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ARTICLE

Customs Sanctions of the EU-27: A Detailed Analysis and a Preview on the Modernized Customs Code of the EU and the European Union Customs Code

Carsten Weerth*

The customs sanctions of the EU-27 are not harmonized – the sanctioning of customs offences is still the task of the twenty-seven Member States and their national legislation. The US has attacked the purely national customs sanctions of the EU as break of the WTO rules in the WTO Dispute Settlement Case WT/DS315 'Selected Customs Matters' but they lost the case. Now an in depth research shows that twenty-six Member States have sufficient national customs sanctions. It also gives an overview about new ideas of the modernized EU Customs Codes on common customs sanctions.

1 Introduction

The customs sanctions of the EU-27 are not harmonized. The EU Customs Law is uniform due to its harmonization by help of the Council Regulation (EEC) No. 2913/92 – the so called Community Customs Code (CC) and its implementing provisions (Commission Regulation [EC] No. 2454/93, the so called Customs Code Implementing Provisions, CCIP). It is applicable directly in all Member States (MS) of the EU-27. However the customs sanctions are still implemented in the national legislation of the Member States of the EU-27.[1] The same applies for the administrative customs sanctions. Three older studies are outdated or incomplete: the first was made in 1982[2] (which was covering the European Economic Community of ten Member States, EEC-10), the second and third are from 2007 and they are covering only thirteen out of twenty-seven Member States.[3]

This study has been expanded in order to research the customs sanctions of all twenty-seven EU Member States. The results will be presented by help of a result table.

Furthermore an overview of the Modernized Customs Code (MCC, Council Regulation [EC] No. 450/2008[4]) is given by which the customs sanctions are harmonized within the EU for the first time.

In a final outlook the legal problems of the harmonization and its limitations are shown.

2 Scope of the Study

The idea of harmonizing customs sanctions in the European Economic Community/European Community/European Union (EEC/EC/EU) is old and the different sanctions systems have been compared in 1982 (EEC-10; the EEC consisted out of ten Member States since 1981 and the study covered eight out of ten Member States: Denmark, Belgium, France, Germany, United Kingdom, Ireland, Italy and The Netherlands)[5] – however thirty years ago the Community Customs Code (CCC) has not been in force. That study was conducted crudely without naming the legal sources and out of a practitioners view.

Notes

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1 See Seer in Tipke/Lang, Steuerrecht, 2010, § 23, No. 6.

2 See Baumann, Zur Ahndung von Zollzuwiderhandlungen in EG-Mitgliedstaaten, ZfZ 1982, 226.

3 See Leitner/Toifl, Steuerstrafrecht International/International Tax Criminal Law, 2007 and Dannecker/Jansen, Steuerstrafrecht in Europa und den Vereinigten Staaten, 2007.

4 Official Journal EU No. L 145/1.

5 See Baumann, ZfZ 1982, 226.

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Another study in French about customs sanctions and the internal market has been published in 1991 and is also outdated.[6]

The general tax criminal legislation within the EU-27 (including the customs sanctions) has been compared in 2007 by two general studies for the EU MS Germany, the Netherlands, Austria, Slovakia, Slovenia, Spain, Czech Republic and Hungary[7] and for the MS Denmark, Germany, Great Britain (only England and Wales), France, Greece, Austria, Portugal and Spain.[8] These studies are outdated due to new national legislation.

For this study, an internet and literature research has been conducted in order to find the legislation and to compare the different systems of the national customs criminal law and customs administrative sanction law of all MS of the EU-27. This is a short presentation of the full results.[9]

Finally, an overview of Article 21 of the Modernized Customs Code (Council Regulation [EC] No. 450/2008) shall be given by which the customs sanctions shall be harmonized within the EU for the first time and which should enter into force on 24/6/2013[10] according to Article 188 paragraph 2 MCC. The recent developments of the creation of a Union Customs Code (UCC) are also taken into account.

3 Results of the legal comparison within the EU-27

The results of this study are shown in a result table [show result table as on last page, on whole page]

(1) All Member States of the EU-27 are already having deterring custom sanctions. The results of the study are presented by help of a table of results and evaluated (see table of results). Customs sanctions are varying strongly according to number and penalty/ years of imprisonment. Luxembourg is a special case, because it does not have custom sanctions on its own, but due to the BENELUX-customs union (as of 1960) it applies the customs sanctions of Belgium. Further specialties are valid in Ireland, where – up to 2011 – the old English customs sanction legislation as of 1876 was still in use; however Ireland is now introducing a new customs sanctions legislation which is already the MCC and therefore applying the most modern customs sanctions legislation of the EU-27. In the Slovakian Republic the old Czech Slovakian Customs sanctions legislation Law No. 1460/1961 was in force until 2005 – it was only then replaced by new national legislation. Lithuania introduced prison sentences for smuggling as recently as 2010.

