

Moving the Debate Forward on EU Border Policy: The role of customs and modern technology

Proceedings of an IN:EX Workshop 29 November 2010

Rapporteurs: Sergio Carrera, Head of Section and Research Fellow, CEPS
and Peter Hobbing, Associate Senior Research Fellow, CEPS

ABSTRACT

This report presents a summary of the main proceedings and discussions that took place during the workshop on 'Moving the Debate Forward on the Future EU Border Policy: The Role of Customs and Modern Technology' held at the Centre for European Policy Studies (CEPS) on 29 November 2010.

The purpose of the expert meeting was to facilitate an open discussion on the current and future role of customs and modern technology in the next generation of the EU's integrated border management strategy together with policy-makers, officials, practitioners, representatives from civil society organisations, academics and experts in the field.



This event was organised within the framework of INEX - *Converging and conflicting ethical values in the internal/external security continuum in Europe*, a three-year project funded by the Security Programme of DG Enterprise of the European Commission's Seventh Framework Research Programme. For more information about the project, please visit:

www.inexproject.eu

PROGRAMME

10.30 – 13.00 MOVING THE DEBATE FORWARD ON THE FUTURE EU BORDER POLICY: THE ROLE OF CUSTOMS & MODERN TECHNOLOGY

Chair: Elspeth Guild (CEPS)

- Peter Hobbing (Associate Senior Research Fellow, CEPS)
- Frank Heijmann (Counsellor to the Board of Directors of the Customs Administration of the Netherlands)
- Tadeusz Senda (Minister-Counsellor, Permanent Representation of the Republic of Poland to the EU)
- David Dolan (Attaché for Customs and Border Protection, US Mission to the EU)
- Kathryn Buer (Senior Business Development-IIS, Raytheon International)

Open Discussion

Rapporteur of the event: Sergio Carrera (CEPS)

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Presentations

Elsbeth Guild (CEPS)

Guild opened the event by highlighting the importance of customs cooperation debates in current EU policy processes. She stressed the difference between border controls when referring to customs, which focus on 'goods,' and border controls dealing with persons. Guild also made the point that customs is one of the areas where there have been numerous technological developments in recent years.

Guild informed delegates that the meeting was organised by the Justice and Home Affairs Section of CEPS in collaboration with the Law, Science, Technology and Society (LSTS) research centre of the Vrije Universiteit Brussel (VUB) within the context of the INEX project, a three-year project funded by the Security Programme of DG Enterprise of the Commission's Seventh Framework Research Programme. This event served as another example of the linkages between the INEX project, academics working in the network, EU policy-makers and the private sector.

Peter Hobbing (CEPS)

Hobbing covered the issue of border management as a multidisciplinary task. He began by referring to the work previously carried out by the JHA Section of CEPS on external border-related issues, which until then had mainly focused on external border security and the impact of these border management policies and practices on individual liberties and the rule of law.

Hobbing stressed that the focus of this expert seminar was rather on the second dimension of EU external borders controls, namely that of goods. He made the point that the security risks related to cross-border trade should by no means be neglected. A notable illustration of this was the recent Yemen air freight plot, proving that it is not just travelling terrorists that might represent a threat but also unaccompanied freight. Hobbing cautioned that customs not possessing a high security profile in the public eye were frequently at risk of losing their well-earned freight-control competences to more 'extrovert' administrations such as the police or border guards. For the sake of efficiency, however, the functions should be kept separate and only exercised by those authorities 'best qualified' to do the job. Hobbing put the traditional division of tasks between the authorities that control 'goods' (customs) and those that manage human mobility (police/border guards)

into historical perspective, referring to the bible and Matthew's "toll collector", to the Roman Empire, the Middle Ages and the 19th century. Customs controls were thus not an invention of the 20th century.

