

European Commission proposal to harmonise customs infringements and sanctions requires further changes

AmCham EU's position on amendments proposed in the IMCO Committee's draft report

Executive summary

In 2014, AmCham EU published a [position paper](#) calling for amendments to the European Commission's proposed Directive on a Union legal framework for customs infringements and sanctions. AmCham EU welcomes the substantial amendments to the Commission's proposal outlined in the recent draft report of the European Parliament's Internal Market and Consumer Protection (IMCO) Committee, which addresses a number of concerns raised by stakeholders. However, AmCham EU urges the Parliament to further reconsider some provisions that could potentially harm the interests of economic operators, including the treatment of voluntary disclosure as a mitigating circumstance and the level of fines for different types of infringements, which should reflect seriousness and intention. AmCham EU also seeks further clarity regarding the limitation period and the criminalisation of infringements.

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Introduction

On Wednesday, 3 February 2016, the Internal Market and Consumer Protection (IMCO) Committee at the European Parliament issued a draft report on the European Commission's proposal for a Directive on the Union legal framework for customs infringements and sanctions¹. The next step in the procedure is to table amendments before the deadline of Wednesday, 16 March 2016, at noon.

The American Chamber of Commerce to the European Union (AmCham EU) would like to welcome the substantial amendments to the Commission's proposal contained in the draft report, which address several of the concerns expressed by interested parties over the last months. In particular, AmCham EU welcomes the replacement of a system of strict liability, by a system where customs infringements will be sanctioned only in those cases where they were committed by negligence or intentionally. AmCham EU also welcomes the change in the methodology to impose fines, which should now be based on the amount of evaded duties rather than on the value of the goods.

Notwithstanding this, AmCham EU urges the Parliament to reconsider some provisions that could deeply harm the interests of economic operators.

Clarity surrounding the limitation period

Firstly, AmCham EU welcomes the amendment of the limitation period set out in Article 13(1) of the Directive from four to three years.

However, Article 13(1) of the Directive still reads that 'Member states shall ensure that the limitation period for proceedings concerning a customs infringement...' is three years. The wording of this provision is too vague since it does not explain which event should take place within the three-year time limit. It is the sanction which should be notified within the period of three years, and this should be stated explicitly in Article 13 of the Directive. Otherwise, the lack of clarity risks making the time limitation redundant.

Moreover, Article 13(4) of the Directive rightly foresees an overall limitation period, after which, despite any interruption of the above three-year time limit, any initiation or continuation of proceedings concerning a customs infringement will be precluded.

This overall time limitation is essential in providing legal certainty. However, generally, the maximum duration of any proceedings should not exceed a period equal to twice the initial limitation, which following the amendment proposed in the draft report, will be of three years. As a result, AmCham EU would expect the overall time limitation period to be reduced from eight to six years in Article 13(4) of the Directive.

¹ [Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions](#)

Removing the reference to voluntary disclosure as a mitigating circumstance

Secondly, AmCham EU would like to express its deepest concerns about the fact that a voluntary disclosure is treated in the amendment 45 to Article 12 of the Directive as a mitigating circumstance. A voluntary disclosure should, however, exempt the economic operator from any sanctions. A different solution will rob this mechanism of its main purpose. An economic operator making a voluntary disclosure will still have to pay the duties which may be due as a result of the infringement. In such circumstances, the voluntary disclosure must ensure that the economic operator at least will not also expose itself to the imposition of sanctions.

The exclusion of sanctions in case of a voluntary disclosure is consistent with the amendments proposed by the draft report. Those amendments clearly seek to treat negligent and intentional customs infringements differently from infringements committed by economic operators acting in good faith. A company voluntarily disclosing a customs infringement, and therefore acting in good faith, should for the same reasons be exempted from fines.

Therefore, AmCham EU strongly encourages the Parliament to remove the reference to voluntary disclosures in the amendment of Article 12 of the Directive. A new article should be added exempting companies from any sanctions in case of a voluntary disclosure, when the infringement is not yet the subject of any investigation of which the person responsible for the infringement had formal knowledge.

Concerns surrounding the thresholds and nature of criminal infringements

Thirdly, the new Article 11a (amendment 38) states that 'In cases of infringements committed intentionally and involving damage of more than EUR 10,000 in duties evaded, Member states may provide instead for the imposition of criminal sanctions'. AmCham EU would like to express its concerns about allowing EU Member States to criminalise customs infringements whenever the evaded duties resulting from the intentional infringement exceed 10,000€.

Criminal law only intervenes as a measure of last resort. This is a principle common to many EU Member States, and which is also acknowledged by the EU, for example when dealing with EU criminal policy issues. Criminal law must therefore be applied only to particularly serious offences. Amounts of 10,000€ in evaded duties, even if applicable only in case of infringements committed intentionally, are not necessarily indicative of a serious infringement, and a higher threshold should be set, in particular when such intentional infringement could already be subject to administrative sanctions.

Moreover, the possibility to impose criminal sanctions when the 10,000€ threshold is met would apply 'instead' of the administrative sanctions. This clarification is required to avoid punishing the same conduct twice. However, if Member states are allowed to criminalise intentional customs infringements whenever the above low threshold is met, the effects of the Directive may in practice be circumvented for most intentional infringements, which could be addressed by the member state as a criminal law issue only.

In addition, AmCham EU also considers that the threshold to criminalise customs infringement does not need to be dictated by thresholds indicated in other pieces of

legislation. To the extent that there could be an overlap, AmCham EU proposes that the Directive should apply as *lex specialis* to customs infringements, and as a result, with priority over any other conflicting legislation of a more general nature.

Therefore, the Directive should foresee its own threshold reflecting the seriousness of intentional customs infringements, which should be well above the 10,000€ limit. In addition, the EU should consider whether administrative sanctions can be harmonised in the absence of a simultaneous proposal to harmonise criminal sanctions. That proposal should also outline the criteria to distinguish between criminal and administrative customs infringements in a uniform manner.

Levels of fines should reflect intention and seriousness

Finally, point a) of amendment 31 to Article 9 of the Directive foresees fines of up to 50% of the evaded duties for 'minor' infringements. This would appear disproportionate in view of the minor nature of the infringement, but also to the extent that the same upper limit is foreseen regardless of whether the minor infringements are committed by negligence or intentionally. The level of the fines should therefore be reduced to reflect the minor nature of the infringement, and different upper limits for intentional and negligent infringements should be considered. A similar comment applies to the fines foreseen for serious infringements in point a) of amendment 36 to Article 11 of the Directive, where the same upper limit, namely 100% of the evaded duties, applies to infringements regardless of whether they were committed by negligence or intentionally. Moreover, if the upper limit is reduced for minor infringements, the upper limit for serious infringement should also be reduced to remain consistent with the proportionality principle.

AmCham EU therefore encourages the EU, and the Parliament in particular, to take the above-referred improvements into serious consideration. AmCham EU stresses its continued commitment to remaining available to further discuss alternatives with Member States, the Commission and the Parliament.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2015, directly supports more than 4.3 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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