedures (simplified versions of customs declarations) as well as those concerning legal and organisational solutions (such as the centralised clearance).[17]

Simplifications that have functioned the longest are the simplified customs declaration and the entry into the declarant's records. These simplifications allow the declarant to provide less information or documentation during product declaration or even to place the goods under customs procedure on their own. However, through the introduction of the institution of a supplementary declaration, EU legislators implemented guarantee measures. This declaration is not an independent act but is an integral part of the customs declaration.

In referring to the above it must be emphasised that the regulations of customs law allowing the placing of goods under customs procedure and their clearing without the submission of required data create a situation of legal fiction. They allow for the occurrence, in a predetermined manner, of legal effects of a given factual state based on an agreement between entities applying the provisions of customs law. The placing of trade goods under customs procedure takes place with an incomplete

17 M. Laszuk, Uwarunkowania kontroli celnej w multicentrycznym systemie prawa, Warsaw 2019, p. 155.

customs declaration (missing some information or presented documents or an entry made by the declarant himself into a registry which is maintained by that entity).[18]

The furthest-reaching simplification is the institution of self-assessment, which consists of providing the entrepreneur importing the goods with a possibility of carrying out controls under customs supervision. The right to perform customs controls results directly from article 185, par. 1 of the Union Customs Code. This simplification, therefore, consists of the authorisation of the economic operator, as a trusted entity, to perform certain duties assigned to customs authorities, including that of customs controls. This method, as implemented by EU legislators, may raise doubts not only in the context of safety and security but also in respect to the legal definition of customs controls contained in article 5, pt. 3 of the UCC, where entities who may realise customs controls have been clearly defined. It should also be underlined that this solution is characteristic only to regulations of customs law. Similar solutions have not been utilised in tax, administrative or any other area of law, nor do the legal systems of other EU member states contain analogous resolutions. The only other examples include the United States and Canada, which utilise the Customs Self-Assessment programme. These types of solutions are meant to maximise the observance of customs law regulations and other regulations concerning the international trade of goods by importers with the simultaneous facilitation of bringing goods onto the territory of a given country. This, however, concerns only low-risk shipments and does not find reflection in regulations of EU customs law.[19]

At this point, it is necessary to refer to systemic and teleological interpretations. The goals of regulations of customs law are mainly to establish rules for the import and export of goods into the customs territory of the European Union as well as ensuring the compliance of operations connected to this area with those regulations. Adherence is ensured mainly by customs controls, a part of customs supervision. Regulations of customs law do not identify any other type of controls which can be realised on their basis in respect to goods that are imported or exported.[20] In considering, therefore, the legal definition of customs controls we must wonder whether EU legislators did not delineate this particular simplification too broadly.

However, in referring to the currently accepted paradigm of trade facilitation and security it must also be said that in providing the trusted entity (AEO) with the ability to perform self-assessments for goods that have been introduced onto the customs territory of the European Union and which are then to be traded, the EU legislators set themselves a significant challenge in respect to security. Permitting authorised economic operators to carry out control operations, one of the most

18 *Ibidem,* p. 157.

19 https://www.cbsa-asfc.gc.ca/prog/csa-pad/menu-eng.html (2.03.2021).

20 More: M. Laszuk, Uwarunkowania…, *op. cit.*

important verification procedures, allows the question of whether the mechanisms for the verification of AEOs developed while the Community Customs Code was still in effect are sufficient under current legal conditions where simplifications are applied to one of the most significant institutions, that of customs controls, the main guarantee of security within the international trade of goods.

The solutions described above may, therefore, attest to the change in the relationship between customs administration and entities performing the international exchange of goods from traditional control and providing directives to one that is based on trust.[21] Will it, however, ensure the safe and secure trade of goods?

3. The Paradigm of Security in the Regulations of Customs Law

Solutions meant to provide security introduced into the Community Customs Code by regulation 648/2005 were retained and even expanded, with special significance assigned to risk analysis, in the Union Customs Code. It should be stressed that within the last several years, the issue of risk has also appeared in other areas of law in the context of regulations concerning controls.

