Sustainable development in European Union (EU) customs law

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Abstract

Increasingly, the concept of sustainable development in legal sciences has become the subject of in-depth research analyses. Some treat it as a political norm and do not subject it to legal analysis. Others attempt to ascribe a legal nature to it. The aim of this article is to answer the following questions: can sustainable development be a principle of customs law? What is its legal status? How can the achievement of sustainable development goals in the customs environment be verified?

1. Introduction

The European Union (EU) actively participates in work that aims to benefit sustainable development, both internationally and in the framework of its internal policies. Nonetheless, to date, a normative approach has not been developed for this concept.

The concept of sustainable development as the basis of integrating the environment protection policy with sectoral policies was stipulated for the first time in Article 11 of the Treaty on the Functioning of the European Union (European Union [EU], 2012). It was the Treaty of Amsterdam (EU, 1997) that shaped its legal regime by promoting economic and social development and high employment levels. What was instrumental for this was the achievement of sustained and long-term development, especially by the creation of an area without internal borders, strengthening of the economic and social cohesion, and creation of the economic and monetary union, finally adopting the single currency.

1.1 Sustainable development as a principle of EU customs law

The now-common definition of the term 'sustainable development', applied in all areas of science and first coined in the so-called Brundtland Report (United Nations [UN], 1987a), rather generally characterises it as an economic approach aimed at solving the dilemma of the necessity to satisfy unlimited demand with the use of limited resources. In this context, sustainable development provides for the satisfaction of the needs of the present generation without impairing the ability of the coming generations to satisfy their own needs.

In his analysis of international and EU law, Ziemblicki (2016) concludes that there is no international, or European, legal definition of sustainable development and that the theoreticians unsatisfied with the definition provided in the Brundtland Report continue to coin and suggest their own definitions. They associate these definitions with either economic development and the gains for both the present and future generations, or with ecological sustainability. Yet, these definitions are not normative, and neither is the very principle of sustainable development.

Decleris (2000) is of quite a contrary opinion. He argues that the Treaty of Amsterdam has in fact sufficiently explained the legal regime of sustainable development, and it is one of the main principles adopted by the EU member states, which have shared the EU's experience in this regard. Also, a significant theoretical and practical role regarding sustainable development has been played by the

body of judgements of the European Court of Justice (now the Court of Justice of the European Union, CJEU). The CJEU is efficiently implementing the vision and the idea of the Rio Declaration (UN, 1992), as well as those of the Treaty of Amsterdam which tackles a wide range of issues related to sustainable development.

Decleris (2000) also presents sustainable development using two separate legal definitions, one narrow and one broad. In the first option sustainable development is the gross income increase which does not result in the parallel depletion or degradation of natural resources. In this definition, sustainable development is usually a combination of economic and environmental policies and, as such, it pertains to a broader social policy.

In the broader definition, sustainable development is the overall reconstructive policy, combining all public policies aimed at restoring a balance among all types of man-made systems and a balance between them and ecosystems. This is to provide for the future stable co-evolution of man-made systems and ecosystems. In line with this definition, each public policy must consider not only the requirements of natural resources protection but also those of sustaining and developing the cultural and social capital. In the broader spirit above, explicit provisions aimed at balancing the relevant public policies should be interpreted. This is because the inclusion of these criteria really means the necessary interdependence of the relevant public policies and any other policies implemented using systemic logic

Mindful of these three requirements the international legislator for the Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific (Antigua Convention) (United Nations Environment Programme [UNEP], 2002) also presents a legal definition of sustainable development where sustainable development is defined as a gradual change in the quality of human life based on the acknowledgment of sustainability as the main and the original objective of the development. This is to be achieved through economic development, coupled with social equality and a transformation of both production methods and consumption patterns, pursuing ecological balance and deeply rooted in the specifics of the region. The process stipulates respect for regional, national and local ethnic and cultural diversities, and a full participation of people in a peaceful and environment-friendly coexistence with nature, without threatening the life quality of future generations or impeding the chances of providing it.

