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Model of Non-uniform Application of the Common External Tariff in the EC

Carsten Weerth*

Many legal advisers, scientists and practitioners know since many years, that the Common External Tariff (CET) of the European Community (EC) is being applied non-uniform from the different national customs services and that the economic operators are using this systematic fault of the EC for their advantage. Which forms of advantages of price differences according to different duty rates at market entry into the EC common market are there?

A model of non-uniform application of the CET of the EC has been developed and proven during three years of research¹ and is presented in this paper.

I. THEORY OF DIVERSION OF TRADE AND NON-UNIFORM APPLICATION OF THE COMMON EXTERNAL TARIFF OF THE EC

Producers and importers of goods are reacting on tariff measures in order to receive more favourable import duties. In former times that was possible only for big, multinational businesses however in times of globalization and strong divisions of working processes around the world, the unification of the rules of world trade, customs procedures and the interaction of different economies and societies this can also be done by small and medium businesses that are participating on global trade – and they must do so in order to survive the competition within each country and the big opportunities in global trade.² In particular the ‘smart’ businesses are regarding taxes at the border as ‘manageable tax’, that means ‘routable taxes’³ (this is also known as ‘international tax planning’⁴). It is of the interest of the importer and his legal adviser to

prevent cost intensive ‘customs problems’ and to circumvent them – the customs problems comprising fines and high customs duties.⁵

A higher customs duty at import of goods equals higher costs for the import. Therefore an importer will try to pay lower costs for the importation of goods, for example, by choosing a lower customs duty when possible.

When a competition of different economies, legal systems and the application of law is regarded this is known as ‘Competition of legal order, Competition of regulation, competition of systems or federalism of competition’⁶ however the ‘regulation or legal orders’ is most fitting. The very question is whether there is a competition between the single customs authorities of the EC Member States for the control of market access and how the importer is reacting. How can the European commission ensure an uniform application of customs law and the access to the common market out of third countries and is this issue politically desirable?

Notes

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1 See Weerth, *Einheitliche Anwendung des Gemeinsamen Zolltarifs beim Zugang zum Europäischen Binnenmarkt?* (PhD-Thesis, Universität Oldenburg), *Uniform application of the Common Customs Tariff at market entry to the EC-Common Market?* (PhD-Thesis, accepted 23/08/2007), 2007, Sierke Verlag, Göttingen, ISBN 978-3-940333-61-2.

2 See Zuvich, ‘The Truth about Customs’, *Journal of Accountancy* (1998): 51.

3 See *ibid.*

4 See Genschel/Rixen, 2006, 2.

5 See Zuvich, ‘The Truth about Customs’, *Journal of Accountancy* (1998): 51.

6 See Reiß, 2006, 1 and detailed for the ‘competition of factors of states’, see Siebert, 1997, 177–192.

2. RACE OF REGULATOR AND REGULATED?

2.1. Concept of the Race of Regulator and Regulated

A race between regulators (customs authorities) and regulated (importer) is very much likely.

The importer of a certain commodity into the EC can choose out of different views on customs classification from (up to) 27 national customs authorities for a more desirable variant (the lesser customs duty) – that is *ceteris paribus*, meaning that the transport costs and further transaction costs are assumed as similar, because these costs shall not disrupt the advantage of a lesser customs duty.

In short it can be said as a competition between an importer and (up to) 27 customs authorities with sometimes different customs classification opinions for a certain commodity into the Common External Tariff (CET).

2.2. Legal View

Out of the legal view the customs authorities of the EC and the European Commission are forced due to obligations out of the EC-Treaty to ensure a uniform application of the CET throughout the EC in order to obtain an equal market access and equal treatment of importers.

However there is a strong contrast between the official and scientific opinion⁷ of the success of the EC customs union, the legal obligations out of the EC-Treaty as of Article 25 paragraph 1 EC-Treaty ‘The basis of the community is a customs union [...] and the introduction of a common customs tariff’ on the one hand⁸ and the practical uniform application of the CET, which is according to the numerous legal cases in front of national financial courts and the European

court of justice in questions of customs classification apparently not given.

The question must be posed whether the legal obligations out of the EC-Treaty are really addressed of the EC – the EC must be measured by its own high measures. The fixed aim of the EC is a ‘customs union’. Does a customs union only consist out of a uniform customs law (customs law union) or does it also consist out of a common customs authority (customs authority union)? Is the EC customs law (in particular the common customs tariff) really being applied uniform? Are systematic differences between the EC Member States and the apparent weaknesses of the EC (e.g., different official languages, mentalities of customs officers, different education of customs officers, different payments of customs officers, different legal traditions, different ways to contest a decision) really being used by international acting multinational businesses? Are the national customs authorities of the EC Member States being played with by and against each other by multinational economic operators?

2.3. Business Administration View

Out of the business administration view of the single importer it is favourable to choose the lesser customs duty in order to receive fewer costs when importing goods and therefore to receive a cheaper market entry to the EC common market. This advantage of costs will only apply when the transport costs within the common market are smaller than the amount that was saved by the smaller customs duty.

2.4. National Customs Service View

Out of the view of the national customs authorities the 27 administration of the EC Member States