The main question is: who does what when examining the tasks of border police and the customs? Basically, border police/border guards control passports (movement of persons) and deal with issues such as threats to internal security, road safety and persons with dangerous objects. Customs deal with 'goods,' which covers a multitude of tasks. In Hobbing's view, there has been a 'paradigm shift' in the customs remit; whereas previously they were only in charge of goods and collecting duties, they are now responsible for health risks, nuclear risks, cultural heritage, counterfeit goods, arms, etc. Hobbing then addressed the justification of customs competence. Inter alia, the added value of customs involvement lay in their long-term experience regarding the paper trail and other commercial practices, the quality as a trade facilitating agency and the experience of 40 years working with EU legislation.

Hobbing stressed that customs controls were clearly not 'a simple thing' but involved problems of uniform application on an EU scale. So far there was neither an EU-wide harmonisation of customs penalties nor agreement between the Commission services involved (TAXUD, HOME, OLAF) as to competence in customs security matters – and the Treaty of Lisbon had not facilitated matters either. The question of what should be 'the right place' for customs in the overall management of the external EU border remains unanswered. Hobbing presented three possible options or scenarios in this regard: first, to continue with the status quo, where Frontex does not get involved in customs but remains mainly focused on the control of persons. As a second option: create a section inside Frontex to deal specifically with customs cooperation. A third option would be to set up a new customs border agency in partnership with Frontex and on an equal footing with Frontex, working exclusively on customs cooperation.

Concrete examples of a combined approach (merger) exist, notably in the UK and the US. Since April 2008, the UK Border Agency (UK BA) has combined visas, control of persons and port of entry functions of customs within one agency. In the US, the Customs and Border Protection agency (CBP) incorporated the entire customs dimension together with immigration control and border surveillance. Finally, Hobbing turned to the question of how things could be organised in the EU. Valuable advice could be taken from the *Guidelines for Integrated Border Management in the Western Balkans* and the *Handbook for the Implementation of Integrated Border Management Concept in Central Asia* (both established by EU border experts), which favoured a multidisciplinary approach involving different agencies and seeing 'security' not as an overall objective but on an equal footing with facilitation. Both texts argued for 'cooperation/coordination' rather than 'merging' the different authorities in charge of border controls of persons and goods.

Frank Heijmann (Customs Administration of the Netherlands)

Heijmann's presentation focused on the relationship between customs authorities and border guards. He explained that customs not only collected taxes while supervising the import and transit of goods in the EU, but also engaged in the protection of society and the facilitation of trade. Only 1/3 of customs staff worked at the border, the other 2/3 at inland offices. As regards safety and security issues, Heijmann addressed the extent to which the events of 9/11 had brought about a 'shift' in the tasks of customs in the EU. In his view there has been absolutely no change, not even since the new amendments introduced on safety and security. As before, the main control task consists of looking at everything that 'appears strange'. The only change probably consists of the 'new means' available to customs to do its work, and the fact that the information flow around it is much higher. The work as such has remained the same. Heijmann explained how customs competences needed to be understood as extending to the complete supply chain, from the moment that goods are produced until they are sold or delivered. Customs intervene at all points of this process.

Heijmann then addressed the question of 'trade facilitation'. Some people might understand this as customs refraining from controls, but this would not be correct. It was more about distinguishing 'goods in general' from 'trusted' goods. He underlined the role of risk assessment of these data, upon which one can determine the extent to which intervention is needed or not. Customs look at all security measures that a trader has in its supply chain. If the security of the trader is good and 'trusted,' there is no interference. Heijmann then moved on to the question of what customs is. He referred to the integrated data pipeline and explained that customs authorities already manage trade through technology, so that customs will use what trade already has available and not ask for information during each of the phases. The physical work at the border is only a very small part of the overall work. Concerning the future, he said that working smoothly should not be achieved by 'merging' the authorities but actually by 'better cooperation'.

Tadeusz Senda (Permanent Representation of the Republic of Poland to the EU)

Senda began his presentation by addressing the core functions of customs. The main task is revenue collection but also the protection of society, national environment, health risks and intellectual property rights. He emphasised that one of the main problems from a customs perspective is that of piracy and counterfeit goods. This is also a real problem in Poland, especially the smuggling of cigarettes. So while there are already many instruments in place to deal with these activities, they are still not satisfactory in order to obtain a high degree of efficiency.

