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5.1 The Abolition of the National Borders and the Customs Union as Founding Values of the European Common Market

5.1.1 The Abolition of the National Borders in the Relationships Among the States

The first essential value related to tax matters in the European legal order may be identified in the abolition of the national borders in order to permit the freedom of circulation of goods and services in the common market.

Indeed, the primary purpose pursued by European Union consists certainly in the abandonment of the domestic borders among the Member States with the aim to set up a unitary European market without internal divisions to be substituted to the national markets (case 13.11.1964, C-90/63 and C-91/63, *Commission vs Luxembourg and Belgium*).

In this perspective, since the original Treaty the prohibition to use customs and duties, as for import as for export, in the commercial relationships among residents in the EU has been established as the main target of the European integration, being

qualified as the first action for the execution of the general purposes (see the art. 3 lett. a TFEU).

The logical basis of this principle is identified in the link between the abolition of the national borders and the freedom of circulation of goods and services. Moreover, it is consolidated in the economic literature the conviction about the role of this principle in the process of European integration: the abandonment of the domestic borders and the institution of a free zone for the exchange of commodities are considered as the first legislative measure to be realized in order to achieve a real supranational common market.

5.1.2 The Institution of the Customs Union

In relation to the principle of the abolition of the national borders it may be linked the principle of the Customs Union (specifically mentioned in the art. 3 lett. a TFEU), whose institution is finalized to pursue an unitary customs policy at the European level with the aim to permit a homogenous treatment of the commercial relationships of the Member States with foreign States (extra EU). This is the further step after the abolition of the national borders, since it shows a higher level of integration of the Member States in the commercial area.

According to this principle, an exclusive competence is attributed to the European Union about the customs policy; the Member States are deprived of any competence in the customs matters and must comply to the discipline established by the European bodies.

The institution of the Customs Union determines the establishment of an unitary customs tariff to be applied to all the commodities coming from countries not belonging to the European Union; therefore, the positive discipline of the customs duties is defined in a unitary way through the European regulation.

This principle is to be considered as an unconditioned rule, directly applicable by the Member States and the European bodies. Every exception to this rule is to be interpreted in a restrictive sense and must be expressly established by the discipline (case 14.12.1962, C-2/62 and C-3/62, *Commission vs Belgium and Luxembourg*).

The institution of the Customs Union is considered as an essential factor of the functioning of the European Union because it assures the neutrality of the customs levy with respect to the circulation of the commodities in the European territories and, therefore, is connected to the fundamental freedoms of the common market (case 16.7.1992, C-163/90, *Leopold Legros*; case 14.9.1995, C-485/93 and C-486/93, *Maria Simitzi*).

5.1.3 The European Customs Territory

Currently the customs borders exist only at the limit of the European Union with the other countries not belonging to the EU (and however in harbors and airports) in order to permit the application of the customs duties for the commodities coming

from the extra EU territories. After overriding the borders with the European Union, the commodities may circulate in the European territory without any obstacle or any taxation or levy (so, they are considered free from customs duties). Therefore, for the customs policy the borders must be identified with the borders of European Union.

It is recognized the existence of a customs unitary space at a European level, where are included the territories of the Member States (and obviously also the territories of the sub-State governments) and where all the principle of the European legal order are fully applicable.

The institution of a Customs Union could generate the problem of the conflict with the commercial relationships eventually established in international agreements. Particularly, the unitary customs tariff could counteract with the clause of “the most favored nation” established by the GATT agreements (and currently also by the WTO agreements), that imposes to apply any customs facilitation to all the countries belonging to the mentioned international agreements; it means that the abolition of the national borders and the unitary customs tariff should be applied to every country which has approved the GATT (or the WTO) agreements. This problem has been expressly solved with a rule that prohibits the application of “the most favored nation” clause in case of Customs Union.

5.2 The Customs Union

5.2.1 The Customs Union

According to the art. 28 TFEU it is established that the European Union sets up and includes a Customs Union which regards all the commercial exchanges among the Member States and determines the prohibition to apply restrictive measures with regard to circulation of commodities in the European territory.

This prohibition is to be considered as an unconditioned rule which does not suffer any exception for every tax; so, this rule fixes the general principle of the European legal order that the commodities may circulate without any obstacle or any tax in the European territory (case 16.3.1983, C-266/81, *Siot*).

The rule of art. 28 TFEU mentions some prohibited restrictive measures as well:

- i. the customs duties for the import;
- ii. the customs duties for the export;
- iii. the taxes with an equivalent effect of the customs duties.

The prohibition of customs duties is justified because of the obstacles that these restrictive measures may produce, even though for a little relevance, with regard to the circulation of the commodities in the European territory (case, 16.7.1992, C-163/90, *Legros*). It is not relevant that the customs duties assume a protectionist function, being sufficient the mere existence of a levy with the feature of customs

duty for the import or for the export or of a tax with an equivalent effect (case 1.7.1969, C-2/69, *Social Fonds Diamantarbeiders*).

In order to permit an homogeneous treatment of the commercial relationships with extra EU countries and, so, a full commercial integration in the common market it is established that the Customs Union produces the adoption of a customs common and unitary tariff for the regulation of the commercial exchanges among Member States and other extra EU States (art. 28 par. 1 TFEU).