(2) In Germany there are two different sorts of customs sanctions: Criminal sanctions ('Zollstraftaten') and summary administrative sanctions ('Zollordnungswidr igkeiten'). Within the EU-27 there are also other sorts of sanctions, and often a three-step sanction system is in force: Customs criminal sanctions, Customs summary fines and Customs administrative sanctions. However solving the question which sanction belongs to what form usually is rather difficult and sometimes not possible, because in some MS the same offence is either seen as criminal act or as summary offence.[11]

(3) In Germany legal persons are not punishable in customs criminal law and customs summary offences directly. However by help of § 14 Criminal Act (Strafgesetzbuch, StGB) acting persons of legal persons organs can be punished. The same applies for summary offences according to § 130 Summary offences Law (Gesetz über Ordnungswidrigkeiten, OWiG), because the owner of a company can be made responsible for the lack of control of his/her employees. The same applies according to § 9 OWiG when someone is acting in order of the owner or as organ of the company. The same principle applies in nine other MS. However in 16 MS direct customs penalties, fines and the sanctioning of offences are possible against legal persons, for example, in Austria, Denmark, Belgium, Luxembourg, the Netherlands and Poland.

(4) Due to the definition of customs sanction in Article 21 paragraph 2 MCC in Germany and all other Member States of the EU-27 a fourth type of sanction will be implemented by lit. B (so called administrative sanctions, for example, taking back an authorization). This fact has not been counted when the current form of sanctions has been accounted of in the table of results.

Notes

6 See Anaboli-Alegre, RMC 1991, 727.

7 See Leitner/Toifl, Steuerstrafrecht International/International Tax Criminal Law, 2007.

8 See Dannecker/Jansen, Steuerstrafrecht in Europa und den Vereinigten Staaten, 2007.

9 See Weerth, Zollstrafrecht und Zollordnungswidrigkeitenrecht innerhalb der EU-27 – Vergleich der unterschiedlichen Sanktionierung und Ausblick auf den Modernisierten Zollkodex. Sierke Publishers, Göttingen, 2012a.

10 The date of entering into force of the MCC and the MCCIP will be postponed to 2015/2016, due to technical problems for implementing the legal texts in all twenty-seven EU Member States, see.Weerth, 88 ZfZ 1, 2012, 8–14.

11 See Anaboli, GTCJ 2010, 389, 392.

(5) Customs sanctions that are too miniscule should not be an aim as well as customs sanctions that would be draconic.[12]

(6) Even before the codification of the Community Customs Code there have been tendencies by the Commission and the European Parliament to harmonize the customs sanctions and to lay them down in EC legislation. However during codification in 1992 harmonization has not been done.

(7) The topic WTO-Dispute-Settlement-Case WT/DS315[13] was the non-uniform application of EU Customs Law, for example, the customs sanctions. The USA was opposing the EU for its different sanctioning system. However the panel ruled that the facts were not substantial. The whole case was not underpinned by facts sufficiently. Within this study it has been proven that the customs sanctions within the EU-27 are differing strongly. However sufficient and deterring sanctions are in force already.

(8) With the creation of the MCC in 2005 again a chance for harmonizing all EU customs sanctions was given. In Article 21 MCC for the first time the creation of common 'penalties shall be effective, proportionate and dissuasive' have been introduced for all MS. Customs sanctions of the first category (temporary halting of permits, etc.) will be introduced by help of EU-Regulations according to Article 288 paragraph 2 TFEU which will be valid in all Member States immediately. However customs sanctions of the second and third category (penalties, fines, prison sentences) will not be uniform and implemented by legal act of the EU commission but must be done by the national legal powers that are the national parliaments. The Member States will have the power and responsibility to create effective customs sanctions and apply them accordingly. The Member States are still unhappy to give criminal powers away to the commission.[14] Therefore under the MCC there will be different customs sanctions within the EU-27. Due to the vague and weak formulation of Article 21 MCC the chance was forgiven to gain a fast step into creating harmonized custom sanctions. The same applies for Article 35 UCC. This is a political drawback concerning a single customs system of the EU (see WT/DS315). Economic operators could – in theory – still choose the Member State with the lowest customs sanctions and enter the common market there.[15]

(9) A project group of the European Commission (General Direction TAXUD with twenty-four out of twenty-seven MS) is working on the harmonization of customs sanctions with a special focus on a pragmatic approach.[16] The GD TAXUD has also issued a call for a scientific comparison of all customs sanctions currently in force,[17] which will only be for internal use of the Commission (a summary should have been published in 2011).[18]

(10) The results of this study are condensed on one page only in the result table. 26 different customs sanctions systems are compared in different points:

- can legal persons be fined directly?
- what is the most severe penalty?
- what is the highest monetary fine for smaller offences?
- possibility of a legal settlement?
- the number of different customs sanctions systems;
- the number of articles and the legal basis of customs sanctions (customs law, tax law or criminal law).

