

Putting More Union in European Customs

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Abstract

The European Commission (2021) decided to call on external expertise to advance the debate on the future of the European Union (EU) Customs Union. To that end the Commission established a ‘Wise Persons Group on challenges facing the Customs Union.’ The Wise Persons Group (WPG) was an independent, high-level group comprised of people with experience in politics, law, industry, the public sector, international trade and academia. The WPG’s primary goal was ‘to reflect on the development of innovative ideas and concepts and deliver a report that contributes to a general inter-institutional debate on the future of the Customs Union.’ The Group published its report and recommendations in March 2022 under the title *Putting more Union in the European Customs. Ten proposals to make the EU Customs Union fit for a Geopolitical Europe* (European Commission, 2022a).

Walsh has now joined the debate to demonstrate how necessary pragmatic compromises on the implementation of customs law have militated against the fundamental concept of the Customs Union since its inception and will continue to do so in the future unless there is the required political will to remedy the known fault lines.

Keywords: Customs Union review; WPG report; customs controls; combatting fraud; pre-clearance

1. Conflicting views on the status of European Union Customs Law

The European Union (EU) Commission sees itself as having a modernised legal framework of customs rules and procedures in place since 2016. For his part, Walsh has viewed the Customs Union legislation as the EU’s Achilles heel from its inception, and it will continue to be so into the future unless the member states face up to their legal responsibilities and ensure that effective, proportionate and dissuasive measures are put in place to safeguard the EU against frauds and irregularities. In this article Walsh attempts to trace the development of EU customs law over the preceding 50 or so years in the hope that his record of the milestones reached along the way may help chart a better way forward.

2. Defining and refining EU Customs Law (Walsh, 1986, pp. 340–344)

In 1968 the EU Customs Union abolished internal customs duties and charges having equivalent effect in trade between the member states and substituted a uniform system for taxing imports from outside the European Economic Community (now the EU). However, the establishment of the customs union involved not only the abolition of all customs duties in trade between the constituent member states and the introduction of a single customs tariff at the common border: a customs union with such limited objectives would not have been very stable. The necessary consequences of substituting

a single customs territory for the national territories – the basic feature of a customs union – were the elimination, at customs level, of any causes of unequal treatment or deflection of trade that could adversely affect economic operators in other member states.

Article 27 of the Treaty of Rome (EU, 1957) – the only Treaty provision providing for the approximation of national customs legislation – envisaged the member states taking the necessary steps ‘to approximate their provisions laid down by law, regulation or administrative action in respect of customs matters’ on the basis of recommendations from the Commission. In accordance with Article 189 of the Treaty, recommendations come last in the EU legislative hierarchy:

In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

Since the recommendations were not binding on the recipient member states, they could look upon the recommendations addressed to them as a minimum which they were ready to accept, but beyond which they considered themselves free to do as they pleased. As a result, no real harmonisation of customs provisions was possible by that means. In effect the reliance on the efficacy of recommendations as instruments of change proved, in practice, to be little more than aspirational.

Given the profound and direct influence of customs legislation on the application of the customs tariff, it was deemed essential that the establishment of Community customs legislation should be brought about, as in the case of the common customs tariff (CCT), based on Community acts that were binding on the member states. After lengthy deliberations the member states were convinced of this necessity, and it was based on programs established by mutual agreement between the member states and the Commission (first in 1963, and later in 1971) that the preparation of genuine Community legislation was undertaken. The net result was the establishment of the CCT, common rules on origin and customs valuation – the duty elements in the taxation of goods. These core taxation measures were, in turn, supported by a framework of directives and regulations governing customs procedures, formalities, controls, debts and guarantees.

Over time it became increasingly evident that, when it came to uniformity of application throughout member states, directives fell far short of achieving the ‘one state’ norm for customs purposes. Commenting on the ‘excessively lax nature of certain Community provisions’ the Commission of the European Communities (1977, pp. 13–14) concluded that:

A large number of Community customs provisions have been adopted by the Council in the form of directives. In those particular cases, there was, in practice, no alternative to the directive because of the pragmatic approach to the approximation of national customs laws. The Community rules, adopted as they were in the most urgent requirements, had to be able to dovetail without difficulty into the national customs legislation in force in each of the Member States. The directive, which is binding on the Member State to which it is addressed, with regard the result to be achieved, while leaving the national authorities responsible for the choice of form and means to be used, was the Community legal form most suited to the intended purpose.

In the light of eight years' experience, however, there is a clear realisation of the difficulty of achieving via directives a really uniform application of Community rules throughout the Community, an objective that is essential however, to a genuine Customs Union. This difficulty is all the greater as the provisions in most of the directives are not sufficiently precise. As a result, the excessively loose drafting of certain directives has led to an approximation of the national customs provisions that is less thoroughgoing than might have been thought initially.

The only way to ensure that customs legislation is uniform and reliable is to see that binding measures are enacted, which are obligatory and directly applicable with, and therefore offer legal guarantees for the individual [i.e. in binding regulation form].

3. Customs law

3.1. The Community Customs Code (Walsh, 2015, pp. 8–9)

The codification of the various pieces of customs legislation in a single, directly applicable Community Customs Code and accompanying Implementing Regulations was the most significant change in the *acquis communautaire* in the context of the establishment of the Single Market in 1993. The Community Customs Code (European Commission [EC], 1992) replaced 105 regulations, directives and amending provisions going back to 1968. The Commission began the consolidation process in the late 1970s, and it took years of painstaking work to produce the Community Customs Code in October 1992, and its Implementing Regulation in July 1993 (EC, 1993); both regulations came into operation on 1 January 1994. From an economic operator's standpoint, both the Code and its Implementing Regulation challenged legal comprehension. This was partly because they were published in the prescribed regulation format – without a table of contents and crossheadings. On the Commission's own admission, it was easy to get lost in the maze of unsignposted and seemingly unrelated provisions. Consequently, the Code lacked transparency, was not easily accessible and was extremely complex. Furthermore, the interpretative preambles in the original (replaced) directives and regulations were not carried forward into the consolidated Code – with the result that an immediate and invaluable source of interpretation and context was lost in the consolidation process.

For its part, the establishment of a single market underlined the critical importance of effective customs supervision at the common external border surrounding the EEC. Once non-Community or third country goods entered any of the Community member states, whether by fair or foul means, they were seen to be in free circulation and able to move and be traded freely throughout the single market area in the same way as goods grown or produced within the Community.

The aborted Modernised Customs Code came next in time.