The normative nature of this approach is its strong asset, while the regionality may be considered its weakness, due to the largely limited number of states who have signed the convention. What is noteworthy is the positioning of sustainable development as the main objective of economic, social and cultural growth.

EU customs law lacks a legal definition of sustainable development, as well as an explicitly stated principle of sustainable development, which immediately gives rise to the fundamental questions: can sustainable development be a principle of customs law, and what is its legal status?

From a formal point of view, the Union Customs Code (UCC) (EU, 2013) contains only three articles (quoted below) referring to environment protection, yet it does not directly address the concept of sustainable development. These three articles regard the purpose of customs law regulations and the principle guiding the prohibitions and restrictions applicable upon the entry of goods into EU customs territory and with reference to goods brought out of it.

First, Article 3 of the UCC states that apart from ‘protecting the financial interests of the Union and its Member States’, ‘protecting the Union from unfair and illegal trade while supporting legitimate business activity’ and ‘maintaining a proper balance between customs controls and facilitation of legitimate trade’, the purpose of customs law shall be ‘ensuring the security and safety of the Union and its residents, and the protection of the environment, where appropriate in close cooperation with other authorities’.

Then, Article 134 of the UCC provides for the guiding principle of prohibitions and limitations, which shall be 'justified on the grounds of, inter alia, public morality, public policy or public security, the protection of the health and life of humans, animals or plants, the protection of the environment, the protection of national treasures possessing artistic, historic or archaeological value and the protection of industrial or commercial property, including controls on drug precursors, goods infringing certain intellectual property rights and cash, as well as to the implementation of fishery conservation and management measures and of commercial policy measures.'

Finally, Article 267 of the UCC, as in the previous articles, provides for prohibitions and limitations also with reference to 'goods to be taken out of the customs territory of the Union', with the priority given to 'controls against drug precursors, goods infringing certain intellectual property rights and cash', among others, on the grounds of 'public morality, public policy or public security, the protection of the health and life of humans, animals or plants, the protection of the environment, the protection of national treasures possessing artistic, historic or archaeological value and the protection of industrial or commercial property', but also accounting for 'implementation of fishery conservation and management measures and of commercial policy measures.'

Coupled with the rational assumptions of the lawmakers and the definition approach to the customs law which specifies general provisions and procedures applicable to goods brought into or taken out of the customs territory of the Union (Article 1.1 of the UCC) – whereby supervision of the EU's international commercial exchange is exercised by the customs authorities, thus supporting 'fair and open trade', as well as the 'implementation of the external aspects of the internal market', 'the common trade policy' and 'the other common Union policies having a bearing on trade, and to overall supply chain security' (Article 3 of the UCC) – the legal matters presented above indicate that the lawmaker has not included the concept of sustainable development into customs regulations. Customs regulations have a supervisory and control function regarding the common commercial policy (EU, n.d.) provisions and the remaining EU policies in commercial exchange, including the environment protection policy, albeit only in a trade-related context.

As far as customs legislation is concerned, the references to sustainability mentioned above are included, among others, in the following provisions:

- the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973), drafted because of a resolution adopted in 1963 at a meeting of members of IUCN (The World Conservation Union). The text of the convention was finally agreed at a meeting of representatives of 80 countries in Washington, DC, the United States of America on 3 March 1973, and on 1 July 1975 CITES entered in force.
- the World Heritage Convention, adopted at the United Nations Educational, Scientific and Cultural Organization (UNESCO) General Conference on 16 November 1972 (UNESCO, 1972). It acknowledges that world heritage should not only be protected for our own present wellbeing, but for the benefit of future generations as well.
- the Stockholm Convention on Persistent Organic Pollutants, adopted by the Conference of Plenipotentiaries on 22 May 2001 in Stockholm, Sweden (UNEP, 2001). The text was subsequently amended by the Conference of the Parties at its 4th meeting (4–8 May 2009), 5th meeting (25–29 April 2011), 6th meeting (28 April–10 May 2013), 7th meeting (4–15 May 2015), its 8th meeting (24 April–5 May 2017) and at its 9th meeting (29 April–10 May).

