ON THE LEGAL STATUS OF THE PREFERENCES OF CUSTOMS IN THE EUROPEAN UNION

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Abstract

In our days – in Hungary especially from 01. 05. 2004 – the legal status of the law of customs could be a question which deserves special attention, considering in particular if it were not be reasonable to move the customs and the law of customs from financial law to commercial law, while emphasizing their role in economic policy – it is time to change paradigm.

Key words

Preferences of customs,contractual and autonomous preferencies, forms of appearance of preferences, General Agreement on Tariffs and Trade

I.

Preferences of customs mean a reduction of tariff items which produces a tariff reduction, therefore the preferences constitute a part of the customs facilitation system involving the same consequences. The elements of this system show, above all, the following structure:

- **customs preference defined by public acts of customs or customs preference according to the law of customs**: For this the duty-free goods importable in the area of the Union serve as an example, as defined in a special source of law, in the 918/83/EEC about the producing of communal system of the relief from duty. Thus for example – depending on the conditions – the goods obtained by marriage or inheritance, the goods of natural persons originating from a third country (the condition is the residing there at least for one year), the product-samples, promotion materials, medical instruments, therapeutic products, school supplies, research materials, travel belongings, bagatelle consigments (to the value of 22 Euro), state gifts, awards, seed grains etc. are duty-free.

- **special reliefs of duty on the evidence of international agreements** (e.g. the agreement on the importation of objects of educional, scientific and cultural nature from 22. 11. 1950 in Lake Success).

- **institutinal neutralization of customs**, when some defined organ is authorized to neutralize the customs according to the possibilities given by the public acts of customs, e.g. the Comittee is authorized to ascertain tariff quotas or tariff ceilings.

- **tariff customs preference**: If the degree of the tariff of import duties and - possibly – that of the export duties is 0 %, or a lower customs-consigment of the goods can be seen than in the case of goods from non-beneficiary countries, then we will find an example of the tariff preference. Here we can mention that the Tariff of the European Union makes the putting into practice of more than 40 tariff items possible, and among them only a few does not show customs preference (e.g.: the tariff items put into practice against the goods of the United States, Japan, South-Korea, Canada, Australia).

  However, it does not turn out from the tariff itself, for what reason these preferences have got into the tariff, thus we have to search for the juridical background of them, and in doing so we can be orientated by the following:

- **customs facilitation given on the evidence of international agreements or unilaterally:** These customs facilitations used to be qualified as **preferences of customs.** Thus, their essential characteristic is that the customs facilitations which are to give to the partner states are determined by international agreements beside the sources of the general (global, communal, national) low of customs[1]. Respectively, the fact that some states can provide preferences of customs in a unilateral, autonomous way for the goods of other sate(s). Among the general characteristics of the preferencial agreements we can list the juridical status, the mode and the extent of customs preference and the rules of origin.

According to the juridical status of preferencies, we can differentiate between **contractual** (e.g. compacts entered into with the Mediterranean countries and the agreement with EU-European Economical Region) and **autonomous** preferencies (e.g. Lomé I-IV. Agreements), and the basis of this classification whether these preferencies are provided on the evidence of bi- or multilateral agreements or unilaterally.

[1] The European Union has made an international agreement with several states, which guarantees for them customs facilitation. For example: the Cotonou Agreement has been reached with the African, Caribbean and Pacific States and with Andorra, the Färöer-Isles, Croatia, Turkey, Switzerland, the European Economical Region, Bosnia-Hercegovina, Serbia-Montenegro, the Mediterranean countries.

The literature usually makes mention of the preferencial agreements among the regional agreements, however we can find among them such ones (the Cotonou Agreement), which break through the borders of regionality because their regional force touches upon more continents.