  Finally the national customs systems of the MS are graded by help of one to three stars (explanation in result table): Three MS are receiving one star, twelve MS are getting two stars and twelve MS three stars (the ranking is depending on the maximum duration of prison for severe cases).

(11) Results in detail:

(a) Nine of the twenty-seven MS are ruling customs sanction in general tax law, however six of these have chosen to create a special customs criminal law.[19]

(b) Nine of twenty-seven MS are laying down the customs sanctions within their national criminal law.

Notes

12 See Anaboli, GTCJ 2010, 389, 391.

13 For detailled analysis see Lux/Rovetta, ZfZ 2007, 225, Rovetta/Lux, GTCJ 2007, 195, Niestedt/Stein, AW-Prax 2006, 516, Hermann in Hermann/Weiß/Ohler, Welthandelsrecht, 2. Auflage, Rz. 627a, Weerth, 2007, Dierksmeier, 2007, Rogmann, ZfZ 2008, 57, Weerth, AW-Prax 2008, 23, 70, Rogmann, AW-Prax 2008, 195, Dierksmeier, AW-Prax 2008, 200, Weiß, ZfZ 2009, 150 and Przybilla, FÖV 58, 2010.

14 See Möller, ZfZ 2011, 39.

15 See Weerth, , 2007 m.W.N. and Anaboli, GTCJ 2010, 389, 391.

16 See naboli, GTCJ 2010, 389, 393.

17 TAXUD/2008/AO-5.

18 See Anaboli, GTCJ 2010, 389, 392; this has not been done until the end of this study.

19 Double counts are possible for points 14a–14c.

(c) Nineteen of twenty-seven MS have regulations on customs sanctions in their national customs laws, but eight do not.

(d) In the EU-27 the maximum prison sentence varies between two and fifteen years; Lithuania introduced prison sentences as late as December 2010 (previously there were only monetary fines).

(e) In ten MS there is the possibility of a legal settlement without participation of courts between the customs administration and the offender.

(f) In seventeen MS of the EU-27 direct customs sanctions against legal persons are possible, for example, in Austria, Denmark, Belgium, Luxembourg and the Netherlands. In ten MS direct sanctions against the legal representatives of the legal persons are possible. In Ireland sanctions against legal persons or their representatives have not been possible until 2011.

(12) The number of customs sanctions can only be determined by rough estimation, because some rules are containing many different elements of misconducts (e.g., § 30 of German Customs Administrative Law and § 30 of Germanys Customs Ordinance). Germany's rather detailed special sanctions for external trade are not counted as customs offences. Still Germany has by far the most detailed customs sanctions legislation of the EU-27 (seventy-four elements of crime). Other Member States are happily working with fewer elements of customs crimes: Hungary (1), Latvia (2), Lithuania (4), Bulgaria, United Kingdom, Ireland and Denmark (6).

(13) Fines and monetary penalties are not specifically ruled in many laws of the Member States – in many cases daily rate systems are implemented or percentages of the withdrawn revenue. In the United Kingdom the national customs legislation is not applied because it is known as being too severe.

(14) The introduction of harmonized administrative customs sanction by help of the MCC-IP according to Article 21 MCC is not possible (because it has been laid down as mandatory for the Member States). The same applies for the recently proposed Article 35 UCC.