Notes

- 7 Examples for the more official opinion are papers from the Commission employees M. Lux and D. Rovetta, see Lux/Rovetta, ‘Das WTO-Streitbelegungsverfahren zwischen den USA und der EG über die Verwaltung und Rechtsprechung in der EG-Zollunion’, *ZfZ* 9 (2007): 225–238, Rovetta/Lux, ‘The US Challenge to the EC Customs Union’, *GTCJ* 2, no. 5 (2007): 195–208 and Lux, ‘40 Jahre Zollunion – wie geht es weiter?’, *AW-Prax* 14, no. 7 (2008): 283–287; it must be questioned whether practitioners of the EC Commission – who are major contributors to the EC Customs legislation – are really neutral and scientifically able to comment on the situation of the EC Customs Union. Examples for the scientific opinion are Prieß/Niestedt, ‘10 Jahre Zollkodex’, *AW-Prax* 10, no. 8 (2004): 295–301 and 10, no. 9, 346–350, Niestedt/Stein, ‘Ist das europäische Zollrecht WTO-widrig?’, *AW-Prax* 12, no. 12 (2006): 516–518, Rogmann, ‘Die Wirksamkeit der gemeinschaftsrechtlichen Mechanismen zur einheitlichen Auslegung und Anwendung des Gemeinschaftsrechts – Zum System der Verwaltung des Zollrechts der EG’, *ZfZ* 84, no. 3 (2008): 57–69, Rogmann, ‘40 Jahre Zollunion – alles im Gleichklang?’, *AW-Prax* 14, no. 5 (2008): 195–199, Dierksmeier, EG-Zollrecht im Konflikt mit dem Recht der WTO, PhD-Thesis, Universität Münster, 2007, URL: <www.efa-schriften.de/pdfs/Dierksmeier.pdf> (2008/11/17), 2007, Dierksmeier, ‘Uneinheitliche Anwendung des EG-Zollrechts’, *AW-Prax* 14, no. 5 (2008): 200–203, Weerth, Einheitliche Anwendung des Gemeinsamen Zolltarifs beim Zugang zum Europäischen Binnenmarkt? (Dissertation, Universität Oldenburg), Uniform application of the Common Customs Tariff at market entry to the EC-Common Market? (PhD-Thesis, accepted 23/08/2007), 2007, Sierke Verlag, Göttingen, ISBN 978-3-940333-61-2, Weerth, ‘Das Modell der Zollarbitrage’, *AW-Prax* 14, no. 1 (2008): 23–25, 14, no. 2, 68–72 and Weerth, ‘50 Jahre EWG, 40 Jahre EWG-Zollunion/Zolltarifunion – ein Grund zum Feiern? Eine kritische Bestandsaufnahme und Analyse’, *ZfZ* 84, no. 7 (2008): 178–185.
- 8 See European Commission, Customs Policy, 10 and as example Alexander in Witte, *Zollkodex*, Commentary, 2006, in front of Art. 20 CC, No. 1, Lux in Dorsch, *Zollrecht*, Commentary, 2001, Introduction into Reg.-CN, No. 42 and Lux in Lenz/Borchardt, *EGV*, 2006, Art. 26 EGV, No. 6.

(in their national competition of states) have an interest in receiving the import and customs declarations in their country (25% of the traditional revenue remains with this Member State).

The easy and non-complicated customs clearance at the local seat of the economic operator is an important regional economic factor for the local economy – in Switzerland the regional authorities on charge of the development of economic facilities is openly co-operating with the Swiss customs service.⁹

Within the EC the national customs services of the Member States and the different economic regions are in an competition in order to hold the import in their location or Member State¹⁰ (e.g., the competition between Bremerhaven and Hamburg in Germany or the competition between the German harbours with the so called ‘Western Harbors’ in the Netherlands – Rotterdam – and in Belgium – Antwerp (and die competition of these last two harbours between themselves)).¹¹

2.5. Competition between EC Member States

Another major idea of the competition of places are the strongly differing rates of the value added tax (VAT) of the Member States of the EC-25¹² (from 15% in Luxembourg to 25% in Denmark, Sweden and Hungary).

There is a deep political discussion and in the press and scientific literature about the competition within the EC common market, however the idea of a competition at market entry to the common market from the outside out of third countries has not been topic of regular research yet.¹³

When there are tremendous differences of VAT-rates (e.g., Denmark, Sweden and Hungary, 25%, Luxembourg 15%, Germany 19%)¹⁴ it is likely that there is a competition for the import of goods out of third countries into the common market over different

Member States of the EC. The importer will choose a better VAT-Rate in another Member State when he gets lower frontier costs and the advantage of costs is not required for transport costs within the common market. For the VAT it must be stated clearly, that they are remaining for 100% into the revenue of the Member State (in contrast to customs duties which are remaining only for 25% in the Member State and 75% must be given to the European commission).

2.6. Economic View

Out of the economic view it must be questioned whether a non-uniform market entry is negative. Citizens can receive imported goods for better prices (when the importer is handing on his advantage) and due to the competition of the national customs services among each other the importer will most probably receive the best conditions for market entry. However the conditions for fair and free trade are contorted. Is this possibly affecting the flow of traffic and changing the trade flow?

2.7. Fiscal View

Out of the fiscal view it must be questioned whether the non-uniform application of the EC customs law is endangering traditional own revenue of the EC in large amounts. Are these small areas of cross-border trade or are these tremendous values and amounts of goods?

2.8. Political View

Out of political view it must be questioned whether the deficiencies of the EC customs union are acknowledged and whether these deficiencies of equal market entry shall be healed.

Notes

9 See Pavel, Forum Z, 2006, Vol. 3, No. 3, 4.

10 By the introduction of the so called central customs clearance model at the seat of the importing business with the Modernized Customs Code in 2013 the competition of the EC Member States will most likely grow less important because the import clearance will be centralized at the customs office of entrance at the seat of the concern., see Lux AW-Prax 2005, 378–383 and 422–425 and see Lux, AW-Prax 2006, 367–370.

11 Personal experiences of customs clearings in sea trade: many economic operators are arguing against Germanys customs service ‘when you cannot do this in Bremen, we will do this in Hamburg, there this is normal’ or in a wider Western European context – ‘in Belgium/ Netherlands this is being done this way and if you do not do it this way, we will import/export there’; this concurrence has been scientifically published by Beußel ZfZ 1998, 258, in particular n. 24, when Belgian customs officers are fearing a higher control frequency could lead to a situation which would be if favour of ‘the Netherlands’ in order to enhance the economic success of the harbour of Rotterdam.

12 See European Commission, DOC/1829/2006, Die Mehrwertsteuersätze in den Mitgliedstaaten der Europäischen Gemeinschaft, URL: <http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/rates/index_de.htm> (15 Oct. 2006), 2006; a lowest and highest VAT-rate has been agreed upon between the Member States, (RL 92/77/EWG of the Council as of 19 Oct. 1992, OJ EC 1992 No. L 316/1), but the differences of VAT-rates are still tremendous, see Genschel, 2005, 13 and Weerth, PhD-Thesis 2007, annex 3.