3.2. The Modernised Customs Code (Walsh, 2015, pp. 10–11)

The Modernised Customs Code (EC, 2008) was promoted as the basis for providing for the simplification and modernisation of customs law in line with 21st century developments and demands. Its preamble set out its purpose as including, *inter alia*, the following objectives:

(3) Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code was based upon integration of the customs procedures applied separately in the respective Member States during the 1980s. That Regulation has been repeatedly and substantially amended since its introduction, in order to address specific problems such as the protection of good faith or the taking into account of security requirements. Further legal amendments were required, *inter alia*, by the entry into force of the 2003 and 2005 Acts of Accession, as well as the Amendment to the International Convention on the simplification and harmonisation of customs

procedures (hereinafter referred to as the Revised Kyoto Convention), the accession of the Community to which was approved by Council Decision 2003/231/EC). The time has now come to streamline customs procedures and to take into account the fact that electronic declarations and processing are the rule and paper-based declarations and processing the exception. For all of these reasons, further amendment of the present Code is not sufficient and a complete overhaul is necessary.

(5) The facilitation of legitimate trade and the fight against fraud require simple, rapid and standard customs procedures and processes. It is therefore appropriate, in line with the Communication from the Commission on a simple and paperless environment for customs and trade, to simplify customs legislation, to allow the use of modern tools and technology and to promote further the uniform application of customs legislation and modernised approaches to customs control, thus helping to ensure the basis for efficient and simple clearance procedures. Customs procedures should be merged or aligned and the number of procedures reduced to those that are economically justified, with a view to increasing the competitiveness of business.

(6) The completion of the internal (single) market, the reduction of barriers to international trade and investment and the reinforced need to ensure security and safety at the external borders of the Community have transformed the role of customs authorities giving them a leading role within the supply chain and, in their monitoring and management of international trade, making them a catalyst to the competitiveness of countries and companies. Customs legislation should therefore reflect the new economic reality and the new role and mission of customs authorities.

3.3. The Union Customs Code

For stated reasons, including the following, the Modernised Customs Code (MCC) never became operative (Walsh, 2015, p. 12):

The implementation of a major part of the processes to be introduced depended on the definition and the development by the Commission, the national customs administrations and the economic operators of a wide range of electronic systems. This required a complex set up of actions between the Member States, the trade community and the Commission, notably important investments in new EU – wide IT systems and supporting activities as well as an unprecedented effort from the business community to operate according to new business models. It was then apparent that, at best, a very limited number of new customs IT systems would be introduced in June 2013 which was the latest legal date for the implementation of the MCC. A new task which intervened after the adoption of the Regulation (EC) No 450/2008, and was linked with the entry into force of the Lisbon Treaty, was the commitment made by the Commission to propose amendments to all basic acts in order to align them with the new provisions of the Lisbon Treaty concerning delegation of powers and the conferral of implementing powers before the end of the term of the Parliament. This has an impact on the foreseen implementing provisions of the MCC which now had to be ‘split’ between delegated acts and implementing acts in accordance with new empowerments in line with Articles 290 and 291 TFEU. Moreover, the ‘Community’ Customs Code (MCC) has now to be renamed into ‘Union’ Customs Code (UCC).

Consequently, Regulation (EU) 952/2013 (EC, 2013b) laying down the UCC was adopted and its provisions applied from 1 June 2016.

3.4. The critical importance of the role of national laws and procedures

While it is easy to look back in time and point to latent defects in, or omissions from, Customs Union legislation, the difficulties the Commission, in particular, faced on that front must be acknowledged. Indeed, many of those difficulties persist to this day. A document from the Commission explained the position (Commission of the European Communities, 1977, pp. 9–10; Walsh, 1986, p. 341):

The introduction of Community customs legislation has not been completed. A number of Commission proposals are still under examination at Council level. Others are being prepared by the Commission departments.

The drafting of those proposals is made difficult as a result of the close links between the Member States' customs law and other areas of national law (civil law, commercial law, maritime law, criminal law, [constitutional and international law] etc.) and as result of the historical circumstances under which the Member States' customs rules were evolved [some inheriting a residue of unconstitutional laws following from the adoption of new tripartite constitutions on independence.]

In recognition of the inherent difficulties involved, and in deference to the principle of *subsidiarity*, the EU essentially left the degree of customs controls to be applied by the member states to the discretion of individual member states. This arrangement is referred to as 'executive federalism'. The principle of executive federalism within the European Communities reflects the principle of subsidiarity, which is enshrined in Article 5 of the EC Treaty (EC, 2002):

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

To that end, Article 1 of the Community Customs Code (EC, 1992) provided that:

Customs rules shall consist of this Code and the provisions adopted at Community level or nationally to implement them.

3.5. The legal lacuna surrounding customs controls

The extent to which the core processes of the Customs Union are applied uniformly across the EU has always been uneven. Walsh (2015, p. 28 and 2020, pp. 76–78) highlighted the position by reference to a study carried out by PwC in 2012/2013 to evaluate the state of the Customs Union. Not unexpectedly, the findings were a mixed bag. Some member states were found to be acting in a proportionate manner while others performed perfunctorily. The study summarised the position as follows (EC, 2013a):

The broad conclusion of the study is that the level of uniformity in a majority of customs processes and procedures is not satisfactory. This includes certain processes based upon a common EU legal basis (e.g. valuation, classification).

The main findings on uniformity based on the analysis of the gathered data:

- a. Conditions for simplified procedures, the interpretation of provisions on the taxable basis for import duty purposes (the customs value), and the classification of goods differ among Member States.
- b. The role and level of documentary controls, physical controls, post-clearance controls or combinations thereof still depend to a great extent on national legislation, national policy and instructions within the control framework of specific Member States (within its risk management framework). Similarly, the European Court of Auditors also concluded that major differences in actual controls exist and that these controls were insufficient to secure the interests of the EU.
- c. Specifically in relation to physical controls, differences arise depending on the control philosophy of Member States and differences in the scope of their controls.
- d. Businesses repeatedly highlighted the impact of differing interpretations of EU legislation by customs officers and national authorities on the carrying out of documentary and physical controls. A further point made was that customs officers sometimes interpret and handle customs-related mistakes made by business differently.

In summary, Walsh (2015, p. 28) concluded that ‘the administration of customs law throughout the EU is still very much a patchwork quilt – with each Member State viewing the law through its own prism.’

