



The Quest for Uniform Interpretation in EU Customs Law

Trade Facilitation and Integrity: Recommendations for Customs and Business

Laura Carola BERETTA
CONFIAD International Trade Advisor

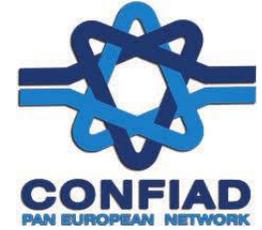
SIL BARCELONA

2019 International Congress on the Authorized Economic Operator

AEO in Global Supply Chains

28th June 2019

Trade Facilitation and Integrity



- The existing literature has analysed the role of trade facilitation in supporting integrity in trade
- Trade facilitation policies are generally considered a powerful tool to support integrity and reduce incentives and opportunities of corruption
- Transparency and predictability are among the key values of trade facilitation

Uniform Interpretation



Transparency and Predictability:

- are considered key values to make trade happen and grow also within and with the EU market
- are important facets of the uniform interpretation prism

Transparency and Predictability – Multilateral Legal Framework



- Article X of the GATT “Publication and Administration of Trade Regulation”
- Article X.1 of the GATT: : «*Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party... shall be published promptly in such a manner as to enable governments and traders to become acquainted with them...*»
- Article X.3 lett. a) of the GATT: «*Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.*»

Transparency and Predictability – Multilateral Legal Framework - ii



- The **WTO Agreement on Trade Facilitation (“TFA”)** has included in the binding WTO legal framework a number of principles and rules building upon the GATT provisions
- The TFA sets forth important rules providing multilateral legal context to interpret fundamental pieces of EU/national legislation and practice such as:
 - Publication and availability of information
 - Opportunity to comment, information before the entry into force (*to the extent practicable and in a manner consistent with the domestic law and legal system...*)
 - Advance rulings

Article X of the GATT - the WTO jurisprudence



- The WTO jurisprudence has widened the scope of application of Article X.1 of the GATT:
- *"Substantively, and when read as a whole within the context of Article X:1, the phrase 'laws, regulations, judicial decisions and administrative rulings' reflects an **intention on the part of the drafters to include a wide range of measures that have the potential to affect trade and traders.** A narrow interpretation of the terms 'laws, regulations, judicial decisions and administrative rulings' would not be consistent with this intention, and would also undermine the due process objectives of Article X..."*

Article X of the GATT - the WTO jurisprudence ii



- The interpretation of the term '**laws, regulations, judicial decisions and administrative rulings**':
- Not necessarily only imperative rules but **any instrument with a degree of authoritativeness** issued by certain legislative, administrative or judicial bodies
- **This does not mean**, however, that **they have to be 'binding'** under the domestic law
- whether a particular measure has a degree of authoritativeness such that it would be properly characterised as 'laws, regulations, administration rulings or judicial decisions' requires a **case-by-case assessment**
- "... it is clear that CNENs are important in enabling the European Communities to maintain a **uniform application** of the Common Customs Tariff within its territory."
- Although the European Communities has noted that CNENs do not 'preclude the exercise of discretion' by member State customs authorities, it is apparent that **there is a clear expectation that such discretion will be exercised in a certain fashion and that infringement proceedings may apply in instances where such discretion is not so exercised.**
- The Panel also finds it relevant that CNENs are issued by the (European) Commission, a body with undisputed authority within the EC for ensuring the uniform application of the Customs Code Tariff, and with the power to challenge interpretations not consistent with its own.

Article X of the GATT - the WTO jurisprudence iii



- All the above principles of interpretation set forth by the WTO jurisprudence apply to the so called **UCC Guidance documents**, the guidelines prepared by the European Commission to promote uniform interpretation
- They also apply to the **domestic legislation of EU MS in the excise duty field**: e.g. according to the WTO panel *Dominican Republic – Import and Sale of Cigarettes*, publication of the Central Bank average-price surveys based on which the Dominican Republic authorities establish the tax base for cigarettes have been considered by the WTO panel part of the administrative rulings