13 There is an opinion that the different VAT-rates at the import in different Member States comprise new ‘border taxes’, which are assumed to contradict the EC-Treaty, see Verwaal/Cnossen, ‘Europe’s New Border Taxes’, *Journal of Common Market Studies* 40, no. 2, (2002): S. 309–330.

14 Since 1 Jan. 2007.

Are these simply different mentalities and historically grown – non-harmonized – topics of the 27 national states (legal system, financial courts, competition between Member States)? Can these problems be addressed in the view of a growing and enlarged EC?

In recent years (in Europe since the 1990, in the US since 1998) the environment of customs regulations has changed fast and strongly.¹⁵ The new tendency of law enforcement in the US and the EC-25 is the transposition of complying with legal requirements (the so called ‘compliance’) to the importer, for example, the correct customs classification of goods into the customs tariff.

2.9. Scientific View

In the scientific community at first there was lead the debate within the young European Economic Community (EEC) about the competition of business

allocation and later about the competition of national systems (in particular after the ‘Cassis de Dijon’-case)¹⁶ however since 1993 the major topic of new research is the completion of the common market and the still apparent deficiencies (e.g., non-uniform tax rates within the EC for the VAT¹⁷ – therefore it still can be said to be a system-and allocation competition of the Member States among each other).

3. A SHORT HISTORY OF THE CET OF THE EC

3.1. BENELUX-Customs Union 1948

The first Customs union in Western Europe was founded in 1948 between Belgium, the Netherlands and Luxembourg (BENELUX-Customs Union).

Note: Please provide citation for figure 1 and 2

Figure 1: The EEC, EC, EU: A Growing Economic and Political Union – The Figure Shows the Date of Accession of New Member States¹⁸

Year	Member States	Accession of Member States
1958	Belgium, Netherlands, Luxembourg, Germany, Italy, France (EEC-6)	–
1973	Belgium, Netherlands, Luxembourg, Germany, Italy, France, Great Britain, Ireland, Denmark (EEC-9)	Great Britain, Ireland, Denmark
1981	Belgium, Netherlands, Luxembourg, Germany, Italy, France, Great Britain, Ireland, Denmark, Greece (EEC-10)	Greece
1986	Belgium, Netherlands, Luxembourg, Germany, Italy, France, Great Britain, Ireland, Denmark, Greece, Spain, Portugal (EEC-12)	Spain, Portugal
1995	Belgium, Netherlands, Luxembourg, Germany, Italy, France, Great Britain, Ireland, Denmark, Greece, Spain, Portugal Austria, Sweden, Finland (EU-15)	Austria, Sweden, Finland
2004	Belgium, Netherlands, Luxembourg, Germany, Italy, France, Great Britain, Ireland, Denmark, Greece, Spain, Portugal, Austria, Sweden, Finland, Estonia, Latvia, Lithuania, Poland, Hungary, Cyprus, Malta, Slovenia, Slovakia, Czech Republic (EU-25)	Estonia, Latvia, Lithuania, Poland, Hungary, Cyprus, Malta, Slovenia, Slovakia, Czech Republic
2007	Belgium, Netherlands, Luxembourg, Germany, Italy, France, Great Britain, Ireland, Denmark, Greece, Spain, Portugal, Austria, Sweden, Finland, Estonia, Latvia, Lithuania, Poland, Hungary, Cyprus, Malta, Slovenia, Slovakia, Czech Republic, Bulgaria, Romania (EU-27)	Bulgaria, Romania

Notes

15 For the situation in the US see Zuvich, ‘The Truth about Customs’, *Journal of Accountancy* (1998): 54, for the situation in the EC see the reports in the journal *AW-Prax*.

16 See Reiß, 2006, 1.

17 See for instance with many further citations Genschel, 2005, Mutual Recognition in Regulation and Taxation, see Genschel, 2002, Steuerharmonisierung und Steuerwettbewerb in der Europäischen Union, Campus Verlag, see Genschel, 2001, Tax Competition in the Single Market: A Policy Constraint for the European Welfare State, Max-Planck-Institut-für-Gesellschaftsforschung Working Paper 1/01 (updated), see Dehejia/Genschel, Tax Competition in the European Union, Max-Planck-Institut-für-Gesellschaftsforschung Discussion Paper 98/3 and see Genschel/Rixen, 2006, The Institutional Foundations of Tax Competition, The International Tax Policy Project, International University Bremen (IUB).

18 This Figure 1 was taken from Weerth, PhD-Thesis 2007, Table 11, 77.

Figure 2: The BENELUX-Customs Union (1948)¹⁹

The BENELUX-Customs union resulted in a Common Customs Tariff and a common customs territory from 1948; therefore the customs territory is not divided and shown as one.

BE	LU	NL

3.2. European Economic Community (1958) to the EC-27 (2007)

The EEC was founded in 1958 and it took ten years to merge the initial four customs tariffs (BENELUX, France, Italy and Germany) to the CET. The closer cooperation of the BENELUX-Countries is also allowed under Article 306 EC-Treaty (so called BENELUX-Clause).

The EEC has been enlarged six times (see Figure 3).

Figure 3: Scheme of the National Customs Services of the Member States from the EEC-6, over the Enlargements of the EEC-9, EEC-10, EEC-12, EC-15, EC-25 to the EC-27. The Meaning of the Short Symbols is as Follows: BE, Belgium; LU, Luxembourg; NL, Netherlands; DE, Germany; IT, Italy; FR, France; GB, Great Britain; DK, Denmark; IE, Ireland; GR, Greece; ES, Spain; PT, Portugal; AT, Austria; SE, Sweden; FI, Finland; EE, Estonia; LT, Lithuania; LV, Latvia; MT, Malta; CY, Cyprus; HU, Hungary; CZ, Czech Republic; SI, Slovenia; SK, Slovak Republic; PL, Poland; BG, Bulgaria; RO, Romania.²⁰

EEC-6 (1958)

BE	LU	NL	DE	IT	FR

EEC-9 (1973)

BE	LU	NL	DE	IT	FR	GB	DK	IE

EEC-10 (1981)

BE	LU	NL	DE	IT	FR	GB	DK	IE	GR

EEC-12 (1986)

BE	LU	NL	DE	IT	FR	GB	DK	IE	GR	ES	PT

EC-15 (1995)