4. Customs practice

Based on these findings Walsh (2020, p. 83) went on to opine:

The Practice of ‘Light-Touch’ Regulation by Member States

On the other side of the coin, the greatest discretionary danger to the uniform application of customs controls and revenue protection arises from apparent light-touch regulatory policies adopted by some Member States when it comes to the application of proportionate customs supervision and controls. Even when viewed through their own lens, a UK Parliamentary Committee was forced to countenance the following serious adverse findings by the European Court of Auditors in relation to customs controls over sea imports:

Having listed the reported failures of Her Majesty’s Revenue and Customs (HMRC) as set out in the European Court of Auditor’s findings on customs practices in the United Kingdom (UK) (EC, 2017a), Walsh (2020, p. 84) concluded that:

Looked at objectively, HMRC was deemed to be operating an open door for frauds and irregularities on the EU’s traditional own resources. While the UK clearly benefits from increased commercial traffic through its ports, Member States and, *a fortiori*, the EU, lose out on revenue (own resources) which is rightly theirs.

5. Findings and recommendation of the Wise Persons Group in relation to extant customs law and practice

The WPG summarised their overriding findings as follows (EC, 2022a, pp. 3–4):

Evidence gathered by the Wise Persons Group on Customs shows that dangerous, non-compliant products still enter the EU market every day and that we leave billions of Customs duties and taxes uncollected. The reality is also that European Customs do not yet currently function “as one”. This leaves the Customs Union at the mercy of its weakest link. Incremental changes introduced over the years were necessary and our group notes the real and important efforts made in recent years to strengthen both the legal and technical framework for customs administration, which will make a difference to the strength of the Customs Union. Nonetheless, in a fast-changing world, these are insufficient to address the scale of the challenges faced by Customs. The Customs Union is not “fit for purpose”.

[T]he vast majority of – if not all – stakeholders interviewed for this report complain about a systematic absence of common implementation of customs measures, different control practices across border entry points, both within and across Member states, differences in control priorities, differences in investigative capacities (controlled deliveries, undercover activities), and differences in methods and sanctions for non-compliance. The same consignment of goods subject to antidumping measures or to prohibitions and restrictions may be checked or not depending on where it enters the EU. Some Customs authorities appear to apply more stringent controls than others do, and sanctions applied in case of irregularities.

With reference to the WPG weakest link analogy, Walsh (2015) wrote some six years earlier:

At the end of the day a chain is as strong as its weakest link. As things currently stand the EU has to rely on individual Member States to carry out all the controls that they (Member States) deem necessary to ensure that customs legislation is correctly and consistently applied and for them to do so in accordance with the provisions in force i.e., Community or national provisions. While the pending Union Customs Code seeks to give the extant provisions more teeth, the protection of the EU, its citizens and its revenue still remains in the hands of individual Member States with varying levels of experience in administering a Common Customs Code.

Viewed in the foregoing cumulative light, it is not surprising that the WPG found the EU Customs Union was ‘not fit for purpose.’ This is a serious indictment of the cornerstone of the EU single market given the weight and width of the extensive knowledge and experiences of the WPG members.

6. Findings of the Wise Persons Group on data

To provide for the type of Customs Union the WPG believes the EU needs, they recommended an approach:

[...] focussed on obtaining better quality data based on commercial sources, ensuring it is cross-validated along the chain, better shared among administrations, and better used for EU risk management,

rather than expecting customs:

[...] to meet their challenges by simply applying the existing, now insufficient, techniques with more vigour.

In their analysis of data management by customs the WPG noted that customs data:

[.....] comes from operators (shippers/customs agents etc.) not familiar with the contents of consignments.

It would not be correct to suggest that customs rely on third party data relating to importations/exportations. Properly understood, customs data verifications are specifically designed to test the correctness of the cumulative dutiable elements involved in any particular importation, namely, tariff classification, valuation and origin. The same considerations apply, *mutatis mutandis*, to goods subject to prohibition and restriction.

For its part, customs tariff classification – the pivot consideration – is determined to the greatest degree possible by reference the objective physical characteristics of the goods at the time of importation/exportation – not by reference to the vagaries of the commercial description of the goods. Accordingly, the European Court of Justice (ECJ, 2006; 2007) ruled that:

It is settled case law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is, in general, to be sought in their [the goods] objective characteristics and properties as defined in the wording of the relevant heading of the CN [combined nomenclature] and in the section or chapter notes.

This being the case, it is hardly surprising that pre-clearance physical examinations by customs have proved to be the most successful means of combating the misclassification of goods – whether done mistakenly or fraudulently. Conversely, if a declarant declares ‘computers’ as ‘machinery’ in their automated declaration, it will be accepted by the system and the goods cleared as such in the absence of physical examination by customs.

On origin, claims to preferential rates of duties must be supported by the legally prescribed form of certificates of origin set out in the particular trade agreement. Likewise, the agreement will have established the verification procedure to be adopted by the issuing authority in the claimed country of origin at the request of the customs authority in the country of importation. As a further safeguard, the agreement’s rules will usually have an anti-avoidance measure built into them requiring (with certain well-defined exceptions) that the goods must be transported direct from the country of origin to the importing country, thus making the system of proofs and checks easier to administer. The ‘direct transport’ requirement may be verified by reference to transport documents such as bills of lading (maritime transport) and airway bills (air transport).

In the case of customs valuation, the constituent valuation criteria determine the nature and scale of the verifications required. The starting point is with the legal definition of customs value as set out in Article 70 UCC (EC, 2013b):

1. The primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, adjusted, where necessary.

The adjustments are provided for in Articles 71 UCC (additions) and 72 UCC (exclusions). The key requirement for the transaction value method to apply is that there must be an arms-length legal sale involved. This being the case, in accordance with Article 145 UCC IA (EC, 2015a), ‘the invoice which relates to the declared transaction value is required as a supporting document’ to the declaration. While an invoice is not a contract as such – it is not signed by the buyer – it serves as a record or evidence of the transaction between the exporter and the importer.

7. Reconciliation of classification and valuation details between export and import declarations

Walsh (2015, p. 36) recommended that the EU should be looking to match, as far as possible, the details of the taxation elements declared on the customs export declaration with the corresponding details declared on the customs import declaration. Commenting on the twin taxation elements of classification and valuation, Walsh went on to opine that:

[...] it would appear axiomatic that a “copy” of the export declaration filed with customs to export the goods to the EU should be produced in support of the import declaration into the EU, with particular reference to the declared export tariff code and value. While the export tariff code will not be based on the EU’s CCT (Combined Nomenclature), the odds are that it will likewise be based on the Harmonised Commodity Description and Coding System (HS) and directly comparable – the HS system is used by more than 200 countries and economies as a basis for their Customs tariffs and covers more than 98 per cent of the merchandise in international trade.

Experience has shown that the exchange of export/import data can also reveal fraudulent export declarations, particularly concerning goods being deliberately overvalued on exportation. It is interesting that this data validating measure was raised some six years later at a meeting of the WPG in January 2022. The minutes of the meeting record (EC, 2022b, p. 2) that:

The Group learned about approaches experienced by WCO members to improve the reliability of data. For instance, “your export becomes my import” aims at comparing export/import data to better identify fraud, while the collection of sale prices from online marketplaces aims at developing “web scraping” techniques.