4 View on the Modernized Customs Code: Problems of Uniform Customs Sanctions

4.1 *Historic Attempts to Harmonize Customs Sanctions in the EEC*

Soon after founding the EEC in 1958 first attempts to harmonize the customs sanctions were made: in particular the creation of the common external customs tariff in 1968[20] was important. The Commission, European Parliament and Economic and Social Committee have more than once pointed out that one of the drawbacks of the EEC is the lack of uniform regulations on the harmonized customs legislation.[21] The Commission again urged in 1979[22] that national systems should be thought about and harmonizing sanctions would be desirable.[23] Knowledgeable onlookers saw that a customs union cannot function without harmonized sanctions – when smuggling is sanctioned by help of very different penal measures.[24] For a very long time one thought that the customs sanctions would be the first core of a European, harmonized criminal law.[25]

4.2 *Discussion During the Formulation of the Community Customs Code 1992*

In the 1980s, the discussion about harmonizing the customs sanctions was conducted again before the codification due to the introduction of the CC: a comparing study of the customs sanctions in the EEC-12 was conducted which should lead to a proposal for a regulation.[26] However, the old rule of uniform vote in Article 235 ECT lead to the result, that this proposal was never published.[27] The question of introducing uniform customs sanctions has been discussed in the EEC-12 between the Commission and Member States – however the introduction of uniform customs sanctions rules into the CC would have postponed the CCC for years, which was why they decided due to pragmatic reasoning not to include these rules.[28]

Notes

20 For an overview see Weerth, ZfZ 2008, 178–184.

21 See Baumann, ZfZ 1982, 226.

22 OJ EC 1979 No. C 84/2, Point I.A.6.

23 Cited according toBaumann, ZfZ 1982, 226.

24 See Baumann, ZfZ 1982, 226.

25 See Vaulont in G/T/E, Art. 9 ECT, No. 35 and Dannecker/Bürger in Dannecker/Jansen, 2007, 90.

26 See Anaboli, GTCJ 2010, 389, 390.

27 See Anaboli, GTCJ 2010, 389, 390.

28 See Vaulont in Groeben/Schwarze, Art. 23 ECT, No. 35.

The Commission is still aiming at introducing of an uniform customs sanction system and therefore informal work on this issue are performed with experts from the MS.[29] However, it must be underlined that it will focus on administrative customs sanctions.[30] The scope of sanctions would be wide in order to enable MS to have a wide range of possible decisions, which means that the application of sanctions will be done by the MS.[31] In 1998 (five years after the official introduction of the common market), the Commission made the second attempt of harmonization of administrative customs sanctions based on a second comparing (unpublished) study on the customs sanctions within the EC-15.[32] Both attempts aimed at harmonizing administrative penalties. The second attempt also failed due to different reasons, for example, missing sanctions in some Member States and difficulties in dividing administrative sanctions from criminal sanctions (in different Member States there were different penalties for the same offence).[33]

In the wording of the CC, there are hints on customs criminal sanctions only in two places: in Articles 212 and 233 lit. d) CC where it is clarified, that the customs debt is not cancelled when 'under a Member State's criminal law, customs duties provide the basis for determining penalties, or the existence of a customs debt is grounds for taking criminal proceedings'. According to the current EU Customs Law, the application of criminal sanctions are done by member's legislations. There are also sanctions for the 'evocation, suspension or amendment of any authorization held by the person concerned' (Article 21 paragraph 2 lit. b MCC); such sanctions are currently valid in Articles 14r, 253d CCIP however they are not regarded as sanctions yet and are not practiced often – at least not in Germany.[34]

4.3 *Discussion at the Formation of the Modernized Customs Code 2008*

4.3.1 *Scientific Observation*

In 2007, it was still found: 'The harmonization of customs criminal law is […] advisable. […] Therefore it is expected that – if [there is criminal law harmonization within the EU] at all – uniform criminal legislation will be formed in this field.'[35] If there is no harmonization on customs criminal law this rises the problem of different trade flows and traffic changes due to the differences in legislation (because in some Member States there are no or low customs) penalties or sanctions for customs offences (model of customs arbitrage). In the literature and also from the practitioners the different application of customs sanctions of customs offences is harshly criticized – therefore in the past often the issue of harmonizing customs sanctions was often raised.[36] Particularly after the results of the WTO-conflict between the US and the EU of the Dispute Settlement Case WT/DS315, it was widely discussed weather the EU-Customs Law (e.g., the different customs sanctions) are not WTO-conform. The panel has ruled that only one tariff case was proven and has assumed the customs sanctions to be WTO-conform.[37] The WTO-case has shown that different customs sanction systems of the EU are not in conflict with Article X:3 (a) GATT 1994, because different customs sanctions systems are not necessarily leading to a non-uniform application of customs legislation.[38] This is an amazing outcome because it should lie in the eye of the observer that strongly differing penalties can lead to alternations of traffic for the entry into the customs territory and the common market – this hypothesis has been proven in another study.[39] Therefore, Article X:3 (a) GATT 1994 is regarded by a

Notes

29 See Vaulont in Groeben/Schwarze, Art. 23 ECT, No. 35.

30 See Vaulont in G/T/E, Art. 9 ECT, No. 35.

31 See Vaulont in Groeben/Schwarze, Art. 23 ECT, No. 35.

32 See Anaboli, GTCJ 2010, 389, 390.

33 See Anaboli, GTCJ 2010, 389, 390.

34 According to own experiences in the customs world.

35 See Dannecker/Bürger in Dannecker/Jansen, 2007, 90.

36 See W/H/W, 2008, iv, 12, Prieß/Niestedt, AW-Prax 2004, 348, Lux/Larrieu, ZfZ 2006, 333, Rovetta/Lux, GTCJ 2008, 206, Weerth, 2007, 326, 353 and Witte/Henke in W/H/K, 2009, 57.