- the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, adopted on 10 September 1998 by a Conference of Plenipotentiaries in Rotterdam, the Netherlands (UNEP, 1998). The convention entered into force on 24 February 2004. The text was subsequently amended by the Conference of the Parties at its 1st meeting (20–24 September 2004), 4th meeting (27–31 October 2008), 5th meeting (20–24 June 2011), 6th meeting (28 April–10 May 2013), 7th meeting (4–15 May 2015), at its 8th meeting (24 April–5 May 2017) and at its 9th meeting (29 April–10 May).
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted on 22 March 1989 and entered into force on the 90th day after the date of deposit of the 20th instrument of ratification, acceptance, formal confirmation, approval or accession, on 5 May 1992
- the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted on 15 September 1987 (UN, 1987b). The Protocol is to date the only UN treaty ever to be ratified by every country on Earth, all 198 UN member states.
- the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, as well as the introduction of temporary prohibitions (UNEP, 2000). The Protocol is an international treaty governing the movements of living modified organisms (LMOs) resulting from modern biotechnology from one country to another. It was adopted on 29 January 2000 as a supplementary agreement to the Convention on Biological Diversity and entered into force on 11 September 2003.

Moreover, there are limitations of trade in certain goods and national regulations in environment protection (although there the legislation is being aligned because of the EU directives).

In Polish environment protection law (Act of 27 April 2001)[1] the concept of sustainable development is built into the regulations (Article 1), together with its definition (Article 3, point 50). It is characterised as socioeconomic development in the framework of which integration of political, economic and social activities occurs, taking account of the biological balance and sustainability of biological processes, with the aim of preserving the ability to satisfy basic needs of communities and citizens both for current and future generations.

The analysis conducted so far, based solely on literal interpretation, suggests that protection of the environment is built into customs law regulations. This is, however, without referring to the concept of sustainable development, and that protection of the environment is legally rationalised in line with the principle of subsidiarity of the EU legislation (Czyżowicz, 2004). While the EU promotes certain issues related to protection of the environment, including implementation of the concept of sustainable development, and is currently aligning legislation of some member states regarding these issues, the role of customs regulations in commercial turnover is largely limited to supervisory and controlling functions,

The concept of sustainable development is treated in law as a relative goal and not as an absolute one – the states are not obliged to achieve it but rather to promote it (see Barral, 2012). It seems that the time allowed for promotion of sustainable development has come to an end and it is now necessary to take decisive legal actions to give it an absolute status, with the view of securing the ability to satisfy basic needs for future generations, as well as for the present one.

Therefore, the lack of a legal definition of sustainable development in the currently binding customs law regulations and the use of the principle of subsidiarity of the EU legislation, in line with a dynamic interpretation of law, suggest that sustainable development is a principle of customs law that has a normative nature.

Similar conclusions can be drawn from an analysis of customs regulations. This includes an analysis of the objectives and principles governing prohibitions and limitations regarding the flow of goods, and providing for environment protection, as mentioned earlier. It refers to the autopoietic theory of law (Rogowski, 2015, pp. 554–556), which perceives autonomy of law in self – or auto – reproduction of the communication network and views its (the law's) approach to society as an infringement on other autonomous communication networks.

The legal system, in autopoietic theory, is a social functional subsystem where legal communication is achieved by legal norms, decisions and the doctrine of law (Rogowski, 2015). Both formal and substantive, and legal rationality occur in this case (Teubner, 1983).