In summary, there is a compelling case for being able to trace the transaction from womb to tomb to the greatest degree possible.

8. Customs declarations to be made by the importer/exporter

Walsh’s recorded observations (2015, p. 110) on the merits of the importer, as opposed to the declarant, being obliged to make the legally binding customs declaration are set out hereunder:

People coming from common-law jurisdictions experience difficulties with the concept of ‘declarant’. They were used to the tried and tested concept of ‘importer’ – normally taken to be the beneficial owner of the goods but defined in more expansive ownership terms: ‘importer’ shall mean, include, and apply to any owner or other person for the time being possessed of or beneficially interested in goods at and from the time of importation thereof until the same are duly delivered out of the charge of the officers of customs. In Community law the concept of importer, based on property rights, was replaced by the concept of the person who has either control or possession of the goods and the covering documents. Accordingly, in Article 4(18) [of the EU Customs Code] ‘Declarant’ is defined as the person making the customs declaration in his own name, or the person in whose name the customs declaration is made. Article 64(1) [of the EU Customs Code] goes on explain:

Subject to Article 5 [of the EU Customs Code] a customs declaration may be made by any person who is able to present the goods in question or to have them presented to the competent customs authority, together with all the documents which are required to be produced for the application of the rules governing the customs procedure in respect of which the goods were declared.

It is worth noting that some EU member states originally had difficulties with the concept of ‘declarant.’ Walsh (1986, p. 562) recorded these difficulties, noting that:

The main plank of the release procedure [clearance of the goods by customs] is the declaration to customs, known as the entry, which is submitted on a special form. The 1979 Directive (EC, 1979) does not rule on every aspect of the entry – the important question of who [was] entitled to lodge an entry [was] left for later legislation. Article 2 of the Directive simply stated that:

The natural or legal person who makes the entry shall hereinafter be referred to as “the declarant”.

The opinion of the Economic and Social Committee at the time made it clear that the failure to define ‘the conditions under which a person may be permitted to make a customs declaration was not an omission as such, but a clear case of the proposed definition having been ‘blocked at Council’ – the provision was based on Article 234 of the Treaty of Rome, which required a unanimous vote by the member states for adoption.

The definition of ‘declarant’ was made good by the Community Customs Code [CCC] Article 4: Definitions:

[18] ‘Declarant’ means the person making the customs declaration in his own name or the person in whose name a customs declaration is made.

Article 64 of the CCC (EC, 1992) further provided that, in addition to making the requisite declaration, the declarant must be able to produce the goods and covering documentation to customs. In effect, the declarant no longer needs to be the owner of the goods or to have a proprietary interest in them, however, tenuous. Historically, importers had to make entry of their goods to customs – the same law applied to former English colonies. It would appear axiomatic that the importer, a party to the sales contract(s) and privy to all the operative terms and conditions involved, should have primary responsibility for declaring the goods to customs rather than a declarant/agent who is neither a party to the contract(s) involved, nor necessarily privy to its terms or conditions. He may not even know the nature of the goods involved.

9. Self-assessment of customs duty liability

Any serious revision of customs law and procedures should include the application of the principle of self-assessment to all customs declarations. This is currently restricted to AEOs¹ in defined areas of customs compliance. Walsh (1986, p. 318; 2015, pp.72–73) set out the rationale for this proposal as follows:

Shifting to substantial reliance on self-assessment by taxpayers, supported by movement from physical to post-release controls;

It is increasingly recognised that the key to effective tax administration is voluntary compliance by the taxpayer, and that the key to voluntary compliance is self-assessment: a system, that is, which relies on taxpayers to themselves declare and pay the tax due – but crucially, provides a system of ex post facto checks of those declarations, with penalties for misdeclaration. This is as true in the area of customs as it has proved, for instance, in relation to business and personal taxes. In the customs context, this means a de-emphasis on physical inspection at the point of entry, with importers (or their agents) themselves declaring the duties payable—but with effective control exercised after goods have been cleared for entry, involving post-release audit and other checks focused on addressing transactions where the risk of misdeclaration is greatest.

An IMF Working Paper went further when noting in relation to the ‘Computerisation of Customs Operations’ involving import and export procedures (Walsh, 2020, p. 238):

Import and export procedures

The procedures to be introduced had to meet recognized criteria applied by modern customs administrations, consistent with the Revised Kyoto Convention: (i) self – assessment, which involves separating the roles between the trader and the customs officer (the importer/exporter assumes responsibility for spontaneously declaring and paying duty, and the customs officer checks these operations); (ii) a high level of compliance, meaning that all goods are recorded and assigned a customs status (regime); and (iii) simplicity and predictability, to reduce the costs for trade. Effective export procedures are particularly important to ensure proper administration of VAT refunds. Appreciable progress has been made in streamlining import and export procedures, a reform that was greatly facilitated by computerization. Self-assessment is now the standard in effect for both presentation of goods in customs (input of cargo manifest data into the system by the shipper or its representative), and assignment of the customs regime (input of declaration data by the customs broker acting for the importer/exporter).

At the end of the day, if it comes to the prosecution of a declarant/importer, the case will stand or fall on the declared amount of duties properly payable. As things stand in the EU, customs are responsible in law for calculating the proper amounts of duties payable. Consequently, an offender’s first line of defence will be to claim that customs determined the amount properly payable, and that they duly discharged their obligation by paying the amount legally demanded of them by customs. This being the case, they can claim they had a ‘legitimate expectation’ that it was the correct amount payable. It is worth recording that EU customs law is notable for the fact that it positively provides for the EU-recognised general principle of legitimate expectation.

Walsh’s views on self-assessment were referenced approvingly in a recent opinion of an Advocate General of the ECJ (2021):

79. More generally, self-assessment of the liabilities in relation to the goods covered by a declaration submitted to the customs authorities is generally considered to be one of the principles underpinning the EU legislation in this field. In this context, the role of the authorities is mostly confined to checking and verifying the declarations and, if necessary, rectifying them. The authorities cannot be expected to carry out time-consuming tasks in order to ‘do the job’ of the declarants and re-calculate their dues on the basis of information and data that is not readily available.

The principle of self-assessment was long recognised in common-law jurisdictions when considering, generally, the means of making customs declarations. For example, self-assessment is the essence of the widely used red/green channel systems at ports and airports.

10. Frauds – detection and prosecution

10.1. The cost of non-compliance occasioned by one member state

In a landmark case the EU Commission successfully sued the UK for its failure to exercise proper controls over imports (ECJ, 2019).

