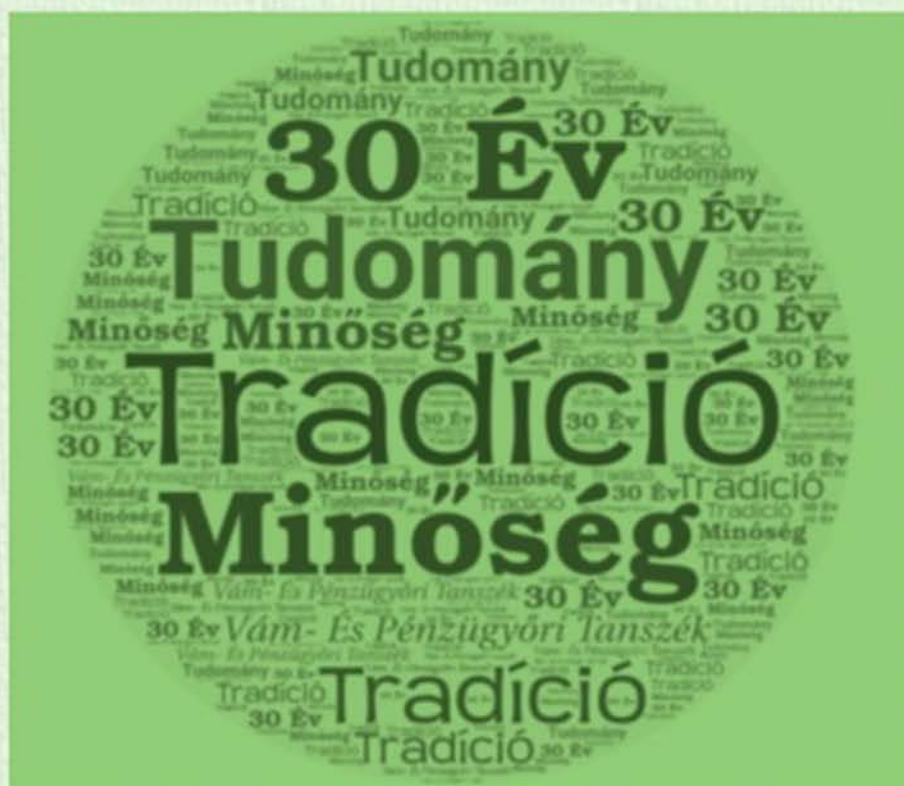

„Tradíció, tudomány, minőség”

Tanulmánykötet

2021

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Van Dooren, Eric[*]: The order to pay the counter value of disappeared goods in Belgium

Absztrakt

The principles traditionally established by Belgian customs legislation almost always apply without difficulty in hypothesising that the goods to be forfeited could have been seized before the judicial assessment. In the opposite case, and therefore in the absence of the physical presence of the goods, the compulsory nature of the forfeiture will have to take on a less obvious meaning. The Belgian Supreme Court and the Belgian Constitutional Court have always applied a fixed case law in this respect and have consistently ruled that, with a view to the forfeiture of goods that have not been seized, the sentenced party is obliged to present these goods. In the event of failure to do so, the criminal court, to safeguard the rights to those goods, must order the defendant to pay the equivalent value of the goods he does not produce for confiscation at the request of the customs authorities. Such an order does not constitute a criminal penalty but is the civil-law consequence of the criminal conviction for forfeiture. This case law often proves to come up against criticism in legal doctrine. Since 2020 however, the Court of Justice of the European Union has removed the issue from the exclusively national enforcement context. That novelty raises whether criminal and customs legislation also allows for alternative ways of thinking.

Keywords: *Removal of goods from customs supervision, obligation to pay a sum corresponding to the value of the missing goods, penalty, cumulation with a fine, proportionality.*

Cím magyarul: A Belgiumban eltűnt áruk ellenértékének megfizetésére vonatkozó végzés

Absztrakt

A belga vámjogszabályok által hagyományosan meghatározott elvek, szinte mindig nehézség nélkül alkalmazhatók, annak feltételezése esetén, hogy a lefoglalandó árukat a bírósági elbírálás előtt lefoglalhatták volna. Ellenkező esetben, és ezért az áruk fizikai jelenlétének hiányában a lefoglalás kötelező jellegének kevésbé nyilvánvaló értelmet kell nyernie. A belga Legfelsőbb Bíróság és a belga Alkotmánybíróság e tekintetben mindig is állandó ítélkezési gyakorlatot alkalmazott, és következetesen úgy döntött, hogy a lefoglalásra nem került áruk elkobzása céljából az elmarasztalt fél köteles bemutatni ezeket az árukat. Ennek elmulasztása esetén a büntetőbíróságnak az ezen árukhoz fűződő jogok védelme érdekében köteleznie kell az elítéltet, hogy a vámhatóságok kérésére fizesse meg az általa elkobzás céljából be nem mutatott áruk ellenértékét. Az ilyen elrendelés nem büntetőjogi szankció, hanem a vagyonelkobzás miatt hozott büntetőjogi ítélet polgári jogi következménye. Ez az esetjog a jogdogmatikában gyakran ütközik kritikába. 2020 óta azonban az Európai Unió Bírósága kivonta a kérdést a kizárólag nemzeti végrehajtási kontextusból. Ez az újdonság felveti, hogy a büntető- és vámjogszabályok lehetővé tesznek-e alternatív gondolkodásmódokat is?