The agreements providing preferences of customs are of enormous economical importance, today they cover a significant part of the world trade and the parties can contribute to the increasing of the trade – so we have to look up in the prescriptions of the General Agreement on Tariffs and Trade. The developed countries have introduced their preferential customs concerning the industrial products of the developing countries from 1971. As these preferencies were new preferencies given in an autonomous way, that is, without the demand of reciprocity, they conflicted with the Article I of the GATT 1947 which put down the commitment of the general greatest preferential treatment. The GATT gave an exemption from this interdiction for ten years in 1971, so the enforce can of the preferential customs take place once again. In 1979 at the request of the developing countries the preferential treatment became an integrant part of GATT as a result of the GATT Tokyo-round-discussions (1973-1979) with the introduction of the „enabling clause" (Art. XXXVI)[2].
The Art. XXIV of the GATT 1994 acknowledges, but attaches conditions to customs unions, free trade areas or the interim agreements aimed at reaching such things. Today the GATT does not prohibit to provide customs preferences for the developing countries in an autonomous way by other states.

In Europe the founders have already defined the bases of customs preferences in 1957 with the signing of the Roman Treaty aimed at creating the EC. The member-states expressed their claims in the k) point of the Article 3 and the IV. part of the Treaty for the merging of the non-European countries and areas in order to increase the commercial trade and to facilitate the common economic and social development. Among these by-laws the Article 133 deserves stressed attention. The (1) paragraph of this prescribes as a burden the total abolishment of the tariffes in the case of importing goods from the Caribbean and the Pacific states to the member-states is.

[2] Helmuth Berndt: Die Präferenzabkommen der EU mit der MEDA-Zone in: Ehlers/Wolffgang/Lechleitner (Hrsg): Rechtsfragen des Zolls in globalen Märkten, Frankfurt am Main, 2005, Verlag Rechts und Wirtschaft p. 179.

From the secondary sources of law of the European Union we can directly conclude from the by-laws put in the d)-f) points of the (3) paragraph of the Article 20 of the Community Customs Code that the Union or its tariff acknowledges the preferences can be given on the evidence of contract or in an autonomous way.

Which are the forms of appearance of preferences?

1. **Preferential zones** are qualificated as areal preferencies. The main point is that the tariff item is ascertained in a lower degree than the one enforced for the customs section concerning goods of the third countries which are not given preferencies or in 0 %, and the provided preferencies embrace the whole intern circulation, first of all in the form of reduced customs.

If two or more states agree that they do not claim customs concerning the goods of each other, but each of the states enforces its own tariff and law of customs on the third countries which do not belong to the agreement, than we speak about **free trade area**. As an example we can cite the agreement between the European Union and the European Free Trade Agreement (EFTA), the free trade agreement between the USA and Israel, the Central European Free Trade Agreement (CEFTA) and the North-American Free Trade Agreement (NAFTA) or the free trade agreement between Australia and the USA (AUSFTA).

One can speak about **customs union**, if one custom district replaces two or more ones, in a way that the customs and other commercial measures are abated among the areas forming the union and each member of the union applies essentially the same tariffs and other commercial measures in its commerce with areas which do not belong to the union.
I think that after the above mentioned facts one can find that the free trade areas and especially the customs unions may show preferential characteristics, but they went beyond the conceptual bounds of the preferential zones and preferential agreements, thus, they must be treated as independent juridical-economical categories.

However, I think that the Cotonou Partnership Agreement in its system is a particular preferential agreement regarding the moving from the autonomous regulation to reciprocity, for its areal force concerning more continents, the number of participants and its

economical effect, and which was signed on the one hand by the African, Caribbean and Pacific states and by the European Union and his member-states on the other in Cotonou, 23. 06. 2000. The African, Caribbean and Pacific states (in the following ACP states) represent a significant economic factor, 77 countries and more than 650 million people, so this partnership is very important for the Union in the respect of its quota from the international trade. On the basis of these data the Agreement can be seen as the greatest North-South directed financial and political agreement of the world.[3] The agreement changed the Lomé IV. Agreement, the characterictics of which – as that of its precendents, the Yaounde I., II, Lomé I-III. Agreements – were the preferencies of customs given in an autonomous way by the Union to the ACP states, just as the equality of the partners or the principle of respecting the sovereignty without the demand of reciprocity.