The losses of traditional own resources² to be made available to the Commission, less collection costs, amounted to:

- EUR496,025,324.30 in 2017 (until 11 October 2017)
- EUR646,809,443.80 in 2016
- EUR535,290,329.16 in 2015
- EUR480,098,912.45 in 2014
- EUR325,230,822.55 in 2013
- EUR173,404,943.81 in 2012
- EUR22,777,312.79 in 2011.

The ECJ (2019) described the fraud in the following terms:

226 This was a relatively unsophisticated fraud involving extremely low customs values being declared by ‘phoenix’ or ‘shell’ undertakings, namely undertakings with negligible resources formed for the sole purpose of carrying out the fraud, which would be wound up or would disappear as soon as the accuracy of the declared values was questioned by the customs authorities, making any post-clearance recovery of customs duties unlikely, if not practically impossible in the vast majority of cases.

227 The fraud was organised by criminal groups that operated through a network and used those undertakings to carry it out. The fraud was mobile and highly responsive in the sense that this illegal and clandestine trade was quickly diverted to another point of entry in the customs territory of the European Union as soon as customs controls were announced or signals to that effect were intercepted by those groups.

10.2. The control criteria required of the member states were a matter of EU record since 2005

The uncertainties surrounding the control defects which came to light in the UK fraud cases could possibly have been avoided if the measures set out in the preamble of the ‘security amendment’ to the CCC (EC, 2005) had been applied:

(2) It is necessary to establish an equivalent level of protection in customs controls for goods brought into or out of the customs territory of the Community. In order to achieve this objective, it is necessary to establish an equivalent level of customs controls in the Community and to ensure a harmonised application of customs controls by the Member States, which have principal responsibility for applying these controls. Such controls should be based upon commonly agreed standards and risk criteria for the selection of goods and economic operators in order to minimise the risks to the Community and its citizens and to the Community’s trading partners. Member

States and the Commission should therefore introduce a Community-wide risk management framework to support a common approach so that priorities are set effectively and resources are allocated efficiently with the aim of maintaining a proper balance between customs controls and the facilitation of legitimate trade.

These measures should have been spelled out in clear and unequivocal terms in binding black letter law [Regulations], leaving the member states no room in which to manoeuvre, and thus creating the required degree of legal certainty for all concerned in these critical areas of law enforcement and revenue collection.

10.3. Fraudsters operate with total impunity

The EU Commission (European Anti-Fraud Office, OLAF), having first reportedly provided UK customs with a list of the parties involved and advised them to take the requisite criminal prosecutions, went on to direct them to secure the suspected duty underpayments by way of independent guarantees prior to the release of the goods. UK customs ignored both this advice and the standing provisions of EU law, which required that they should secure the potential duty liability in the circumstances of the particular cases – including cases where fraud was not suspected. Notwithstanding the importations were seen at the time as overt frauds, there appears to have been no requirement to obtain guarantees to cover potential penalties – the guarantees were to be in respect of suspected duty underpayments only. Mindful that the EU provisions in question were based on the ‘parent’ GATT Valuation Agreement, it is instructive to learn that the parent provisions in question allowed for the inclusion of penalties in a guarantee to allow the release of goods from customs control pending inquires as to the declared values of the goods for customs purposes. In considering the issue of guarantees in a dispute involving Colombia and Panama a World Trade Organization (WTO) Dispute Panel (WTO, 2018) agreed with Colombia:

in that the fact that Article 13 of the Customs Valuation Agreement contemplates the use of guarantees expressly for the payment of customs duties does not mean that the use of guarantees to cover other taxes or penalties is prohibited under that article. (para. 7.636)

Article 7, sub-article 3 of the WTO Trade Facilitation Agreement (WTO, 2017) provides for the ‘Separation of Release [of goods] from Final Determination of Customs Duties, Taxes, Fees and Charges’:

3.4 In cases where an offence requiring imposition of monetary penalties or fines has been detected, a guarantee may be required for the penalties and fines that may be imposed.

3.6 Nothing in these provisions shall affect the right of a Member to examine, detain, seize or confiscate or deal with the goods in any manner not otherwise inconsistent with the Member’s WTO rights and obligations.

In summary, it is clear that UK customs had the necessary authority, within the law, to demand security for the suspected underpayments of duty and potential penalties or fines. The Commission and EU law called for a duty guarantee only – which UK customs ignored: but the UK was not, *sensu stricto*, requested to obtain a guarantee to cover potential penalties.

10.4. Obligation of the member states to prosecute frauds

The ECJ/UK case left no doubt about the responsibilities of the member states for the prosecution of customs frauds, finding as follows (ECJ, 2019):

52 Accordingly, in order to ensure the protection of the financial interests of the Union, the Member States are obliged to adopt the measures necessary to guarantee the effective and comprehensive collection of customs duties, an obligation which dictates that customs inspections may be properly carried out.

53 It follows from the requirements of Article 325(1) TFEU that the Member States must, to that end, provide for the application of penalties that are effective and that act as a deterrent in cases of contravention of the EU customs legislation. Further, the obligation on the Member States to provide for penalties that are effective, proportionate and dissuasive in such cases was laid down in Article 21(1) of Regulation No 450/2008 and is now imposed in Article 42(1) of Regulation No 952/2013.

54 While the Member States have in that regard a freedom to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two, they must nonetheless ensure that cases of serious fraud or any other serious illegal activity affecting the financial interests of the Union in customs matters are punishable by criminal penalties that are effective and that act as a deterrent.

10.5. National measures open to UK Customs to deal with the offences

If UK customs were unwilling, or unable, to prosecute the perpetrators of the frauds, they had the independent option of either detaining or seizing the goods as being liable to forfeiture – a practice that dates to Roman times in England. Without going into too much detail, historically, UK customs law readily recognised that if the offenders were not arrested and the goods detained or seized, they were gone forever. Walsh (2015, p. 33) noted this historical position:

In a wider context, however, customs general powers were designed to secure the smugglers, smuggled goods and their conveyances. Otherwise, the smugglers would flee the jurisdiction with their conveyances and goods and not be amenable to the law at all. Van Jaarsveld, *in The History of in rem forfeitures – A penal legacy of the past (2006), (12–2), Fundamina 137*, noted in this direction:

It is noteworthy that in rem civil forfeiture was used by the Admiralty Courts to punish foreign owners of pirate ships who escaped because they were outside their jurisdiction.

Accordingly, as UK customs law provided for the detention and seizure of uncustomed goods, it was open to them to detain the goods in this case pending further enquiries, or to seize them outright as being liable to forfeiture. UK customs powers to that end could not have been clearer, having been exhaustively examined and ruled on in a domestic context by the UK Supreme Court in *R (On the application of Eastenders Cash and Carry plc and others) (Respondents) v The Commissioners for Her Majesty's Revenue and Customs (Appellant)* [2014] UKSC 34 (Walsh, 2015, p. 32).