37 For detailed analysis of the WTO-case WT/DS315 see Lux/Rovetta, ZfZ 2007, 225, Rovetta/Lux, GTCJ 2007, 195, Niestedt/Stein, AW-Prax 2006, 516, Hermann in Hermann/Weiß/Ohler, Welthandelsrecht, 2. Auflage, Rz. 627a, Weerth, 2007, Dierksmeier, 2007, Rogmann, ZfZ 2008, 57, Weerth, AW-Prax 2008, 23, 70 ff, Rogmann, AW-Prax 2008, 195, Dierksmeier, AW-Prax 2008, 200, Weiß, ZfZ 2009, 150 and Przybilla, FÖV 58, 2010.

38 See Appelate Body Report, WT/DS315/AB/R, para. 211 and Przybilla, FÖV 58, 2010, 17.

39 See Weerth, 2007, Weerth, AW-Prax 2008, 23 and Weerth, GTCJ 2009, 71–85.

minor opinion for an option of further harmonization of customs sanctions within the EU,[40] however the major opinion (and in particular members of the Commission) are fearing a new WTO-case.[41] Until recently, it was questionable whether the EU had the competence for harmonizing the customs sanction systems or weather an alteration of the EC Treaty (ECT) would be necessary, because within the ECT of Niece (valid until 30 November 2009) such a competence was missing. The European Court of Justice also made an adequate ruling.[42] However the European Court of Justice altered its jurisdiction by the ruling of 13 September 2005 on case C-176/03[43] (*COM v. Council*) for a case on Environmental Law when it said that the harmonization of criminal law is possible in order to enforce important aims of the ECT.[44] The legal situation was different for the old EUT (EUT of Niece) because in the third pillar of the EU the cooperation in criminal matters was regulated and it was accordingly laid down in Article 29 EUT. The Treaty of Lisbon has changed the legal situation from 1 December 2009 on.[45] The EC has lost its legal personality and the EU has gained legal personality. The drafts of the MCC and the regulation on the MCC were done with the old ECT of Niece.

4.3.2 *Proposals for the MCC*

The Commission did draw five proposals for the legal wording of the MCC. The proposals 4[46] and 5[47] have been published. The contained rules regarding the customs sanctions did vary strongly (see Article 19 of the fourth proposal and Article 22 of the fifth proposal).

The MCC has been published as European Parliament and Council Reg. (EC) No. 450/2008 as of 23 April 2008 in another final wording.[48]

The fourteenth point of reasoning the regulation of the MCC reads:

> (14) The streamlining of customs procedures within an electronic environment requires the sharing of responsibilities between the customs authorities of different Member States. It is necessary to ensure an appropriate level of effective, dissuasive and proportionate sanctions throughout the internal market.

Article 21 MCC in the published version states: 'Each Member State shall provide for penalties for failure to comply with Community customs legislation.' These sanctions 'shall be effective, proportionate and dissuasive'.

The EU is by that text implementing the continued jurisdiction of the European Court of Justice[49] (in particular case 'Greece Maize', C-68/88).[50] It should be highlighted that for the first time in the EU history a general obligation to introduce customs sanctions exists. The 27 MS are forced to introduce binding customs sanctions legislation due to Article 288 paragraph 2 TFEU, ex-Article 249 paragraph 1 ECT). The previous two drafts contained more precise wording, however only the final wording was successful with all MS – former texts were not chosen due to the opposing opinions of some Member States and the legal service of the Commission.[51]

The Commission has stated in the reasons for the MCC-regulation that it is planned for the future to propose the harmonization of the criminal customs sanctions.[52] The Council and the European Parliament have taken this idea into account and bind the Member States by Article 21 MCC to implement customs sanctions in their national legislation[53] – this is a step into the right direction.[54] Nevertheless, this means that until now (under the current EU Customs Law) there are Member States which have no or not sufficient customs sanctions or sanctions which are

Notes

40 See Dierksmeier, 2007, 238 and Commission members Lux/Rovetta, ZfZ 2007, 225 and Rovetta/Lux, GTCJ 2007, 195.

41 See Niestedt/Stein, AW-Prax 2006, 516, Rogmann, ZfZ 2008, 57, Rogmann, AW-Prax 2008, 195, Rogmann in Gellert, 2009, 27 (42), Weiß, ZfZ 2009, 150, Weerth, 2007, 272, 335, 349, 357 and Weerth, ZfZ 2008, 178 (185).