Senda then highlighted three models of 'customs organisation.' First, customs and excise – under the umbrella of the Ministry of Finance, as in Poland, but it is not included in the tax authorities. Second, revenue – customs merged with tax administration – as is the case in Hungary and Denmark; and third, under the umbrella of a border agency, as in the UK. Which option would work best? Senda said that it would be possible for Frontex to be divided into two pillars, but he expressed doubts as to whether this was actually possible at this time. DG TAXUD would not recognise the situation few years ago.

Senda then addressed several questions that are central to the thinking about the future of customs cooperation at EU level: the budget, the nomination of the director and the management structure - all highly political issues. None of these changes would take place quickly. He also mentioned that after the Treaty of Lisbon, with the abolition of the third pillar, a change in the working structures of the Council could take place, particularly regarding the customs cooperation working party and the customs union working party. It is necessary to change the role of customs cooperation WP and possibly to merge the two, establishing one with three sub-groups: one on legislation and policy, another on tariffs and another one on customs (third pillar) cooperation. This, he said, would also strengthen DG TAXUD.

Senda then moved on to outline the harmonisation that has taken place at EU level through the adoption of a common body of legislation (Article 2 of the Customs Code), the Customs Policy Group at DG level meeting four times a year, the binding tariff information, and IT systems. He also underlined the EU answer to 9/11 and the security and safety amendment of the CCC.

The final part of his presentation focused on border management in Poland, where responsibility lies with the regional governor (customs and border guards have the same status). The Polish model relies on strong cooperation between border guards and customs and establishing joint customs control, including border controls.

David Dolan (US Mission to the EU)

Dolan highlighted the US experience in the field of border management, where the customs officer also handles migration (control of movement of persons) issues. The officers of US Customs and Border Protection (CBP) have to be cross-trained.

Dolan began by giving a historical background to the current US system of border management. Before March 2003, nobody would have thought that it was actually possible to merge customs and immigration into one sole law enforcement authority (under the Department of Homeland Security, DHS) to control external borders. The events of 9/11 changed everything, however. The primary concern switched to security and how to make US borders more secure. The revenue function of customs had been decreasing over the years. So the US took the initiative to set up the CBP, where the same staff members cover both border and customs functions.

The US administration is trying to improve the work with the other US agencies towards an international trade data system for security purposes, involving features such as advance notification of shipments, a 24-hour rule, overseas presence of officers etc. He outlined the main features of a concept note describing the processes and how they engage with other law enforcement agencies. Dolan also pointed out the relevance of the international dimension in the discussion. At present there is enforcement bilaterally or multilaterally but the future will be a global trade system. He then raised the question: "can a national administration put the international agendas first?" He concluded that this was possible as far as customs could merge with other agencies, which was feasible but would require another generation or two.

Kathryn Buer (Raytheon International)

Buer outlined what the modern hi-tech industry in general (not just her own company) could offer to customs and other border services to facilitate control tasks and make them more efficient. The scope of such technology ranges from suits to protect against hazardous materials, body heat scanners, tamper-proofing and cargo security devices to biometrics and complete registered traveller schemes.

The most recent development focused on comprehensive systems in the area of automated risk assessment (ARA) which allowed (1) risk and threat assessment, (2) targeting and profiling, (3) advance intelligence and (4) strategic decision-making, where these systems/programmes could be used for passengers as well freight. Moreover, ARA possessed some crossover functions for internal administrative use, in particular to identify weak border crossing points and offices with a likely occurrence of corruption, whereas the latter function had to be decided on a case-by-case basis by the administration concerned. External ARA use provided many advantages, notably allowing the deployment of scarce resources to specific risk/threat areas.

The ensuing debate between representatives of customs (Member States, third countries, World Customs Organisation); representatives of international trade and transport showed that everyone was aware of the need for customs to modernize in all respects and keep pace with global challenges. However, the large majority was in favour of customs remaining an independent organisation rather than merging with police/border guards. According to the WCO representative, only 3% of customs administrations worldwide had merged with other services. Nevertheless, there was unanimity that customs should seek closer cooperation with other services in the sense of a coordinated (rather than integrated) border management.