In the case referred to in paragraph 10.1 above, the facts found by OLAF (EU, 2017) were as follows:

[.....] OLAF carried out an extensive analysis of all customs declarations presented in the UK for all imports of textiles and shoes from China between 2013 and 2016. For example, OLAF found women's trousers imported from China were declared at customs in the UK at an average price of EUR 0.91 per kg, although in the same period, the world market price for the raw material (cotton) alone was EUR 1.44 per kg and the average declared value in the whole of the EU for the same products was EUR 26.09 per kg. OLAF calculated a loss to the EU budget of almost EUR 1.987 billion in customs duties. The investigation also revealed substantial VAT evasion in connection with imports through the UK by abusing the suspension of the payment of VAT, the so-called customs procedure 42.

Based on the foregoing facts, and the phoenix-like characteristics of the importers involved, the seizure of the goods as being liable to forfeiture was clearly called for in the circumstances of the case. If the owners wished to reclaim the seized goods, they would have been obliged to lodge a valid notice of claim within a month from the date of the notice of seizure. In the absence of such a claim, ownership of the goods automatically vested in the State. In the case of a valid claim, UK Customs would have been obliged to initiate civil condemnation proceedings to confirm the forfeiture. Being civil *in rem* (against the thing) proceedings, UK Customs only needed to establish on the balance of probabilities evidential standard that the goods had been undervalued. They did not have to establish this fact beyond the higher reasonable doubt standard – the criminal standard. Further, they did not have to establish fraudulent intent. In the circumstances of the case, proving that the goods had been undervalued should not have presented a problem, more particularly when considered in the light of the ECJ (2019) finding that:

226 This was a relatively unsophisticated fraud involving extremely low customs values being declared by ‘phoenix’ or ‘shell’ undertakings, namely undertakings with negligible resources formed for the sole purpose of carrying out the fraud, which would be wound up, or would disappear, as soon as the accuracy of the declared values was questioned by the customs authorities, making any post – clearance recovery of customs duties unlikely, if not practically impossible in the vast majority of cases.

Further, even if the condemnation court perversely failed to find that the goods were lawfully seized as being liable to forfeiture, UK customs would have been protected from the tort of unlawful seizure or detention by the saving provisions of Section 144, Customs and Excise Management Act 1979 which indemnified them in the following circumstances:

(1) Where, in any proceedings for the condemnation of any thing seized as liable to forfeiture under the Customs and Excise Acts, judgment is given for the claimant, the court may, if it sees fit, certify that there were reasonable grounds for the seizure.

(2) Where any proceedings, whether civil or criminal, are brought against the Commissioners, a law officer of the Crown or any person authorised by or under the Customs and Excise Acts 1979 to seize or detain any thing liable to forfeiture under the Customs and Excise Acts on account of the seizure or detention of any thing, and judgment is given for the plaintiff or prosecutor, then if either – (a) a certificate relating to the seizure has been granted under subsection (1) above; or (b) the court is satisfied that there were reasonable grounds for seizing or detaining that thing under the Customs and Excise Acts, the plaintiff or prosecutor shall not be entitled to recover any damages or costs and the defendant shall not be liable to any punishment.

11 Penalties and sanctions for customs offences in the EU

11.1. Continuing failure by the EU to harmonise customs penalty provisions

The following facts best evidence the EU’s seeming lack of commitment to a cogent Customs Union. The Commission of the European Economic Community (EC, 1963, pp. 22–27) highlighted the remedial action deemed necessary in 1963 to safeguard against the type of fraud that occurred in 2011 – nearly 50 years later (Walsh, 1986, p. 344):

Although most customs law now falls within Community jurisdiction, infringements of the law continue to be dealt with according to the relevant provisions in force in each of the Member States. Such a situation is hardly compatible with the idea of the Customs Union. The infringements of Community customs law which are committed in one Member State have effects throughout the customs territory of the Community, and furthermore the wide range of sanctions resulting from a

given infringement, depending on the state in which it is established and prosecuted, is such as to make for appreciable inequalities of treatment between Community nationals depending on which Member State they are based. At its utmost limit, this situation could even lead to the deflection of trade.

The problems identified in the Commission document to the Council in 1963 proved to be a blueprint of the above-reported UK customs case that resulted in the loss of 2.7 billion euro to the EU's revenue. Viewed against that stark background, it is hard to believe that more than 50 years later the harmonisation of the member states' customs penalties appears to be no nearer resolution. If anything, the strength of the proposed member states' obligations is being diluted from 'recommendations', which were abandoned as being useless a half a century ago, to 'guidelines' – the softest of soft non-binding law.

11.2. Having to rob Peter to pay Paul

The annual EU budget comprises of three main resources, namely, traditional own resources (largely customs duties); a statistical VAT-based contribution from each member state, and a residual own resource based on gross national income (GNI). GNI is considered as a balancing source of the EU budget as the amount to be contributed by each member state varies from year to year depending on the overall revenues needed to cover expenditures, after taking into account the amounts coming from customs duties, VAT-based contributions and miscellaneous sources such as fines imposed when businesses fail to comply with EU rules, taxes from EU staff salaries, bank interest, and contributions from third countries. Over the years the relative share of customs duties and VAT has significantly decreased. This has meant a corresponding increase in the GNI-based contributions to make up the required budget balance. The GNI contributions now account for over 70 per cent of the total own resources funding. Consequently, any decline (including losses caused by fraud) in the contribution of duties or the VAT-based share of own resources to the budget target must be compensated by higher national GNI based contributions. The net result is that member states must make additional compensatory contributions to the budget to make good any fraud-related losses arising. The reality is that EU frauds and irregularities come at a considerable cost to compliant member states, and ultimately to EU taxpayers – a fact that tends to be overlooked. This needs to be recognised in the EU collective fight against fraud.

11.3. Remaining unforeseen difficulties surrounding the EU's criminal law provisions

Regrettably, the EU Commission may well find that the full transposition of the provisions of the directive on the fight against fraud to the Union's financial interests (EC, 2017a) into the domestic laws of the member states will not necessarily sustain successful proceedings in the cases covered by the directive. Perverse as it may appear, the Commission will have to go a step further to ensure that the subsisting domestic laws and transposed EU provisions being relied on to sustain EU criminal prosecution are not at variance with the constitutional and binding international agreements provisions of the member states – not overlooking the supremacy of EU law. Walsh (2020, pp. 391–394) drew attention to these militating factors following studies on behalf of the EU Commission of accession member states in the 1990s. As a result, subsequent EU Customs Blueprints (EC, 2015b, p. 12, par. 1.1.) mandated that national customs procedures had to be based on a transparent, comprehensive and effective legislative framework and, at the same time, comply with national and international legal obligations and standards, namely,

- Legislative provisions are in line with national (constitutional) requirements.
- Legislative provisions ensure the application of relevant international conventions...