42 EuGH (*Cowan/Tresor Public*) vom 02.02.1989, Rs. C-186/87, Slg. 1989, 195, No. 19.

43 EuGHE 2005, I-7879.

44 For the EU Customs Law mebers of the European Commission administration think this to be desirable, see Lux/Larrieu, ZfZ 2006, 333 and Rovetta/Lux, GTCJ 2007, 206.

45 See detailled Weerth, AW-Prax 2010, 46–50.

46 TAXUD/458/2004 – REV 4, 11.11.2004.

47 COM (2005) 608 final, 30.5.2005.

48 OJ EU 2008 No. L 145/1.

49 See Witte/Henke in W/H/K, 2009, 57.

50 EuGHE 1989, I-2965 and Anaboli, GTCJ 2010, 389, 390.

51 See Reuter/Fuchs, Das neue EG-Zollrecht, Wien, 2008, 84 and Witte/Henke in W/H/K, 2009, 57.

52 See proposal COM (2005) 608 final as of 30/11/2005, 9: 'In order to reinforce consistency throughout the Internal Market, a common framework for penalties in respect of infringements of the Community customs rules will be proposed to the Council and the European Parliament at a later stage.'

53 See detailed Lux/Larrieu, ZfZ 2006, 334 and for the new administrative sanctions see Reuter, AW-Prax 2005, 117 and Klötzer, wistra 2007, 1, 7.

54 See Wolffgang, AW-Prax 2007, 179, Reuter, AW-Prax 2005, 117, 118 and Wolffgang/Henke/Witte, iv, 12.

fining the same offences different.[55] The introduction of uniform customs penalties was requested in the literature.[56] Different aspects were criticized: the way the EU is implementing binding legislation (which is normally done by help of regulations) by help of directives (which must be implemented by Member States[57]) and the definition of 'administrative sanction' in the MCC which is regarded not to be sufficient.[58] Furthermore, it has also been criticized as problematic, that the monetary fines are differing strongly.[59] However, one could argue that the Commission will most likely not determine the high of the monetary fines and 'administrative sanctions', for example, the suspension of an authorization will have the same effect in all Member States.[60] It is thought that the new sanctioning rule of Article 21 MCC will lead to an evaluation, harmonization and increase of the administrative customs sanctions.[61] In some Member States this new Article is assumed to lead to the formation of a first real customs sanction system.[62]

However, the results of this study (see point C. and the Table of Results) are showing that a sufficient customs sanctions system is in place already.

Twenty-six Member States are currently having customs sanctions systems (and Luxembourg is applying the system of Belgium). However, the current customs sanctions are differing strongly (see Table of results). It is unclear weather the implementation of Article 21 MCC in all national legislations is leading to more severe penalties. It must be assumed that an intended harmonization but no unification occurs. In some Member States this will lead for the first time to the creation of a real customs sanctions system.[63] Luxembourg will continue to have a special role due to its close bonds to Belgium and the Netherlands in the BENELUX economic and customs union.

4.4 *Legal Situation after Entering into Force of the Lisbon Treaty (1/12/2009)*

The European Treaty of Lisbon is changing the legal situation dramatically since 1/ December 2009: on the one hand the EC has lost its legal personality and on the other it has gained legal personality.[64] By the entering into force of the Lisbon Treaty, a new opportunity came for criminal law dogmatic: 'things not done' could suddenly be possible – this new situation opens the door for the criminal law science to adapt to changing environments.[65] Two ways are possible: the creation of a supranational (European) criminal law (by help of EU-Regulations) or the harmonization of national criminal law (by help of EU-Directives).[66] The MCC is an EU-Regulation (which should enter into force on 24 June 2013 the latest[67]). The cooperation of customs authorities (ex-Art. 135 ECT) is now regulated in Article 33 TFEU and the exemption of the harmonization of criminal law (ex-Article 135 ECT) has been cancelled. Article 33 TFEU has been considered by parts of the literature as legal basis for harmonizing customs sanctions.[68] This assumption cannot be shared because only the cooperation in customs matters is governed by Article 33 TFEU (e.g., common legal instruments such as CC, CCIP, MCC, MCCIP, Customs Reliefs Reg. (EU) No. 1186/2009, etc.).[69] However, the competence for harmonizing criminal law is laid down in Article 83 TFUV.[70] According to Article 83 paragraph 1 subparagraph 2 TFEU, the EU is able to make blueprints for the conditions and amount of penalties in certain criminal fields. Article 83 paragraph 1 subparagraph 3 TFEU enables the Commission to list the criminal policies and fields of action when a uniform ruling of the Council exists.[71] However, the cooperation for prevention and