Although the Cotonou Agreement itself does not contain concrete preferencies, its regulation is frame-like; it wants to provide its preferencies of customs within the scope of the commercial agreements compatible with the WTO on the basis of mutuality and reciprocity. Agreement on the evidence of the conditions defined in Chapter V of the Agreement. The preferred cirle of products and the measure of the findable assimetry in the schedule of the reduction of customs must be registered in the newly fixed agreements.

After the preparatory period of the Cotonou Agreement the relief from duty remains – except the commerce with the countries developed least of all -, **but its juridical nature will transform, the relief from duty existing on the evidence of mutuality and reciprocity will replace the autonomous relief from duty.** From 01. 01. 2008 the European Union manages its commercial activity as a partial realization of what is included in the commercial chapter of the Cotonou Agreement (Part 3, II. title, Chapter 2) on the evidence of the Economic Partnership Agreements (EPA) compatible with the presciptions of the WTO within the scope of the region of the six African, Caribbean and Pacific states signing the Agreement, and this will advance the establishing of tariff unions among the states concerned.

2. Tarifal preferencies

[3] The Lomé Convention http.//europa.eu.int/comm/development/body/cotonou/lome_history_en.htm p. 2.

These preferencies manifest themselves only in the effect produced on the customs items of tariffs. These can be contractual or autonomous advantages, but their main form of appearance is the autonomous reduction of tariffs in the scope of the GSP system.
The developed states of the world provide unilateral, tarifal customs preferencies for the goods of the countries developed least of all and for the developing countries within the scope of the Generalised System of Preferences, in short: GSP. GSP was introduced in 1971 as a result of the recommendations of the United Nations Conference of Trade and Developement (UNCTAD) and it has been renewed severeal times since then. The European Union adopts these rules on the evidence of the 980/2005/EEC today, which thus manifest themselves in reducing the tariffs and in procedural rules (attestation of origin) related to them. The Cotonou Agreement can be valued not only as an areal, but as a tariffal preference, however we have to underline that this is not an autonomous preference any more.

3. The common characteristic of the areal and the tariffal preferencies is that for the sake of a more advantageous treatment of customs showing themselves in the reducing of the amounts of tariff or while applying the tariff quotas and tariff ceilings it is necessery to examine the origin of the goods and to attest it in the required way as well. The origin of the goods is significant because the commodity - depending on its origin - can be treated by more favourable standards than it is determined in the column about the greatest preferential tariff titled „erga omnes" of the Tariff or duty free. For if a state would provide customs preferences for the products of another state independently from the origin of the commodity, then an exporter of a third state could take advantage from this situation in such a way that it would transport its commodity to the beneficiary state at first and after then - from there - to the state making reduction.[4] The applying of the rules of origin attempts to rule out this undesirable effect.

Speaking about the rules of origin we must follow with attention the definition of the concept of the „originating product", the operations, workings resulting the originating status, the cumulative rules, the „territorial principle" connecting to these and the way of attestation of the origin as well.

[4] The literature mentions this phenomenon as deflexial effect. Huszár Ernő: Nemzetközi kereskedelempolitika Budapest, Aula, 1994, p. 326.

In a general sense we have to consider the country as the originating place of a commodity, where it was wholly and completely exploited, grown, dreeded or produced or that country, where the commodity or the materials used up for it were worked, prepared in a sufficient degree and where it is directly transported from to the importing countries.[5]

The concept of the originating product is generally defined in details by the preferential agreements. The detailedness and the exactness are particularly important because the Customs Code of the Union contains only the rules of the non-preferential origin, so it could not have been applied here.