While the EU Customs Blueprints proved to be invaluable yardsticks for gauging best practice for the guidance of the accession member states and the wider world of customs, it is questionable if the then member states applied the same rigours to their own customs regimes. Had they done so, they may well have discovered a host of subsisting domestic laws and practices that needed to be reassessed in the light of higher laws such as the member states' constitutions, the European Convention on Human Rights and the entire corpus of binding EU law. For example, the EU Commission's report on the transposition of the Directive's provisions into member states' domestic law unwittingly points to a potentially unconstitutional provision that goes to the very heart of the rule of law and the essential element of any system of justice (EC, 2021):

Conformity issues have been identified in a quarter of the Member States. On Article 7(1), the legislation of several Member States contains provisions that allow individuals to escape criminal liability or the imposition of sanctions if they report the crime or repay the damage caused to the Union's financial interests at various stages before or during criminal proceedings. Such provisions could make sanctions ineffective and not dissuasive.

A member state's retort would certainly refer the Commission to their own bible – the UCC:

Article 42

Application of penalties

1. Each Member State shall provide for penalties for failure to comply with the customs legislation. Such penalties shall be effective, proportionate and dissuasive.
2. Where administrative penalties are applied, they may take, *inter alia*, one or both of the following forms:
 - (a) a pecuniary charge by the customs authorities, including, where appropriate, a settlement applied in place of and in lieu of a criminal penalty;
 - b) the revocation, suspension or amendment of any authorisation held by the person concerned.

Walsh has long held the view that the imposition of these 'compromise' or 'compounded' penalties in relation to criminal offences amounts to the administration of justice in cases where a member state's constitution embraces the doctrine of the separation of powers. In such circumstances, the penalty determination is a matter for the member state's courts and not for a customs administrative body. Aside from the separation of powers doctrine prohibiting such practices, there is also the *nemo iudex in causa sua* consideration ('nobody should be a judge in his own case').

Depending on the jurisdiction, compromise or compounded monetary settlements in lieu of criminal prosecutions are, in effect, a 'get out of jail' card for offenders. In legal terms the agreement can amount to a civil contract between the offender and the customs authority to pay the agreed penalty. The result is that the offender can avoid the statutory penalty and the risk of arrest and imprisonment. Further, should they fail to pay the agreed civil penalty, the customs authority – depending on the national legislative provisions in force – cannot reinstate the criminal prosecution. Instead, to recover the debt, they must sue the offender on the contractual settlement agreement in civil proceedings – a likely worthless pursuit. It is also a case in some jurisdictions that whereas the offender can renege from the agreement and have their day in court, this option is not open to the customs authorities. The overall gain to the offender – aside from the likely lower pecuniary penalty they will receive under the settlement arrangement – is that they avoid a criminal conviction, possible imprisonment and a criminal record. The downside for the rule of law is that the settlement system ousts the jurisdiction

of the courts in customs criminal offences and thus facilitates fraud. Other member states ultimately end up paying the cost of this. The member states' customs infringements and sanctions systems were considered by a Project Group established by the EU Commission in 2013. The following are the reported findings of the Project Group regarding settlements (EC, 2013a):

Settlement refers to any procedure within the legal or administrative system of a Member State that allows the authorities to agree with an offender to settle the matter of a customs infringement as an alternative to initiating or completing customs sanction procedures. Fifteen out of twenty-four member states have this procedure for customs infringements.

12. Proposal to make the EU a bonded area

Having read the WPG's report the reader will, not unreasonably, ask what were the fundamental 'mischiefs' the group set out to address and where does the existing system fall down? The fundamentals of the existing system have been the same for hundreds of years and are well summarised by Crombie (1962, pp. 64–66):

Within twenty-four hours of arrival at a port the Master or his authorised Deputy must make a full report of the ship [the ship's manifest] at the Customs House: to show, [*inter alia*], marks numbers and description of all her cargo and where it was loaded. His independent declaration of the goods to be unloaded provides an essential part of [Customs] control. It provides a general statement against which the detailed particulars declared by importers on their entries may be checked [by Customs], and against which goods actually landed may be written-off [accounted for].

The importer's entry is essentially the self-assessment made by the importer or, commonly, by the forwarding agents who specialise in customs matters, and who, if only for geographical reasons, can more easily manage matters on the spot. The signatures of the agent must be binding upon the importer who authorises him to act on his behalf. The entry, the self-assessment of duty liability [by the importer] is made in the terms of the Customs and Excise Tariff, and is checked against it before being "passed" [document check]. And if the amount of duty payable is for any reason not known or in dispute a deposit [of duty] is taken to allow customs clearance [to] go forward as if the [full] duty had been paid. The entry completed and "passed", that is not merely received and accepted, and duty paid, the importer must now present it to the Officer in whose charge the goods are lying before they can obtain release of the goods. This is crucial to the Department's control, for the importer's self – assessment [entry declaration] has been checked by a scrutiny of the documents, when an under-declaration of duty may be discovered and sent back for correction of more than one kind; and now it is independently checked [by the Examining Officer] by comparison of the documents with the goods landed, when an under-payment may be discovered of a kind which would never come to light from a documentary check alone. Thus, the customs entry, when passed, is the authority to the Officer to release the goods which prove to be correctly declared, or if it contains fraudulent or incorrect declarations it is the basis on which any proceedings are ordered or fines imposed.

Notwithstanding computerisation and other technological advances, the foregoing checks, balances and legal considerations apply equally today. If anything, there are greater safeguards in place such as advance information about the arrival of means of transport (ships/aircraft/trucks) and cargoes; automated processing procedures; automated risk-based selection of goods for physical examination; x-ray scanning of goods and containers, and post – importation transaction checks and audits. For their part, the WPG seemingly want to go further and safeguard against potential duty losses. To that end they recommend (p. 32) that:

Non-beneficiaries of the reformed AEO system would need some arrangement to ensure that they are trustworthy to trade with the EU market. As an exception to the AEOs, they would be able to trade with the EU by providing a bond in relation to the goods they move across EU borders. The bond would require to be guaranteed by an AEO and misdeclaration will be reported by controlling Member States' Customs authorities to the central body, which will make a charge against the bond. Such a charge would be considerably greater than the amount of the misdeclaration, to reflect the likelihood that the mis-declared item caught by a Customs control is in fact representative of a significantly larger number of consignments which were not checked, to ensure that there is a real disincentive to the traders being prepared to accept losses on a small number of mis-declared items, while taking the profit on a much larger number of items which were not sampled for checking. AEOs who consistently allowed fraudulent operators to avail of their bond guarantee services will be liable and will be removed from the Authorised list. In this way, commercial actors exporting to the EU would either be trusted directly or would be treated as trusted because they are "represented" by another AEO which vouches for them financially. This is particularly relevant for e-commerce platforms.