The existing regulations pertaining to sustainable development differ significantly one from one another at times, depending on the adopted instrument. Yet, there is overall cohesion among them, as sustainable development is legally defined as an objective to be achieved (Barral, 2012), and it has currently become an unavoidable paradigm, which – as it is commonly accepted – should be a foundation of most, if not all, human activities, both in the lawmaking process, and regarding the implementation of law.

2. Customs control of goods as a verifier of the achievements of sustainable development goals within the customs environment

Customs control of goods is the key mechanism for verification of the achievement of sustainable development goals within the customs environment. On one hand, the control has a fiscal function which safeguards the interests of the EU budget, and the budgets of individual member states. On the other hand, it has a protective role related to the safety of the lives and health of people, plants, animals and the natural environment.

Numerous definitions of customs control exist in the literature. As argued by Michalak (2014, pp. 365–380), most of them relate directly to customs regulations, international trade (easings) and law enforcement (control). Czyżowicz (2004), as well as Lux (2004), defines the controls as customs supervision, that is, the activities conducted by customs authorities with the aim of securing obedience to customs legislation.

For definition purposes Michalak (2014) combines all elements of customs control found in the literature to date, and characterises it as the implementation of all acts of customs law and other acts by appropriate customs authorities within the framework of law governing international trade, with the purpose of enforcing compliance with the law. This approach in fact reflects the normative definition of customs control found in the Kyoto Convention of 1973 (World Customs Organization [WCO], 1973), where customs control is defined as all the means taken with the purpose of securing obedience of law (acts and directives), the enforcement of which is the responsibility of customs authorities. This definition has been copied, almost directly, by the International Convention on the Harmonization of Frontier Controls of Goods (UN, 1982).

In the UCC (EU, 2013) the definition has been largely extended to mean:

> specific acts performed by the customs authorities in order to ensure compliance with the customs legislation and other legislation governing the entry, exit, transit, movement, storage and end-use of goods moved between the customs territory of the Union and countries or territories outside that territory, and the presence and movement within the customs territory of the Union of non-Union goods and goods placed under the end-use procedure. (Article 5, point 3)

The structure of these definitions is similar as they are united by a common purpose – to establish compliance or noncompliance of facts at hand with the relevant provisions of the law. What they also have in common is the controlling entity – the customs authorities, as well as the nature of activities undertaken in the process, which are supported by specific means and methods leading to the establishment of compliance or lack of compliance of the facts at hand with the relevant provisions of the law. The list of activities undertaken by customs authorities, presented as an example in the UCC, is not that important as it regards obedience to all customs regulations, which comprise the following:

> the Code and the provisions supplementing or implementing it adopted at Union or national level; the Common Customs Tariff; the legislation setting up a Union system of reliefs from customs duty; international agreements containing customs provisions, insofar as they are applicable in the Union. (EU, 2013, Article 5, point 2)

Customs controls are directly aimed at identification of noncompliance customs regulations and at application of relevant sanctions. The law enforcement in this context has been, and remains, subject to national jurisdictions, which has led to numerous differences in the treatment of economic operators on the EU market, thus breaching the basic principle of the EU legislation: that of equal treatment of economic operators in the market. This has led to the situation where in one member state certain actions are regarded as a breach of customs regulations and, therefore, are punishable. Consequently, the economic operator has no right to use custom easings and simplifications. In some other member states, however, the same actions would not be deemed as a breach of law and would not be punishable, so there would be no legal obstacles for economic operators to avail themselves of customs easings and simplifications. Therefore, in the exact same situation different treatment would be applied to economic operators, thus breaching the sacred principle of fair competition in the EU market (Gwardzińska, 2016).