BE	LU	NL	DE	IT	FR	GB	DK	IE	GR	ES	PT	AT	SE	FI

EC-25 (2004)

BE	LU	NL	DE	IT	FR	GB	DK	IE	GR	ES	PT	AT	SE	FI

EE	LT	LV	MT	CY	HU	CZ	SI	SK	PL

EC-27 (2007)

BE	LU	NL	DE	IT	FR	GB	DK	IE	GR	ES	PT	AT	SE	FI

EE	LT	LV	MT	CY	HU	CZ	SI	SK	PL	BG	RO

Notes

19 This Figure 2 was taken from Weerth, PhD-Thesis 2007, Figure 7, 103.

20 This Figure 3 was taken from Weerth, PhD-Thesis 2007, Figure 5, 46.

3.3. Data and Methods

The survey has been conducted solely by help of publicised data either from the EC databases on trade statistics, in the scientific literature or in financial court cases. Mostly the period of the EC-15 has been the topic of research (1995-2004) but some cases have also been included from earlier or later periods of the EC economic history.

Trade flow analysis has been conducted for chosen cases (Chicken cuts of either pos. 0210 or 0207, and old-timer-vehicles of either pos. 8703 or 9705). Furthermore reports of the Anti-Fraud-Authority of the EC (OLAF) have been evaluated, reports from the EC court of auditors have been consulted and judicial cases have been reviewed.

4. MODEL OF NON-UNIFORM APPLICATION OF THE CET OF THE EC

The race between a regulator and a regulated is not a simple circle of interaction when the customs authorities of an EC Member State are reacting on the action of an importer and the importer reacts again – (simple interaction, see Figure 4).

However the situation is more complex. Each new action of the importer can result in different alternatives of action, that are not easily recognizable for the customs authorities of a EC Member State.

The importer must declare the goods in a customs declaration, which is verified by the national customs authorities of a Member State. The importer will react on this result of validation at the next importation and customs declaration (reaction).

The aim of each action of an importer is the reduction of the customs duties, which can be done by different alternatives of action. Basically the tariff rate

(t , tariff) is calculated by help of three variables value (v), duty (d) and quantity (q):

$$t = v \times d \times q \tag{1}$$

The duty d is determined by the customs classification of the goods into the CET of the EC (c , customs classification) and is depending from the country of origin (o , origin) and the time of the customs declaration (ti , time).

$$d = c_{o,ti} \tag{2}$$

The alternation of a customs duty on imported goods is the depending on the variables v , q und d ($c_{o,ti}$).

Every national customs service of a EC Member State is responsible for the right application of the CET and each of the variables in formula 1 is potentially a negative influence of free trade²² and also the possibility of hidden discrimination of goods.²³ The problem of the customs classification of goods is (as well as the customs value) the possibility of using it as means of protectionism²⁴ and therefore a certain commodity could be excluded from the MFN principle when the customs classification is 'unjustified'.²⁵

For importers with a different opinion on customs classification from the customs authorities of a EC Member State there are different alternatives of action (see Figure 5 and Table 1).

Figure 4: Scheme of a Simple Circle of Regulation²¹

I = Importer, C = Customs service

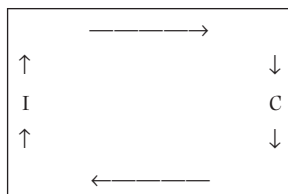
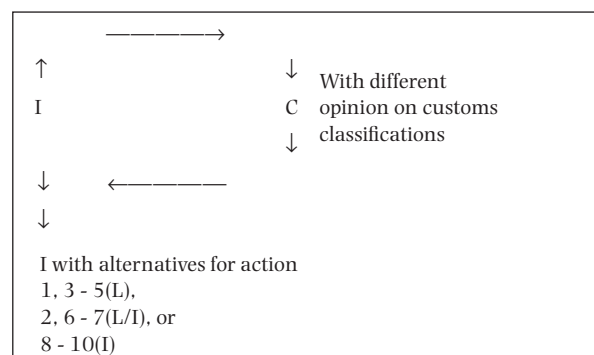


Figure 5: Model of Non-uniform Application of the CET of the EC²⁶

Scheme of alternative actions for importers with different opinions of customs classifications

I = Importer, C = Customs service



Notes

21 This Figure 4 was taken from Weerth, PhD-Thesis 2007, Figure 3, 43.
 22 See Trebilcock/Howse, 1999, 124.
 23 See Weiß in Weiß/Herrmann, 2003, §11, No. 419.
 24 See Hasenpflug, 1977, 47 and Trebilcock/Howse, 1999, 127.
 25 See Weiß in Weiß/Herrmann, 2003, No. 419.
 26 This Figure 5 was taken from Weerth, PhD-Thesis 2007, Figure 4, 45.

Table 1: Model of the Non-uniform Application of the CET of the EC²⁷

Possible actions of an importer at market entry to the European common market with the legal status in Germany: legal (L), illegal (I)

No.	Action	Status L/I
1	Contesting a Customs classification of a Member State (for a limited time)	L
2	Import without hint of a binding tariff information (BTI) with a different classification result	L/I
3	Import over another Member State that has a different opinion of customs classification – change of trade flow (so called ‘tariff shopping’)	L
4	Application for a BTI in another Member State that has a different opinion of customs classification (so called ‘BTI-shopping’)	L
5	Development of new goods in order to prevent a unfavourable customs classification	L
6	Decrease of the customs value	L/I
7	Change of the country of origin	L/I
8	Change of the description of goods	I
9	Change of the amount of goods	I
10	Smuggling, concealing of goods and unlawful introduction into the customs territory	I

Note: The reduction of a customs value can be obtained with legal or illegal means.²⁸ The country of origin can also be influenced legally and illegally: false declarations are illegal but imports of similar goods out of another country of origin with a more favourable customs duty is legal; a simple classification of these two points (6/7) as legal/illegal is therefore not possible. The negation of a different BTI is illegal in Germany when customs duties are not paid.