Kulcsszavak: *Áruk kivonása a vámfelügyelet alól, az eltűnt áru értékének megfelelő összeg megfizetésére vonatkozó kötelezettség, büntetés, halmazati bírság, arányosság.*

***

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The historical legal context of the Belgian customs enforcement system

The origin of the Belgian customs tax system can be found in the system that was in place during French domination from the end of the 18th century. The French system was adopted in the United Kingdom of the Netherlands, the jurisdiction that Belgium was a part of before its independence in 1830. The foundation of the Belgian tax system was therefore established during the Dutch period, adding new elements to the French system.

Of particular relevance is the Law of 12 July 1821 regarding the system of the Realm's taxes as from the year 1822. This Law set out several legal principles concerning the levy of incoming and outgoing duties as well as excises.[125] These principles were further developed by the General Law of 26 August 1822.[126] This General Law replaced the previous general and special laws of 1816, 1818 and 1819.[127] After Belgian independence, few changes were made to customs and excise legislation. However special reference should be made to the Law of 6 April 1843 regarding the sanctioning of smuggling.

The current General Law on Customs and Excise (hereinafter 'GLCE') dates from 18 July 1977 and constitutes a codification of different legal provisions that were in force at that time. Key elements of the GLCE can be traced back to the early 1800s, in particular the General Law of 26 August 1822. With the exception of the establishment of an unjustified inequality with regard to the criminal responsibility of employers, the position of third parties of good faith within the framework of the confiscation and the mitigating circumstances, the visitation, and the joint and several liability to pay fines, the Belgian Constitutional Court has continuous ruled conservative towards the legislation of 1822.[128] [129] Consequently only minor adjustments to the GLCE have been made by the jurisprudence of the Belgian Constitutional Court.

Legal provisions on the forfeiture of goods

GLCE

Articles 220 (1) and 221 (1) GLCE provide for the seizure and confiscation of goods in respect of which an attempt has been made to conceal the required declarations on the import or export of these goods and thus to evade European treasury duties. The same forfeiture of the goods in question follows from Article 257 (3) GLCE, which makes the act of removing goods from customs supervision an offence. Similar provisions can also be found in the various excise laws in the event of possible prejudice to the Belgian Treasury.

In this case, the special forfeiture is in the nature of an object, in the sense that it applies to the object irrespective of who is in fact its owner and who is in reality the debtor who has evaded tax.[130] Even when the tax evader is unknown, the criminal court must pronounce the forfeiture.[131] Case law has also decided that despite a criminal acquittal of the defendant, for

[125] Article 10 of Law 12 July 1821.
[126] Official Gazette 1822, n° 38.
[127] Article 1 of the Law of 26 August 1822.
[128] Van Dooren E., 2011. 469.
[129] Van Dooren E., 2014. 464-480.
[130] Belgian Court of Cassation 29 April 2003, no P.02.1459.N and P.02.1578.N, Belgian Court of Cassation 8 December 2009, no P.09.1185.N; Belgian Court of Cassation 12 January 2011, no P.09.0835.F; Belgian Court of Cassation 15 February 2011, no P.09.1566.N; Belgian Court of Cassation 19 January 2016, no P.14.1519.N; Belgian Court of Cassation 28 June 2016, no P.14.1588.N; Belgian Court of Cassation 13 September 2016, no P.15.0124.N; Belgian Court of Cassation 4 October 2016, no P.14.1881.N.
[131] Belgian Court of Cassation 14 November 1984, no 3885.

example on the grounds of error, a forfeiture of the seized goods must still be ordered.[132] After all, the confiscation is aimed at a particular good or object and does not affect the person prosecuted or convicted.

Moreover, pursuant to Article 221 (1) GLCE, the forfeiture is mandatory in the event of a conviction for the crime under Article 220 (1) GLCE.[133] As the criminal judge therefore has no choice, it is not necessary for the Belgian Supreme Court (*Court of Cassation)* to give further reasons as to why he is imposing the special forfeiture.[134] What is required, however, is that when he pronounces the forfeiture, the criminal judge establishes that the conditions for the application of this punishment have been met.[135] The very nature of the forfeiture of the seized goods also implies that the ruling on this punishment cannot be suspended or that the punishment can be imposed conditionally.[136] The Constitutional Court also never saw any objection in the fact that the forfeiture order could be pronounced without the possibility of deferring the enforcement of the sentence. For the Constitutional Court, the exception with general criminal law is proportionate to the public interest objective pursued.[137]