Uniform interpretation in the EU Law



- Uniform interpretation of EU law is achieved through the preliminary ruling which can/is to be requested to the European Court of Justice on the basis of Article 267 of TFEU (Case 166/73 *Rheinmühlen-Düsseldorf*)
- Opinion 2/13 of 18 Oct. 2014, para. 176: «In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has **the object of securing uniform interpretation of EU law**»

Uniform interpretation in the EU Law - ii

- It guarantees transparency, predictability, equality in the EU market together with other key principles:
 - ✓ **Loyal and sincere cooperation** Article 4(3) TEU includes a mutual legal obligation for the **EU** and the Member States "to assist each other in carrying out the tasks which flow from the Treaties".
 - ✓ **Effet Utile or principle of effectiveness**: EU law has to be interpreted in light of its purpose
 - ✓ **Teleological interpretation**: the European Court of Justice generally indicates that "in interpreting a provision of European Union law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part" (e.g. *Covaci*, C-216/14)
 - ✓ **Right to be heard**: Article 41 of the EU Charter of Fundamental Rights, *Sopropé* C-349/07

The EU customs law architecture and hierarchy

- EU Treaties, European Convention on Human Rights and general principles of EU law
- WTO law and EU law: *«the primacy of international agreements concluded by the European Union over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements»* (British Sky Broadcasting Group plc C-288/09, para. 88)
- **Secondary binding legislation** = UCC legal package composed by the EU customs code and its implementing legislative acts, but also excise duty and VAT directives and the domestic legislation implementing them

The EU customs law architecture and hierarchy - ii

- EU Guidelines
- National guidelines/circulars



Real-life case study

- The Union Customs Code excludes the right to be heard in the release of binding origin and tariff information
- In practice some Member States rightly do not take this provision into consideration and grant the right to be heard; other Member States stick on this provision of secondary legislation that goes against the primary principle of the right to be heard
- Result: economic operators in some MS are unduly exposed to potentially unfavourable advance rulings against which they have to bear the cost of administrative or judicial review
- Economic operators having the knowledge / the resources to make some genuine forum shopping make a test-case import from the country (ies) that interpret the UCC in the context of EU law

The Guidelines of the European Union Customs Code



- Discussed between the European Commission and the customs administrations of the Member States also in presence of the private sector/the Trade Contact Group of which CONFIAD is part
- They should be aimed at promoting uniform interpretation of the EU customs law
- They are not binding but they are *de facto* followed as a sort of bible by some national customs administrations, therefore their quality has a direct impact on the interpretative performance of national customs

The Guidelines on Guarantees - a dangerous legal vacuum

- Guarantees in the post clearance control: based on Article 89 (4) (3) of UCC: *“If the guarantee has not been released, it may also be used, within the limits of the secured amount, for the recovery of amounts of import or export duty and other charges payable following post-release control of those goods.”*
- Considerations:
 - Post clearance period, apart from the 3 years foreseen by the EU customs legislation, in case criminal issues arise, consists in a different timing based on the national legislation, so the burden and the cost of the guarantee are different from one MS to another
 - In *Thailand - Cigarettes (Philippines)*: the Panel has suggested that: *«absence of the specific procedural rules generally applicable to the release of guarantees for the internal taxes»* may be the basis of a claim grounded on Article X.3 of the GATT mandating uniform, impartial and reasonable administration of laws, regulations, decisions and rulings

Conclusions

- The UCC legal package provisions are EU secondary legislation and as such they should be interpreted in light not only of the EU law principles but – based on the indications of the European Court of Justice - also of the WTO law
- The UCC Guidance documents fall within the definition of “laws, regulations, judicial decisions and administrative rulings”, they should be drafted in such a way so as to clarify the grey areas/sticking points which may leave room to national/domestic differing interpretation by EU MS, differing interpretation which may leave room to distortions within the EU internal market
- Recommendation for the EU Commission, customs and business is to interpret the EU customs law in the context of the EU law principles and WTO law in order to have uniform interpretation, level-playing field and predictability within the EU market and – if seen from a third-country perspective - in trading with the EU market



Many thanks for your attention!

Laura Carola BERETTA
International Trade Advisor
bruxelles@confiad.org
+32 (0)497 635507