5. FORMS AND PROOFS OF NON-UNIFORM APPLICATION OF THE CET OF THE EC

The alternatives of action and the model of non-uniform-application of the EC CET have been proven by help of different examples. The trade flow alternations at import into the EC common market over a Member State with a customs classification opinion that results in a better opinion (lower duty) and the transport within the common market into another Member State (so called ‘tariff shopping’, Table 1, 3. alternative of action) has been postulated in the literature before.²⁹

The success of contesting a classification opinion of the customs service of a Member State is limited

in time (until the final judicial decision) – a survey of the European Court judgments from 1969 until 1994 has shown, that in 56 out of 151 cases (37%) the economic operator was successful whereas in 95 cases (63%) the customs service was successful.³⁰

For the classification of the alternatives of action it is important to understand that some of them are legal and others are illegal however weather or not an action is illegal is depending on the criminal laws of the EC Member States (EC-15 = 15 Member States or EC-27 = 27 Member States), because the criminal consequences are not laid down in the EC customs law.

Therefore it can be more favourable for an importer to choose a Member State in which there are no legal consequences for his actions. However some duty

Notes

27 This Table 1 was taken from Weerth, PhD-Thesis 2007, Table 9, 44.

28 False declarations or the false manufacturing of documents are illegal, however the presentation of another invoice out of the chain of delivery is legal (Art. 147 para. 1 s. 3 CCIP), when this is a transaction with the aim of importation into the EC; there are legal scopes of action for the determination of the customs value, see very detailed Möller, Verrechnungspreis und Zollwert, PhD-Thesis, Universität Freiburg, 2004.

29 See Vander Schueren, CMLR 1991, 857 and Müller-Eiselt, ZIZ 1997, 415.

30 Own calculations on the basis of data from Vermulst, MJIL 15, no. 4 (1994): 1316–1327; out of 158 cases seven cases had an ‘uncertain result’.

reductions can always be corrected by help of later in-house audits according to Article 78 CC.

The different and difficult legal classification of the customs classification means that there are legal scopes for duties on goods at market entry.

The customs classification of a certain commodity into another tariff line can only be charged when this can be proven. However the proof is due to the difficulty of classification of goods and the uncertainty difficult and almost not possible.

Since the foundation of the EEC-6 in 1958 the European (economic) Community has been enlarged six times up to the EC-27 in 2007.

By the enlargements more and more different customs services have been put into charge of application of the CET at the outer EC-border. When a single customs service has another classification opinion for the classification of a certain commodity into the CET from the other customs services the danger of changes of trade flows at market entry into the European common market is immense (see Figure 6): for example France could have had another classification opinion from the rest of the EC-15, that means that there is the chance of non-uniform application of the CET. The chance that this situation results in a change of trade flow pattern at the entry to the EC common market into the direction of France is very high.

The tax management by help of customs classification into a Customs Tariff is a possibility for customs

duty reduction for multinational economic operators and small and medium businesses that are using different legal and structural systems of EC Member States for the import control in order to play the systems against each other (insofar the knowledgeable importers are making 'Games with Customs'³¹).

The illegal activities are staying the instrument of criminal minds and the organized crime. It can be distinguished between the concealment of goods (e.g., hiding in secret places or the breaking of a border by help of an airplane that is flying over the frontier and is landing uncontrolled or that is thrown overboard next to the shoreline); real smuggling, see model, tenth alternative of action) and the attempt to cut short taxes or customs duties by giving the authorities in question not real or unreal or not complete declarations (smuggling in a wider sense, see model, 6.-9. alternative of action). In both cases this is a criminal act to German tax law according to §§370 ff. AO. However the criminal offences against the EC customs law is not laid down in the Customs Code but differing in each Member State. Therefore it may be favourable for an importer to choose another Member State that does not have national criminal rules or ones with fewer or more harmless penalties.

The EC customs code is differing between the ways a customs debt is incurred: the normal way of incurrance is laid down in Article 201 CC³³ and smuggling³⁴ is laid down under the scope of Article 202 CC.³⁵

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Figure 6: Scheme of Possible Trade Flow Changes for Non-uniform Application in the EC-15 (1995-2004); Shown is the Duty (MFN, Most Favoured Nations); The Arrows are Showing the Trade Flow at Import to the European Common Market; Next to the Lateral Movements there are of Course Imports in all Member States.³²

Trade flow at import of goods in to the EC														
Thrid country (non-EC-Member)														
→ → → → → ↓↓↓↓ ← ← ← ← ← ← ← ← ← ←														
BE	LU	NL	DE	IT	FR	GB	DK	IE	GR	ES	PT	AT	SE	FI
	10		10	10	4	10	10	10	10	10	10	10	10	10
← ← ← ← ← ← ↓↓↓↓ → → → → → → → → → →														
EC Common Market														

Notes

- 31 See the ZEIT-Article of Ulrike Meyer-Timpe, Die Zeit No. 23 of 2 Juni 2005, 27.
- 32 This Figure 6 was taken from Weerth, PhD-Thesis 2007, Figure 6, 46.
- 33 Article 201 CC has the following text:
 - (1) A customs duty on importation shall be incurred through:
 - a) the release for free circulation of goods liable to import duties [...]
 - (2) A Customs debt shall be incurred at the time of acceptance of the customs declaration in question. [...]
- 34 See Witte in Witte, Zollkodex, Commentary 2006, Art. 201 CC, No. 15.
- 35 Article 202 CC has the following text:
 - (1) A customs debt on importation of goods shall be incurred through:
 - a) the unlawful introduction into the customs territory of the Community of goods liable to import duties [...]

However the unlawful introduction of goods into the EC customs territory has not been topic of this survey.³⁶ Included in this survey are 'fraud and any other illegal activities affecting the financial interests of the Community' against which according to Article 280 paragraph 1 and 2 EC-Treaty all measures shall be taken, 'which shall act as a deterrent and be such as to afford effective protection in the Member States'. Estimated is an impact for the EC-own resources (traditional revenue of the EC) between 5% and 20% of the EC-total revenue per year.³⁷

Controls by the customs services at importation of goods are done in a very small amount of cases – estimates are thinking about only 1% of all imported goods.³⁸ In some cases the irregularity can be determined by help of the invoice or other trade documents (contract, Bill of lading, etc.).³⁹

However such trade documents are controlled on fewer occasions because the world of customs is more and more an electronic virtual world without trade documents which means that real paper documents are more seldom seen.