It is worth noting that a somewhat similarly conceived 'bonding' concept was proposed in England as far back as 1733 (Great Britain, 1843):

The plan of the minister for the correction of these abuses [false declarations and undervaluations of imported goods] was to benefit the fair trader [Authorised Economic Operator or trusted trader in current parlance] by putting down his unprincipled competitors, and to improve the revenue without additional duties. Conceiving that the laws of the Customs were insufficient to prevent fraud, there being only one check – that at the time of importation – be proposed that tobacco should be subject to the laws of Excise as well as those of Customs and having first paid the Customs duties on importation ...be lodged in a warehouse appointed by the Commissioners of Excise [pending delivery for home consumption or re-exportation on payment of drawback]. (p. 102)

Setting aside the potential illegalities of the WPG 'bonding' proposal, it is not for customs to legislate for the unborn child. Furthermore, the overall scheme of customs law, which must be looked at as a whole, makes provision for the recovery of uncustomed goods and unpaid duties and the prosecution of offenders. I would respectfully argue the proposed 'bonding' arrangement would do nothing to remedy the flagrant failings of member states in relation to those matters. On the contrary, the proposal appears to be totally misconceived; it would be costly and cumbersome in terms of administration and compliance, and would achieve nothing in practice. It would represent a three-hundred-year step backwards in time. As a separate but related issue, it also must be borne in mind that the practice of allowing a 'trusted trader' to act as a guarantor for a 'non – trusted trader' proved to be a fertile source of fraud under the EU Single Market Excise Movement Control System. This type of fraud is well known and documented within the EU (Walsh, 2015, p. 44). Enforcement agencies involved in the prevention, detection and prosecution of criminal activities (including customs offences), *a fortiori*, international drug smuggling cartels, have long ago reached the inescapable conclusion that the most effective way of tackling offenders is to confiscate the proceeds of their crimes. The EU Commission summarised the measures adopted by Ireland and the United Kingdom to that end as follows (EC, 2019, pp. 6–7):

Looking at *in rem* proceedings [...] applied in both Ireland and the United Kingdom common characteristics are evident:

- They target property believed to be the proceeds of crime rather than the person (who may not be investigated) [*in rem* proceedings against the property *per se* as opposed to *in personam* proceedings against the person involved – thereby avoiding “double jeopardy” (*non bis in idem*) i.e. being tried twice for the one offence];
- They apply civil procedural law rather than criminal procedural law. Regarding matters of evidence, they apply the civil law standard “on the balance of probabilities” (rather than the criminal standard “beyond reasonable doubt”);
- They include important safeguards such as notice provisions, the opportunity for a respondent to contest the confiscation order by seeking to vary or annulling it, the opportunity for any persons claiming ownership to be heard, provision for legal aid, provision for compensation etc.;
- The statutory agency charged with the pursuit of the proceeds of crime (i.e. the Criminal Assets Bureau in Ireland) is multidisciplinary [it includes seconded customs staff] and is empowered to share confidential information.

These measures have proved to be highly successful and have survived sustained challenges to their legality in Ireland through the courts up to Supreme Court level, and beyond that to the European Court of Human Rights. The measures have been further validated by the number of countries that have introduced similar legislation since 1996. The EU Commission (2022c) also have the EU-wide position on asset recovery and confiscation under active review.

It is worth noting that customs interests and customs law were influential in the decision to set up the Criminal Assets Bureau (CAB) in Ireland in 1996 (Walsh, 2015, p. 31).

13. The elephants in the room

From a legal standpoint, the first thing that needs to be done is make the importer/exporter liable in law for the import/export declaration – they are a party to the sales contract(s) and privy to its terms and conditions. Further, the legal onus should be on them to self-assess their duty and other liabilities in accordance with all the provisions in force. Further, the detention and seizure of goods should take place where the circumstances call for such actions – subject to the overriding principle of proportionality. At the same time, all the member states’ laws, regulations and procedures need to be examined to establish if they can successfully sustain legal proceedings. Further, the civil settlement of criminal offences involving commercial transactions should cease. Criminal prosecutions for such offences should become the norm and not the exceptions.

On trade facilitation, the only way to create a meaningful version of a seamless border is to make all goods eligible for clearance prior to importation – subject to risk analysis. By doing so, you automatically obviate the need for a temporary storage procedure for pre-cleared goods. As previously pointed out, the temporary storage facility was a legal fiction created in 1662 to facilitate the entry and clearance of import goods – to the exclusion of goods cleared by customs. Accordingly, if goods have been cleared prior to importation, there is no need for temporary storage, and every revenue reason why cleared goods should not be put into temporary storage as they may then be used as a vehicle to remove uncustomed goods. The incalculable savings to importers by obviating temporary storage in terms of time (days) and handling costs would greatly outweigh any revenue and safety and security risks involved. In fact, the risks involved are far greater for temporary storage goods (Walsh, 2021, pp. 19–20).

Finally, the WPG report has been a very valuable exercise and has provided a welcome platform for others to contribute to the debate.

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Notes

- 1 An Authorised Economic Operator (AEO) is a member of the international trading community that is deemed to represent a low customs risk and for whom greater levels of facilitation should be accorded
- 2 Traditional own resources (together with own resources based on value added tax and gross national income) constitute the revenue for EU budgets. Traditional own resources include mostly customs duties on goods imported into the EU as well as levies and anti-dumping duties. Member States are allowed to keep 25 per cent of customs duties collected for administration costs.

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Tom Walsh served as an Irish, Zambian and EuroCustoms official for 32 years. He spent a further 14 years as a Senior Customs and Excise adviser with PwC (Ireland) and KPMG (Europe). He has undertaken several assignments concerning customs and excise matters on behalf of the EU and the World Bank in over 30 countries in Europe, Africa and Asia. His most notable assignment was the drafting of the Common Market Customs Management Regulations (2009) for the Common Market Countries of Eastern and Southern Africa (COMESA). He is the author of two books on the Community Customs Code and several articles on ECJ judgments. His LLM and PhD theses are on customs law and practice. He has also lectured in customs law at the Cork Institute of Technology, Ireland.