Thus qualified as originating in general are:

a) products made or created in full in the beneficiary states;

b) products created in the beneficiary states which do not consist of materials wholly produced there, supposing that these kind of materials have gone through sufficient working or processing in the beneficiary states.

We have to regard products not wholly produced as sufficiently worked or prepared if the conditions defined in agreements or notes, Annexs belonging to them are realized, which indicates the working or preparing that must be done on the used up non-originating materials and that concerns only this kind of materials.

Cumulation of origin

Several preferential agreements order that the production process proceeded in one or more states of the preferential area should be added in the respect of the status of origin. We know the full and the limited cumulation and the bilateral and multilateral versions of them.

In the case of full cumulation every working on the basic material in the preferential area is taken into account for the defining of the place of origin. The certain working phases thus do not need to result in a status of origin; the origin will be ascertained when the product goes to another cumulative country for further processing.

In the case of limited cumulation the operations done on the basic material the processes particularly defined in single agreements are added in the respect of origin.[6]

[5] Pardavi László: Vám és biztosítás 2002, Budapest, 2002, Ligatura p. 60.

[6] The V. Annex of the Cotonou Agreement ascertains cumulative rules - besides the cumulation with the offshore countries and areas and the Union – for the South-African and the neighbouring developing states as well. All the three regard the materials originating originally not from them essentially as originated from the

In the case of bilateral cumulation the principle of one country – one commodity is valid, that is, the originating state is the one where the last processing have been done with the commodity, while in the case of multilateral or regional cumulation, the processing also happens in another country or countries of the preferential area. Here, the originating state is the one, where the greatest value is added to the basic material.[7]

Territorial principle:

Every preferential agreement includes the conditition that the terms ascertained concerning the obtained originating status must be satisfied in the beneficiary states without a break. If the originating products exported are transported back, they must be seen as non-originating, except for if it is sufficiently provable for the Customs that

a) the products transported back are the same as the exported ones; and

b) they did not undergo processes necessary to exceed their preservation in a good condition in the given state or during their export.[8]

Attestation of origin

It is necessary for the requisition of the preferences provided by the international agreements to attest the origin. The origin of the commodity can be ascertained from the forwarding note and other avaliable conformed documents (account) first of all. The origin of the commodity must be acknowledged by certificate of origin (FORM A, EUR1, the announcement of the exporter made on an account) in the case of requisition of preferencies.

If a doubt arises during the customs (administration) regarding the origin, further evidence can be required after presenting the certificate of origin in order to ensure that the giving of the origin suits the conditions included in the public act.

ACP states, if they were worked in products produced there and if the materials go under a considerable working or processing in the ACP states, thus in this case the limited multilateral cumulative rules appear.

[7] Wolffgang: in: Witte-Wolffgang: Lehrbuch des Europäischen Zollrechts, Herne/Berlin Verlag Neue Wirtschafts-Briefe 2003 p. 449-450.

[8] For example, the preferential treatment ensured in the by-law concerning the commercial cooperation in the V. Annex of the Cotonou Agreement is related only to such products, which are delivered directly among the the ACP states, the Union, the offshore countries and territories or the South-African areas, without reaching any other areas. The products constituting a consistent freight, however, can be delivered through other areas, together with the transfer or temporary storing if it is necessery, supposing that the commodities remain under the control of the customs authorities of the country of the transit or storage, and do not undergo other processes, as for example unloading, re-loading or any other process aiming their preservastion in a good condition.

Summary

As a conclusion it can be said that the juridical status of the preferences of customs may be examined from the viewpoint of the source of law and from that of reciprocity, mutuallity. From the viewpoint of source of law one can assume that the preferences can be provided in the course of multilateral or bilateral agreements, which can be either regional or global in territorial respect. Moreover, the preferences can be given on reciprocal, contractual grounds and in an autonomous way as well. We also find an example for the case (in the Cotonou Agreement) that the preferences given in an autonomous way are gradually succeded by preferences given and got on a reciprocal ground.

Literature:

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