The rules of the Customs Union are applicable for the circulation of the commodities with origin in EU countries and also for the exchanges of the commodities coming from extra EU countries which are considered in the regime of free circulation in the European territory (art. 28 par. 2 TFEU). At this purpose, are considered in the regime of free circulation the commodities coming from extra EU countries for which all the obligations, even formal, related to import have been complied and the taxes (including the customs duties) have been collected (without any recovery) (art. 29 TFEU).

5.2.2 The General Principles for the Functioning of the Customs Union

The functioning and the regulation of the Customs Union are regulated in the European legal order through some juridical principles recognized in the Treaty; they are general rules that presided on the rules of the derivative legislation about the customs duties and the taxes over the circulation of commodities applicable to the commercial relationships with extra EU countries.

At first, according to the art. 30 TFEU it is prohibited the recourse to customs duties for import or for export in the commercial relationships among the Member States. This rule establishes that it is prohibited the recourse to every customs duties, including the fiscal levies, so as to solve any theoretical dispute about the juridical nature of the customs duties. This principle excludes the possibility for the Member States to set up a customs discipline at the national level, recognizing the exclusive competence of the European bodies.

At second, according to the art. 31 TFEU it is established that for the commercial relationships with extra EU countries are applied the customs duties regulated by the common customs tariff, determined by Regulation of the Council. On the basis of this common customs tariff the customs duties applicable in the Member States for the import or the export are homologated. This principle fixes a homogeneous criterion for the customs policy of the European Union and outlines the integration process required for the establishment of an effective common European market.

Moreover, with the aim to stimulate the cooperation in the customs policy it is expressly established the prohibition for quantitative restriction to the import (art. 34 TFEU) or to the export (art. 35 TFEU) or the establishment of taxes with an equivalent effect. There are not fiscal measures (therefore, to be distinguished from the real taxes) (case 4.4.1968, C-27/67, *Fzucht GmbH*; case 20.3.1990, C-21/88, *Du Pont de Nemours*), which may include a compliance with a fiscal nature (as the

issue of invoices, or other fiscal behaviors). Sometime, this quantitative restriction to the import or to the export may be admitted because of reasons of security, protection of health, protection of historical or artistic values, etc.; in any case this restriction admitted for public interest cannot become an instrument for the discrimination among European agents, nor a simulated restriction to the freedoms of circulation (art. 36 TFEU).

5.2.3 The Prohibition of Taxes with an Equivalent Effect

In the European legal order it is expressly established the prohibition of taxes over commodities passing through the national borders which may produce the same effect of the customs duties for import or for export. This kind of fiscal measures is called “taxes with an equivalent effect” to mean the suitability to impact over the commercial relationships among residents in the Member States and residents in other extra EU countries.

Evidently, this prohibition is connected instrumentally to the general prohibition of customs duties to be adopted by the Member States as a final rule of the Customs Union: indeed, even taxes different from the customs duties, but having the same capacity to impact over the circulation of commodities, may alter the free concurrence and generate an obstacle to the functioning of the common market (case 14.9.2005, C-485/93 and C-486/93, *Maria Simitzi*). The purpose of the prohibition of taxes of an equivalent effect is to avoid that the general prohibition of customs duties may be aggirato through fiscal measures with a different denomination or a different structure (compared to the customs duties) which are devoted to limit or to alter the free circulation of commodities.

The taxes with an equivalent effect are to be considered as monetary measures connected to the passage of the commodities through the national borders of the Member States and suitable to increase the price of the commodities. Particularly, The qualification of “taxes with an equivalent effect” is not related to the denomination or to the juridical structure of the monetary measure, being requested only that this measure is suitable to alter the price of the imported or exported products compared to the domestic products (case 26.2.1975, C-63/74, *Cadsky*; case 25.1.1977, C-46/76, *Bauhuis*; case 9.3.1978, C-106/77, *Simmenthal*; case 31.5.1979, C-132/78, *Denkavit*; case 21.3.1991, C-209/89, *Commission vs Italy*). It does not assume relevance the existence of a discriminatory effect (case 16.7.1992, C-163/90, *Leopold Legros*), nor the destination of the fiscal flows (case 1.7.1969, C-24/68, *Commission vs Italy*).

The only admitted exception to the prohibition of taxes with an equivalent effect regards the institution of monetary measures to be qualified as the price of the services rendered by public bodies to the economic agent at the moment of the passage of the commodities through the national borders. In this case, the monetary measure is justified by the rendered service under a logic of commercial relationship (a sort of contract between the public body and the economic agent) and, therefore, excludes the qualification as a fiscal measure. To qualify these monetary

measures as price of the service it is required (case 25.1.1977, C-46/76, *Bauhuis*; case 9.11.1983, C-158/82, *Commission vs Denmark*; case 31.1.1984, C-1/83, *IFG Intercontinentale*; case 29.7.1988, C-18/87, *Commission vs Germany*):

- a. the coherence between the rendered service and the amount of the monetary measure;
- b. the existence of a certain and specific benefit for the economic agent.

If the monetary measure is collected with respect to some control required by provisions of the European legal order, this measure cannot be qualified as a “tax with an equivalent effect”, subject to the coherence of the amount of the measure itself with the cost of the control and subject to the existence of an obligation of the Member State about the control in the interest of the European Union (case 12.7.1977, C-89/76, *Commission vs United Kingdom*; case 2.5.1990, C-111/89, *Bakker Hillegom*). In this case, it is not necessary to verify the existence of a certain and specific benefit for the economic agent, because it is considered implicit in the European regulation of the control.