Notes

55 See Weerth, , 2007, 328, 354 and Wolffgang/Henke/Witte, 2008, iv.

56 See Weerth, , 2007, 353 and Wolffgang/Henke/Witte, 2008, 12, 13.

57 See Reuter, AW-Prax 2005, 117, 118.

58 See Wolffgang, AW-Prax 2007, 179 and Reuter, AW-Prax 2005, 117, 118.

59 See Wolffgang, AW-Prax 2007, 179.

60 See Weerth, 2007, 353.

61 See Witte/Henke in W/H/K, 2009, 57.

62 See Witte/Henke in W/H/K, 2009, 57.

63 See Witte/Henke in W/H/K, 2009, 57.

64 See Weerth, AW-Prax 2010, 46.

65 See Kubiciel, ZIS 2010, 742, 743.

66 See Kubiciel, ZIS 2010, 742, 743.

67 See Weerth, ZfZ 2012b, 8.

68 See Hecker, 2010, § 8 Rz. 24 f. and Möller, ZfZ 2011, 39, 41.

69 See Lux in Lenz/Borchardt, EUT, 2010, Art. 33 TFEU, No. 17.

70 See Lux ZfZ 2009, 307 and Lux in Lenz/Borchardt, EUT, 2010, Art. 33 TFEU, No. 17.

71 See Kubiciel, ZIS 2010, 742, 743.

prosecution of customs administrative offences – which are no criminal offences – is not determined by the TFEU; therefore such harmonization could occur according to Article 33 TFUV.[72] In Article 83 paragraph 1 subparagraph 2 TFUV, the following fields are mentioned: 'terrorism, trafficking in human beings [...], illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime'. Almost all of these listed fields are covering cross-border trade and are enforced by the customs services of the EU at the external border of the EU.

It must be concluded that the harmonization of customs criminal law by help of directives are possible on the basis of Article 83 I TFEU and the harmonization of customs administrative sanctions law by help of regulations are possible on the basis of Article 33 TFEU.

4.5 *New Developments in EU Customs Law Modernization*

The MCC is possibly not entering into force in 2013. The Commission has proposed to introduce a new set of two regulations which is partly necessary due to the Lisbon Treaty. It has published a new proposal which is discussed widely – the so called Union Customs Code (UCC).[73] However, at this point it is unclear what is going to happen in the near future. The new proposal is most likely entering into force before the MCC enters into force and replaces it. The UCC contains identical rules for customs sanctions in Article 35 UCC.

5 Conclusion

The MCC contains a regulation for customs sanctions in Article 21 which forces the Member States to introduce 'effective, proportionate and dissuasive' sanctions. The same applies for the new UCC in Article 35 UCC.

This study shows that deterring customs sanctions are in force in twenty-six EU Member States already (Luxembourg does not have own customs sanctions but applies the legislation of Belgium). However there are strong differences in terms of penalties (duration of prison sentences), fines (amount of money to spent) and other administrative sanctions.[74] Article 21 MCC/Article 35 UCC would – for the first time in European customs history, force all Member States to introduce a 'real sanction system'.[75] The Commission has planned during the formulation of the legislation to implement a 'final list of customs sanctions' for the EU – however this attempt has been cancelled by the veto of a couple of Member States and the internal legal service of the Commission – therefore a non-final list has been established for internal use.[76] The implementation in EU legislation has been planned for the date of putting into force of the MCC[77] – however that undertaking is not possible due to the finally agreed on wording of Article 21 MCC (which forces the Member States to implement the sanctions in their national legislation) and is therefore not even necessary.

The WTO view of a common EU customs system is also of importance. The Dispute Settlement case WT/DS315 has resulted in the ruling that the EU customs system is sufficiently harmonized. There still is an apparent problem between Article X and Article XXIV GATT. Either all rules must be published and applied uniform or there is the option of Customs Unions within the WTO-System with differing national rules. The EU is a still growing and evolving system which is seen as a blueprint for many customs unions around the globe, most notably in Asia, Africa and South America. Possibly the formation of the EU and its evolution can be compared to the US in its early years as of 1776: the US was growing and evolving, many rules were different at the beginning and only formed in the process and history of more than 200 years of existence.