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Background note

by Peter Hobbing (CEPS)

Our initial observation stems from earlier meetings/publications with a focus on Schengen person-related controls at the external border: they pointed to a still unsatisfactory situation due to prevailing 3rd pillar traditions, namely an inadequate application of the Community legal system, especially in fundamental rights and democratic/judicial control, and an equally deficient system of compliance control in terms of the Schengen peer evaluation.

Our assumption was that EU customs, with a much longer tradition of applying a 1st pillar Community *acquis* (since 1968), would be in a position to serve as a point of reference if not a model for developments to be accomplished in the Schengen framework.

Recent contacts with the responsible Commission service (DG TAXUD) confirmed this to a certain degree but also revealed a number of exceptions/limitations and weaknesses, i.e. unresolved issues on the customs side. Whereas for a long time Community-wide compliance control was considered a largely ‘automated’ process based on just a few incentives (25% share of customs revenues to be kept by collecting Member States, cf. Article 2(2) Council Decision 2000/597/EC) and regulatory mechanisms (common EU legislation, infringement procedures, administrative/enforcement cooperation, joint training) at central level, reality looks somewhat different as recent enquiries have shown.

Full awareness of the situation was reached via a WTO complaint lodged by the United States in 2004, claiming that the EC “administered its customs law in a non-uniform way” (in terms of considerable differences between Member States’ practices) thus infringing Art X:3(a) GATT 1994. If the procedure (closed in 2006) did not succeed, it was due to a lack of sufficient evidence presented by the US. But the problem persists, becoming even more serious in the digital age and the growing trend towards splitting up import/export formalities between various Member States. If the EU authorities are aware of the problem and seek a solution, it is yet to be found.

The issue gets more complicated when it comes to its sanction aspects, i.e. the most severe means to counter non-compliant behaviour among importers/exporters. In view of the hitherto prevailing 3rd pillar scenario in criminal justice matters, the Commission twice (1980s, 1998) had to withdraw proposals to harmonise this area. Now with the Lisbon Treaty in force, a solution would appear to be within reach but new difficulties have surfaced, mainly with regard to the three Commission services that claim ‘chef de file’ competence in the field (TAXUD, OLAF, HOME).

On top of this, there seem to be problems regarding the legal basis to be chosen for the introduction of EU-wide sanctions: the Commission services assumed that a non-criminal, purely administrative system of sanctions (‘administrative penalties’) would be fully sufficient to ensure compliance with the rules, thus avoiding the cumbersome harmonisation of criminal law. However, the fact that several Member States do not foresee this type of sanctions, confining their system to criminal

sanctions appears to be an obstacle to taking the 'easy' road towards harmonisation granted by Article 76 TFEU. Various initiatives and considerations are underway, notably a fact-finding study on national regimes in customs violations, with a report to be expected in 2011.

To conclude, one might say that although the customs area does not offer us any ready-made answers, it has to struggle with more or less the same problems we encounter in Schengen-related border management. This must be seen as a strong argument in favour of a joint search for solutions, all the more since it is hardly feasible or at the least counterproductive to keep border matters entirely apart depending on whether they concern persons or freight.

The extremely close links between both areas as regards security are currently evidenced by the so-called 'Yemen freight bomb plot'. Reactions in the Member States call for reinforced freight security, partially by means of a takeover of freight control functions by police authorities. Our panel, with representatives from DG TAXUD, Member States customs and the US Customs Attaché will be able to shed some light on all solutions currently practised or proposed.

Since full digitalization is the second leg of all modernisation efforts, be it e-border customs procedures as stipulated by the revised Customs Code (MCC=Modernised Customs Code) or anti-fraud/security strategies to counter freight-related risks (e.g. risk management tools, container surveillance under the CSI – Container Security Initiative), we will discuss the latest developments with the help of industry representatives specialised in freight-related border control and processing.