Maintaining a balance between trade facilitation, standardisation and the unification of procedures within the international supply chain as well as the need for greater control and intervention caused a rise in the significance of risk analysis. This has found reflection in the conditions of customs controls where risk management is of primary importance. It is visible, among others, in the international convention on the simplification and harmonisation of customs procedures or within the Union Customs Code (and earlier, since 2005, in the Community Customs Code). The definition of risk presented in article 5, pt. 7 of the UCC specifies situations conditioning customs controls ("'risk" means the likelihood and the impact of an event occurring, … which would prevent the correct application of Union or national measures, compromise the financial interests of the Union and its Member States, or pose a threat to the security and safety of the Union and its residents, to human, animal or plant health, to the environment or to consumers'). Systematic recognition of risk, also through random controls and the introduction of all necessary means limiting possibilities for its occurrence, is risk management. The EU legislators stipulated the scope of risk management by identifying activities that relate to it, such as gathering data and information, the analysis and assessment of risk, the recommendation and initiation of activities as well as the regular monitoring and review of this process and its results on the basis of international, EU and national

21 J. Liu, Y. Tan, J. Hulstijn, IT Enabled Risk Management for Taxation and Customs: The Case of AEO Assessment in the Netherlands, (in:) M.A. Wimmer, H.J. Scholl, M. Janssen, R. Traunmuller (eds.), Electronic Government 8th International Conference, EGOV 2009, Linz 2009, p. 376.

sources and strategies. They have also implemented two fundamental rules upon which the system of risk assessment is based: the development of binding union-wide criteria and norms for the assessment of risk ensuring uniform utilisation of customs controls and the definition of priority areas of control.

Taking the above into account, current designations for customs controls occur mainly on the basis of risk analysis. The completion of risk analysis before the introduction of the goods onto the customs territory of the EU is possible thanks to the creation of the obligation of filing an entry summary declaration that contains 'safety and security particulars'.[22] It can be considered a transitional measure utilised mainly for non-union goods,[23] which is the primary basis for carrying out a risk analysis related to the safety and security of entering goods and which, at a later stage, can result in a safety and security control. The entry summary declaration, therefore, is not a document that regulates the legal status of the good but is meant to identify a non-union product and determine dangers that impact the safety and security of its entry. The fulfilment of the obligation to provide 'safety and security data' does not, therefore, result in the release from the responsibility to resolve the legal status of goods covered by such a declaration.

This is confirmed by the basic requirements of the summary declaration – reliability of the information and timeliness. In referring to information reliability, EU legislators clearly state that one absolute condition is that the declaration contains data necessary for their identification although it only concerns an intention to import. Time limits for filing the declaration have been precisely indicated with no room for flexibility.

Concluding, it should be said that the aim of the solutions described above was the assurance of better-oriented customs controls through the creation of a common basis for risk analysis and thus the enhancement of the safety and security of the entire European Union. The essence of the analysed customs law institutions is substantiated by the fact that the EU has extended the application of rules concerning safety and security (including the obligation to file a summary declaration) to EFTA states (Norway[24] and Lichtenstein[25]) and to Switzerland[26].

22 M. Laszuk, Kontrola oparta na analizie ryzyka – wybrane problemy, "Monitor Prawa Celnego i Podatkowego" 2015, no. 5, p. 186.

23 K. Lasiński-Sulecki, T. Rudyk, M. Śpiewak, Tytuł III. Przepisy stosowane wobec towarów wprowadzonych na obszar celny Wspólnoty do czasu otrzymania przeznaczenia celnego, (in:) W. Morawski (ed.), Wspólnotowy Kodeks Celny. Komentarz, Warsaw 2007, p. 444.

24 Decision of the EEA Joint Committee No. 76/2009 of 30 June 2009 amending Protocol 10 on simplification of inspections and formalities in respect of carriage of goods and Protocol 37 containing the list provided for in Article 101 (Official Journal of the EU L 232 from 3 September 2009).

25 The agreement with Switzerland is also binding in the Principality of Lichtenstein.

26 Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security

Accounting for the fact that EU member states form an internal market and create a single economic area with EEA countries and that controls at external boundaries often concern only goods, the significance of entry summary declaration and risk assessment for the safety and security of the EU market is especially important. It must also be stressed that within doctrine the summary declaration is described as the most effective EU-level measure of risk management. Its effectiveness, however, depends on very close cooperation between member countries.[27]

The function of the safety and security paradigm in international trade, as well as the solutions implemented within this area (summary declaration, risk analysis), caused the emergence of two types of customs controls: ex ante control (preliminary customs control) and safety and security control. It should be said that the ex ante control also occurs in other types of controls, such as financial controls.