The membership of the EU has risen dramatically between 1958 (six Member States, EEC-6), 1981 (EEC-10), 1995 (EC-15) and 2007 (EU-27). Croatia is going to be the twenty-eighth Member State in July 2013 and the common market and the customs system is functioning according to WTO rules.

The EU customs sanctions are still evolving and they will at some point in the future most likely be uniform. Up to that point they will evolve to be more and more harmonized in order to prevent importers from choosing liberal Member States (with lower penalties and sanctions) for their business.

Table of results

Member States (**MS**) of the EU-27, lp: sanctions against **l**egal **p**ersons are allowed, **P**rison sentences (max.), **F**ines for minor customs offences (max.), **LS** Legal settlement

Notes

72 See Lux in Lenz/Borchardt, EUT, 2010, Art. 33 TFEU, No. 17.

73 See Commission proposal COM (2012) 64 final.

74 See Dierksmeier, 2007, 237.

75 See Witte/Henke in W/H/K, 2009, 57.

76 See Lux/Douglas-Hamilton, GTCJ 2008, 293, Reuter/Fuchs, 84 and Witte/Henke in W/H/K, 57.

77 See Lux/Larrieu, GTCJ 2006, 62 and Lux/Douglas-Hamilton, GTCJ 2008, 293.

possible with customs authorities, **1/2/3** Sanktions systems, # Number of criminal customs offences/customs sanctions, customs sanctions in national customs laws (**nCL**)/in national tax laws (**nTL**)/in national criminal laws (**nCrimeL**). The withdrawal of simplifications which is already applicable in the current Customs Code has not been regarded. Classification of systems (* - *** stars):

MS	*lp*	*Pr*	*F*	*LS*	*1/2/3*	*#*	*nCL*	*nCrimeL*	*nTL*	*Classification*
Germany	-§	10 y	EUR 5000	-	3	4/74	+	-	+	***
Austria	+	7 y	EUR 5000	-	2	5/2	+	-	+*	**
France	-§	10 y	EUR 3000	+	2	3/5	+	-	+	***
Italy	-§	10 y	10-times	-	3	8/19	+	-	-	***
Belgium	+	5 y	10-times	+	2	7/4	+	-	-	**
Luxembourg	+	5 y	10-times	+	2	7/4	-	-	-	Belgium
Netherlands	+	6 y	EUR 45000	+	3	18	+	-	-	**
Great Britain	-§	7 y	EUR 2839, 1-times	+	2	6	+	-	-	**
Denmark	+	8 y	2-times	-	2	6	+	+	-	***
Greece	-§	5 y	10-times	-	3	13	+	-	-	**
Spain	+	4 y	4-fach	-	2	12	-	-	+*	**
Portugal	+	5 y	600 daily rates	-	2	5/2	-	-	+*	**
Poland	+	5 y	720 daily rates	-	2	9/2	-	-	+*	**
Hungary	+	8 y	0.5-times	-	3	1 (4)	-	+	-	***
Czech Republic	-§	12 y	EUR 140000	-	2	4/3	+	+	-	***
Slovak Republic	-§	12 y	EUR 75000	-	2	7/7	+	+	-	***
Sweden	-§	6 y	Yes, how much?	-	3	16	-	-	+*	**
Finland	+	2 y	Yes, how much?	-	2	4/2/ 2	+	-	+	*
Ireland	+	5 y	EUR 2000	+	2	4/2	+	-	+*	**
Estonia	+	10 y	EUR 3200	+	2	3/19	+	+	-	***
Lithuania	+	8 y	Yes, how much?	-	2	4	-	+	-	***
Latvia	-§	8 y	Yes, daily rates	-	3	2	-	+	-	***
Slovenia	+	5 y	EUR 16692	-	2	4/3	+	+	-	**
Malta	-§	2 y	EUR 5823	+	2	4/27	+	-	-	*
Cyprus	+	3 y	EUR 2926	+	2	13	+	-	-	*
Bulgaria	+	10 y	2.5-times	+	3	2/4	+	+	-	***
Romania	+	15 y	EUR 2000	-	2	5/33	+	-	-	***

+* nTL has been published as a special tax or customs criminal law.
§ Criminal liability is applying for acting organs of companies and legal persons.
* = no or only short prison sentences (up to three years);
** = prison sentences up to seven years;
*** = prison sentences of eight years or more.

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