This issue requires a quick legal intervention – the customs law requires uniform regulations regarding both the rules for punishing noncompliance with the customs law, and regarding the severity of the sanctions. The European Commission, and then the EU, have not addressed the issue of these discrepancies for 28 years, that is, from the establishment of the Community Customs Code (EU, 1992), where integration of customs procedures was the main goal, through numerous iterations, to the Modernised Customs Code (EU, 2008), where the main theme was the digitalisation of customs transactions, to the UCC (EU, 2013)[2] which also stops short of providing a uniform approach to the issue of sanctions. The EU legislator has limited themselves to the conclusion that 'each Member State shall provide for penalties for failure to comply with the customs legislation. Such penalties shall be effective, proportionate and dissuasive.' Administrative sanctions may take the form of, for example, 'a pecuniary charge by the customs authorities, including, where appropriate, a settlement applied in place of and in lieu of a criminal penalty' or 'the revocation, suspension or amendment of any authorisation held by the person concerned' (Article 42, UCC) (EU, 2013).

As observed, these provisions of the UCC delegate punishment for noncompliance with the customs legislation to the individual member states. The lack of a uniform approach to this issue, however, will largely impede legislation reform and weaken the prospects for the advancement of the concept of sustainable development in the customs environment.

The custom controls conducted at present comprise the key components of sustainable development, that is, socioeconomic development coupled with protection of natural resources and cultural capital, as they:

- provide for the legal turnover of goods within the framework of business activities conducted by economic operators, which may contribute to an increase in profits of the state and the EU budget due to the payment of duties and taxes by entities involved in the international turnover of goods; the increase of the turnover of goods may translate not only into increased legal employment but also into more general socioeconomic development
- counteract illegal economic turnover by detection and prevention of all kinds of custom offences related to illegal trade in wild animals and plants, or in wastes polluting the environment, or in goods breaching certificated standards which might be harmful to the life of people, animals or plants, and which go against the rules of fair competition on the market. On one hand, the controls protect society, citizens and the natural environment from harm, but on the other hand they protect the states from failures in the collection of budget receipts
- prevent the smuggling of dangerous goods, including arms and munitions, thus impeding the growth of terrorist organisations and contributing to the development of strong state institutions
- protect goods with national cultural values (artistic, historic or archaeological), as well as intellectual property, trademarks, thus contributing to the maintenance of the cultural heritage not only for the present generation but also for future ones.

3. Conclusion and recommendations

This analysis, conducted in line with the concept of dynamic interpretation and a systemic approach, has shown that sustainable development is a principle of customs law and that it has a normative status. Such a statement does not contradict the legal norm included in the treaties of Maastricht and Amsterdam which require a connection between development policy and environmental protection, as well as the treaties' connection with harmonisation of other public policies. This is to secure stable and continued advancement of the European nations. Consequently, for the EU, the concept of sustainable development is also a legal standard.

Provisions of customs law have been integrated into regulations in the common commercial policy, including those of customs policy and other EU policies. Also, the environment protection policy has been integrated with the others but only with reference to its commercial aspect, where the customs regulations play supervisory and control functions. Customs controls have become an exemplary verifier of all the components of sustainable development, that is, of socio-economic development coupled with the environment and the cultural capital protection.

3.1 Recommendations

1. Currently, there is no meaningful coordination of activities of the General Directions of the European Committee on the creation of legislation pertaining to sustainable development and, therefore, there is an urgent need to strengthen such activities.
2. Sustainable development should have an absolute status, and not a relative one, as is the case at present.
3. Uniform application of customs law in the individual member states requires a uniform enforcement framework and a uniform set of sanctions for noncompliance. The lack of a uniform enforcement framework at the EU level contributes to the weakening of sustainable development and is conducive to illegal trade in goods posing a threat to the environment.

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Notes

1 Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska, Dz.U. 2001 nr 62 poz. 627 z późn. zm. [The Act of 27 April 2001 Environmental Protection Law, the Polish Journal of Laws 2001 No. 62, item 627, as amended]. https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20010620627

2 Article 11 of the Treaty on the Functioning of the European Union (former Article 6 of the Treaty establishing the European Community): Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. oide.sejm.gov.pl/oide/index.php?option=com_content&view=article&id=14804&itemid=946

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