Frauds and illegal activities are fought within the EC by help of the EC-Anti-Fraud-Authority (OLAF) that was founded in 1999.⁴⁰ The operational activity reports of OLAF are always containing interesting cases in which economic operators have tried to utilize the different ways the Customs services of the Member States are working or in order to make open fraud.⁴¹

With the EC-Treaty of Amsterdam the Article 135 EC-Treaty (ex-Article 116 EEC-Treaty) has been introduced into the EC-Treaty which enables to further regulate the cooperation of the Members Customs services between themselves (horizontal) and to the Commission (vertical) in order to push the 'Co-operation in Customs'.⁴²

On the basis of Article 135 EC-Treaty the commission has introduced a deeper and better cooperation

of the Member States by council regulation (EC) No. 515/97⁴³ for cases of irregularities,⁴⁴ which are regularly examined by OLAF. In the years 2003-2007 there were 173 irregularities for the importation of goods examined by OLAF (see Table 2).

OLAF has distinguished four different ways of fraud:

- (a) false descriptions of goods which results in false customs classifications in den CET.
- (b) false countries of origin, that are resulting in the application of the wrong (antidumping-) duty.
- (c) false customs values, that are resulting in a false calculation of the customs duty and
- (d) false amounts, that results for specific customs duties to the false calculation of customs duties.

By these results of OLAF alternatives of action numbers 6-9 of the model have been proven (see Table 1).

Table 2: Overview of OLAF-Cases from 2003 to 2007⁴⁵

Overview of OLAF about the number of possible frauds [cases] according to false customs classifications in the CET – false descriptions of goods, false country of origin, false customs values or false amounts of goods.⁴⁶

Year	Description	Country of Origin	Value	Amount
2003	7	19	0	2
2004	6	43	3	2
2005	7	41	1	1
2006	13	7	2	0
2007	8	3	8	0
Overall	41	113	14	5

Notes

36 However illegal activities are mentioned in the model, for example, when they can help to understand a legal problem.

37 See Wassmann in Bongartz, 2000, 373.

38 See Durić, ZIZ, 1999, 69 and very detailed Wamers, Marktbeobachtung, PhD-Thesis Münster, 1997, 314–324 (in particular Annex 3: 'Einzelfälle der Marktbeobachtung').

39 See Wassmann in Bongartz, 2000, 373.

40 Beschluss der Kommission SEK (1999) 802 vom 28. Apr. 1999 zur Einrichtung des Europäischen Amtes für Betrugsbekämpfung (OLAF), ABl. EG 1999 Nr. L 136/20.

41 See OLAF, 4th Operational Activity Report June 2003, 30, OLAF, 5th Operational Activity Report June 2004, 49–55 and OLAF, 6th Operational Activity Report, December 2005, 49.

42 See Geiger, EUV/EGV Commentary, 2004, Art. 135 EC Treaty, No. 1.

43 Council Regulation (EC) No. 515/97 from 13 Mar. 1997. OJ EC 1997, No. L 82, 1.

44 The term 'irregularities' is not defined in a Art. 280 EC-Treaty, however the Regulation (EC, EURATOM) No. 2185/96 (OJ EC 1996 No. L 292/2) concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities has a definition in Art. 2 of 'irregularities', see Billwiller, PhD-Thesis 2002, 29: 'Therefore the irregularities are 'serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States against the financial interests of the Community or of the Member State concerned.'

45 This Table 2 was taken from Weerth, PhD-Thesis 2007, Figure Table 10, 48, and has been updated for the years 2006 and 2007.

46 See OLAF, 4th to 8th Operational Activity Report, 2003–2007.

The biggest treat for the own revenue of the EU is according to OLAF the false countries of origin in customs declarations for the import into the EC.

In the time of the OLAF report from July 2002 to June 2003 there were 68 different goods that were underlying an antidumping duty, where at minimum 30% of the customs value (up to 200% of the customs value).⁴⁷ 113 out of 173 cases (65%) of the cases which have been under review of OLAF between 2003 and 2007 were cases with wrong countries of origin – it must be assumed that these were cases that tried to undergo the high antidumping duties. However the number of new cases with false countries of origin has fallen significantly in 2006 and 2007. In 2006 and 2007 the number of cases with a false description or as OLAF puts it with a ‘misdescription of goods including Combined Nomenclature Code’ has risen.

The tenth alternative of action is proven by many press releases of the customs authorities.⁴⁸

The first alternative of action (Contesting a Customs classification of a Member State for a limited time) is proven by many court decisions.

The fifth alternative of action (Development of new goods) is a very rare case – it has been proven for the development of salted chicken meat as a ‘new good’ (Pos. 0207 or 0210?).

The third alternative of action (Import over another Member State that has a different opinion of customs classification – change of trade flow, so called ‘tariff shopping’) has been proven by two court rulings and the empiric research by help trade data of old vehicles (Old-timer).

The fourth alternative of action (Application for a BTI in another Member State that has a different opinion of customs classification – so called ‘BTI-shopping’) is known within the customs service however these cannot be named due to the customs secret as of Article 15 Customs Code (model, Table 1).

6. RESULT

The systematic weaknesses of a non-uniform application of European customs law by the Member States and of the CET at market entry to the common market are used by economic operators in various ways in order to save customs duties – therefore customs duties can be seen as ‘manageable tax’, that is a tax which can be reduced by ‘customs management’.

The model of non-uniform application of the CET (see Figure 5, Table 1) shows ten alternatives of action: three alternatives of action are illegal (no. 8–10); three further alternatives could be illegal or legal in Germany (no. 2, 6/7); four alternatives of action (no. 1, 3–5) are legal in Germany and these alternatives of action have been the main theme of this research. All ten alternatives of action have been proven.