Preliminary (ex ante) control is realised before the initiation of activities connected with the import of non-union goods into the customs territory of the EU. Its character is, therefore, preventative, providing opportunities to stop activities that are contrary to the law.[28] These types of controls allow the assessment of risk that the introduction of goods onto the customs territory of the EU may carry. It very often conditions safety and security controls.

Accounting for the functioning of the safety and security paradigm as well as a significant increase in threats to that safety and security within the international environment, security-related controls have become especially significant. This has allowed the recognition of a new type of control that is an important element of supply chain security. It is important to distinguish that with respect to these types of controls the concept of security is not only to be limited to threats to public safety but should be understood more broadly, as mentioned above. Security control is a control of prohibitions and limitations that are justified by reasons of public morality, public order and protection of life and health of people and animals, protection of the environment, and protection of national heritage and of industrial, intellectual and commercial property.

The authority to conduct customs controls related to safety and security results from the content of article 134, par. 1 of the Union Customs Code, according to which at the moment of import of goods onto the customs territory of the EU (the moment of the actual crossing of the external borders of the EU) they become subject to customs supervision and may undergo customs controls. In identifying the earliest moment at which control of safety and security may be done we must refer to article 139, par. 1 of

measures (Official Journal of the EU L 199 from 31 July 2009, pp. 24–42).

27 L. Gellert, The entry summary declaration in the context of risk management, "Customs Scientific Journal" 2014, vol. 4, no. 2, p. 34.

28 L. Kurowski, E. Ruśkowski, H. Sochacka-Krysiak, Kontrola finansowa w sektorze publicznym, Warsaw 2000, p. 50.

the UCC, which establishes the obligation of the immediate presentation to customs authorities of goods imported into the customs territory of the EU. This is the reason that security controls are most often initiated after the fulfilment of two conditions: entry of goods into the customs territory of the EU and their presentation to customs authorities. This type of control is characterised by a lack of prior notification of its initiation, which is justified by its aims.

Conclusions

Before its accession into the European Union, regulations of Polish customs law mainly focused on defining the rules for the international trade of goods which would ensure the appropriate collection of customs and other public duties. Progressing integration and globalisation caused an increase in the international trade of goods and necessitated the facilitation of that trade.

The establishment of first the paradigm of trade facilitation and its later expansion by safety and security caused several significant changes in the rules governing the international trade of goods. Especially important was the application of solutions meant to ensure the safety and security of that trade in the context of already implemented, far-reaching simplifications. Considering the fact that the instruments used in the area of facility often did not completely agree with those concerning safety and security, the introduction of regulations that could establish an equilibrium between these two aspects required EU legislators to proceed with extraordinary care.

It must be said, however, that to a large degree the introduced legal solutions guarantee the correct function of the trade facilitation and security paradigm. This can mainly be seen in the institution of the authorised economic operator (AEO), which realises the assumptions of both its aspects. EU regulations concerning the AEO include several simplifications (in the area of customs controls, for example) and, at the same time, the legislators establish solutions (the conduction of a detailed audit before issuing a permit) meant to ensure the safety and security of the supply chains of entities granted the status of AEO participating in the trade of goods.

It must be mentioned, however, that solutions introduced into the Union Customs Code may cause doubt about the ensuring of the safety and security of the international trade of goods. This concerns the institution of self-assessment. This solution adopted by EU legislators may breed reluctance regarding the assurance of safety and security but also in respect to the legal definition of customs controls which determines the spectrum of entities entitled to perform them. Legislators have given authorised entities (AEOs) the ability to carry out self-assessment, including that of performing customs controls, for clearing goods that have been imported onto the customs territory of the EU and that are later to be allowed to be traded.

In referring to the above it must be stated that this solution presents a significant challenge regarding safety and security. Transfer of authority to the AEO permitting the carrying out of controls, one of the most important instruments of verification, warrants the question of whether mechanisms for the verification of authorised economic operators developed at the time of the Community Customs Code are indeed sufficient within the current legal state, where simplifications to one of the most important institutions – that of customs controls, the main guarantee of safety and security in the international trade of goods – have been introduced. Confirmation of the significance of customs controls is the clear emergence of new types of controls that are important in respect to safety and security – those of the ex ante control and the security control.

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