The model of non-uniform application of the CET has been proven by the following cases and examples:

- (a) numerous judicial cases against BTI in the Member States and in front of the European court of justice, for example, financial court of the country of Brandenburg as of 16 October 2002 4 K 2243/01⁴⁹ (model, first alternative of action, contesting the classification opinion);
- (b) ‘molten magnesia’, because two judicial decisions from financial courts in Germany,⁵⁰ and the European court of justice⁵¹ have shown that some importers are not declaring a BTI with a different opinion of classification in order to receive a better customs duty (model, second alternative of action, import without hint of a BTI with a different classification result);
- (c) the application of further BTI in other Member States that have another classification opinion which has been postulated by the US in front of a World Trade Organization (WTO) panel WT/DS315 (so called ‘BTI-Shopping’) – examples are known within the customs service, however they cannot be cited due to the customs secret (Article 15 CC) (model, fourth alternative of action);
- (d) the import of old-timer vehicles as of pos. 9705 from the US because by help of a trade flow analysis has been proven that collectables as of pos. 9705 have been imported into six EC Member States significantly more in other Member States than vehicles as of pos. 8703: Belgium, Luxembourg, the Netherlands, France, Denmark and Sweden (so called ‘tariff shopping’, model, third alternative of action, change of trade flow);
- (e) the import of salted chicken meat as of CN position 0210, because after the accession of ten (south-) eastern European countries and the creation of the EC-25 in May 2004 it could be proven by help of a trade flow analysis, that in two Member States (Estonia and Slovakia) the importation of this commodity under the classification of pos. 0210

Notes

47 See OLAF, 4th Operational Activity Report, 2003, 29.

48 See internet page of Germanys customs service, URL: <http://zoll.de> → Aktuelles.

49 See Erl. KN Pos. 8703 (GE) No. 05.0.

50 Germanys federal court of finances, BFH as of 2003/11/04, VII R 23/02.

51 European court of justice as of 2005/12/08, C-445/04 (*Possehl Erzkontor GmbH*).

was possible though the European commission has tried to stop this classification possibility before (so called 'tariff shopping', model, third alternative of action, change of trade flow);

- (f) the import of salted chicken meat as of CN position 0210, because this good has been developed after closing of the Uruguay-round in order to receive a favourable customs duty (model, fifth alternative of action, development of a new commodity);
- (g) 173 cases of fraud which has been identified by the European Anti-Fraud Office (OLAF) between 2003 and 2007 – in 41 cases false descriptions of goods were shown, in 14 cases the customs value of the goods had been declared to low, in five cases the amount of goods had been declared to low and in 113 cases (65%) a false country of origin had been declared in order to receive a more favourable lesser customs duty (see Table 2) (model, sixth to ninth alternative of action; declaration of a different customs value, a different description, a different country of origin or a different amount);
- (h) the import of numerous electronic products over Member States with another opinion of classification into the CET because there are big differences of tariff rates (between 0 and 14%, see Table 3) and this usage of cost differences has been acknowledged publicly by a PANASONIC-Manager⁵² (model, third alternative of action, change of trade flow);
- (i) the concealment of goods and import against rules into the customs territory are proven by numerous judicial cases⁵³ (model, tenth alternative of action), however this mode of action has not been the major theme of the thesis.

7. CONCLUSIONS

7.1. Utilization of the Non-uniform Application of the CET by Economic Operators

The non-uniform application of the CET is being utilized by economic operators since many years in order to reduce the customs duties when importing goods into the EC. This is a distortion of competition and it leads to the reduction of traditional revenue of the EC.

Table 3: Overview of Customs Duty Differences⁵⁴ for Some Technical Equipment.⁵⁵

Commodity	Customs Duty (%)
Video-/Digital camera, depending on the technical detail	0-12.5
Computer, Notebook, Handheld	Free
USB-Stick, depending on the technical detail	0-14
Monitors, depending on the technical details	0-14
CD-Player	9.5
DVD-Player	14
MP3-Player, depending on the technical details	0-14
MP4-Player (also MPEG4-Player)	0-14

7.2. Customs Classification of Goods into the CET: Complex Rules

The law of customs classification and the application of the CET are difficult due to many code lines for customs officers and economic operators likewise. Different results for the classification of a similar commodity are possible due to different ways and standards of education of customs officers in the Member States of the EC-27 and the economic operators.

7.3. Dispute settlement

The law of customs classification is an inexact science. Differences are regularly arising between the HS contracting parties about the uniform application of the HS nomenclature that are resolved according to the general procedure of dispute settlement as of Article 10 paragraph 2 HS by decisions of majority.

The European commission is also deciding about customs classifications according to Articles 8, 9 and 10 Reg.-CN in the Customs Code Committee according to Article 247a CC and issues Classification-Rulings as council regulations that are binding within all Member States without basis of rulings of the HS council or a court decision by the European court of justice.⁵⁶ By help of this procedure the dispute settlement within

Notes

52 See the statements of PANASONIC-Manager Petra Hermann in a ZEIT-article from Ulrike Meyer-Timpe, Die ZEIT, No. 23 as of 2 Jun. 2005, 27.

53 See numerous practical cases, German customs service, press releases, URL: <www.zoll.de> → Aktuelles (2008/11/09), 2008.

54 This Table 3 was taken from Weerth, PhD-Thesis 2007, Table 45, 285.

55 See BMF, Informations- und Wissensportal Zoll online, URL: <www.zoll.de/faq/reise_verkehr/einreise_nicht_eg/index.html> (2006/04/09), 2006; this overview has been deleted since then; the MP4-Player had not been contained.

56 The proceedings is explained by Sonnefeld, 55 dZ-Fachteil 2002, No. 10, F-57-F-58.

the EC shall be ensured when different opinions arise between Member States.⁵⁷

For example mouse pads were classified into the CET with different results (see Table 4).

Germany therefore suggested a joint classification under the heading of 8473 as computer part. However the EC decided in a Classification ruling – Council regulation (EC) No. 471/2002⁵⁹ – that the classification into four different tariff lines is correct (see Table 5).

The fact that a dispute settlement within the EC for the uniform application of the CET is necessary means vice versa that this is the proof of regular non-uniform application of the CET by the Member States in single cases.

7.4. Can an uniform application of the CET be obtained?

The non-uniform application of the CET has been proven by help of numerous single cases. The non-uniform application of EC customs law has also been

proven in single cases. The EC Customs Union is therefore not working fully and orderly. However it must be said that the national customs services of the EC Member States are applying the EC customs law and the CET more or less uniform.

That means, that the fair and free trade for all market participants and the EC customs union is working more or less well – but here also exceptions of single cases are proving the rule.

Finally economic operators are always interested in a cost reduction: they are viewing customs duties as ‘manageable taxes’ and with the non-uniform application of the CET they are using comparative cost advantages for the market access to the EC common market. However this is to the disadvantage of the main revenue of the EC and the economic operators that are not using this systematic error of the EC. Whether the cost advantages that are obtained by non-uniform application are channelled through to the customer has not been part of the survey.

7.5. View into the Future

The uniform application of the HS nomenclature is not only a problem of the EC (EC-15, EC-25 and EC-27) but a global problem, because the technical progress and development of new commodities is very fast, the reaction speed of the concerned customs services (for arbitration or the dispute settlement until solving the problem) is more or less slow.

The problem of the non-uniform application of the CET within the EC is enhanced by the structural weakness of the EC-27, that 27 national customs services shall apply the EC customs law uniform though the national customs officers are having different standards of education, payments and cultural identities.

The EC is asked to acknowledge this problem and to address it.

If this problem is not tackled, the market access to the EC common market from third countries will stay non-uniform and therefore discriminating. Smart economic operators are using and are going to use this fact for further distractions of market access and competition – the revenue of the EC that is consisting between 10% and 15% out of revenue from customs duties is seriously in danger.

A possible solution is the creation of a common EC customs service (or a common tariff authority). Faster decisions and a uniform application of the CET could be received in this way. However the European

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Table 4: Classification Opinions for Mouse Pads out of Different Material⁵⁸ (after Sonnfeld)

No.	Chapter/Position
1	3920
2	3921
3	3926
4	4008
5	4016
6	50-55
7	5903
8	5906
9	6002
10	6307
11	8473

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Table 5: Results of the Classification of Mouse Pads According to Classification-Regulation (EC) No. 471/2002⁶⁰

No.	Tariff Line
1	3926 9099
2	5903 2090
3	6212 1090
4	6307 9010

Notes

57 See Sonnfeld, ddZ-Fachteil 2000, F-65 for the different ideas about the customs classification of mousepads.

58 This Table 4 was taken from Weerth, PhD-Thesis 2007, Table 43, 242.

59 See OJ EC 2002, No. L 75, 13.

60 This Table 5 was taken from Weerth, PhD-Thesis 2007, Figure 44, 242.

commission has already dismissed this idea because some EC Member States are not willing to give up their national customs service – the political will is missing and the EC does not have the competence to overrule the Member States.⁶¹ The same applies for the idea of a central EC customs authority.⁶²

The WTO dispute settlement case *WT/DS315 (US v. EC 'Selected Customs Matters')* has shown a lot of deficiencies of the EC customs service system and the EC has put the European commission under tremendous pressure to review the system of national customs services that are applying the EC customs law even when the European commission is (politically) celebrating the outcome of the panel as big success.⁶³ The dispute settlement procedure has not been successful for the US in 18 out of 19 cases because the US did not present adequate evidence and in one case the EC has lost (customs classification of LCD monitors into the nomenclature in the Netherlands). To put it blandly – when compared to a 19-fold murder case in front of a US-court an 18-fold non-guilty verdict and a single guilty verdict (death penalty) would not be celebrated as a victory.

The EC has shown in the past years its tremendous ability to adapt to new challenges, also to within the field of the customs union.

Right now one is trying to fix the situation with methods and ideas that did not work out in the EEC-12 to tackle the task of a strongly enlarged EC-27. The Modernized Customs Code is a moderate and non-sufficient approach to alter the overall system of the EC customs union – the future will show whether the EC is able and prepared to further adapt. Next to the conclusion that stark change is required the EC commission the EC council and the Member States must also show the political determination to change the EC customs system.

7.6. Suggestions

– The situation of the EC-27 is very special – it is the biggest, most successful and most important customs union of the world. But it is also a WTO Member and therefore it underlies the WTO-rules, under the particular rule of Article XXIV GATT. The WTO should question their rules that apply especially to customs unions – a CU is always a

step to a bigger and deeper integration than a Free Trade Agreement. However in most parts of the world the FTAs are much more widely spread than CUs. In order to facilitate world trade and to enhance the founding of CUs exemptions from the rules of Article X GATT should be adopted for Customs Unions in order to enable the CUs also to be WTO Members.

- When differences in classification opinions between EC Member States or HS Member States occur it takes a very long time to receive a solution. This period of time should be very much shortened. The European Court of auditors has also made this suggestion recently.⁶⁴ A close monitoring to customs classifications should be introduced by the EC commission.
- A BTI should be a 'must' when a customs declaration is filed. Right now the BTI must not necessarily be declared within the customs declaration. In some EC Member States the omission of a BTI in a customs declaration is a criminal offence when the customs duties are shortened (e.g., in Germany). The European Court of auditors has also made this suggestion recently.⁶⁵
- A BTI can now be applied everywhere within the EC – therefore an importer can perform so called 'BTI-shopping' and apply for a BTI until he gets the wanted result. This should be altered into a rule where an applicant can only apply once at the seat of the company (foreign companies from third countries to a single BTI authority).
- The criminal fines for offences against the EC Customs Code are differing in all 27 Member States because the national governments are in charge of determining these laws – this is a systematic error of the EC that can easily be used by importers by simply importing over Member States where no charges must be feared. High ranking members of the European commission General Directorate in charge for the EC Customs Law have also declared their desire for a uniform criminal law.⁶⁶ The European commission has announced a plan to introduce customs fines after the entering into force of the Modernized Customs Code (which is to be applied from 2013).⁶⁷

Notes

61 See Lux, *AW-Prax* 2008, 285.

62 *Ibid.*

63 See European Commission, Customs: WTO rejects US claims and confirms the regime for EU customs administrations meets high standards, Press release IP/06/1557 as of 14 Nov. 2006.

64 See European court of auditors, Special Report No. 2/2008, OJ EC 2008 No. C 103, 1.

65 *Ibid.*, the special report was based on observations in only six out of 27 EC Member States.

66 See Lux/Larrieu, *ZfZ* 2006, 333 and Rovetta/Lux, *GTCJ*, Vol. 2 No. 5, 206.

67 See European Commission, COM (2005) 608 final as of 30 Nov. 2005, 9.

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