Presence or absence of the goods

The aforementioned principles almost always apply without difficulty in the hypothesis that the goods to be forfeited could have been seized prior to the judicial assessment. In fact, the goods are already in the hands of the customs administration, and they become the property of the Belgian State once the decision of the criminal judge has become final. The goods have never had the opportunity to be put into circulation. In that case, the forfeiture of the goods serves a punitive purpose, which is why case law also assumes that the forfeiture can no longer be pronounced when the criminal action has lapsed due to prescription.[138]

In the opposite case, and therefore in the absence of the physical presence of the goods, the compulsory nature of the forfeiture, as far as it is considered applicable, will have to take on a less obvious meaning. The customs administration then usually has no idea where the goods, which are the object of the customs offence, are located or where they have gone. What can the criminal court then decide on the basis of the European and Belgian customs legislation with regard to these missing or disappeared goods? That the answer to this question is not obvious is already shown by the fact that even the highest courts have repeatedly been confronted with legal questions on this issue.

Jurisdiction of the Belgian Court of Cassation

The Belgian Supreme Court has always applied a fixed case law in this respect and has always ruled that, with a view to the forfeiture of goods that have not been seized, the sentenced party is obliged to present these goods. In the event of failure to do so, the criminal court, in order to safeguard the rights to those goods, must, at the request of the customs authorities, order the defendant to pay the equivalent value of the goods which he does not produce for confiscation. Such an order does not constitute a criminal penalty, but is the civil-law consequence of the

[132] Belgian Court of Cassation 12 January 2011, no P.09.0835.F; Court of Appeal Antwerp 18 April 2002, *RW* 2002-03, 1468.
[133] Belgian Court of Cassation 14 November 1984, no 3885; Court of Appeal Liege 4 February 1981, *FJF* 1981, 38.
[134] Belgian Court of Cassation 24 May 2016, no P.15.1604.N.
[135] Belgian Court of Cassation 7 March 1984, no 3315.
[136] Belgian Court of Cassation 14 June 1989, no 6135; Belgian Court of Cassation 11 October 1989, no 6540.
[137] Belgian Constitutional Court 20 February 2002, no 38/2002; Belgian Constitutional Court 28 March 2002, no 60/2002.
[138] Belgian Court of Cassation 22 October 1953, *Pas* 1954, I, 68; Court of Appeal Liege 14 December 1981, *FJF* 1982, 63; Court of Appeal Liege 20 December 1983, *Pas* 1984, II, 82; Court of Appeal Antwerp 4 February 2010, *RW* 2010-11, 628.

criminal conviction for forfeiture.[139] The argument put forward several times before the Court of Cassation that the order to pay the Belgian State the counter value of the fraudulent goods should be regarded as a penalty (without legal basis) that was pronounced as a consequence of a conviction for a criminal offence in a judicial procedure of a criminal nature, was rejected each time. Accordingly, there was no reason for the Court to request a preliminary ruling from the Court of Justice of the European Union on the assessment of that conviction in the light of the principle of legality laid down in Article 49 of the Charter of Fundamental Rights of the European Union.[140]

The order to return the goods is therefore, for the Court, a purely civil order which can only be enforced by means of civil enforcement measures and which, of course, is no longer owed if the goods themselves can be confiscated. The subsequent order to pay the counter value in the event of the non-representation of those goods constitutes the application of the rule arising from Articles 1382 and 1383 of the Belgian Civil Code that every debtor of goods must pay the counter value as compensation if he has taken it from his creditor or if, through his actions, he fails in his obligation to deliver the goods. The customs administration is then returned to the state it would be in if the goods could be seized. Article 44 of the Belgian Criminal Code, which allows the criminal court to order a defendant to pay damages, applies this principle, and it is from this principle that the criminal court derives its authority.[141] If, after an eventual order to pay the counter value, the goods were still to be presented to the customs administration, this would seem to make the order irrelevant.

The counter value of goods to be confiscated but not seized or produced constitutes at the same time compensation in the sense of Article 50 of the Belgian Criminal Code.[142] Although in both cases full compensation of the damage suffered will be ordered, the legal situation in application of Articles 44 and 50 of the Criminal Code (costs incurred for the detection and prosecution of the crime) is not comparable to that based on Article 1382 of the Civil Code and on the claim of the injured party. Moreover, in order not to violate Article 50 of the Criminal Code, the criminal judge is obliged to order all defendants he sentences for the same customs offence and against whom it must order the forfeiture of the goods concerned, jointly and severally, to pay the counter value upon their non-representation, regardless of whether or not that non-representation as such is a consequence of their wrongful conduct. Therefore, the criminal court cannot take into account, for example, the fact that the offence was committed by a co-offender and that he or she had no knowledge of the future fate of the goods.[143] The application of the principle of proportionality does not allow any deviation from that rule either.[144]

Furthermore, the aforementioned obligation on the criminal judge arises solely from the crime committed, so that no separate fault needs to be established which is causally linked to the fact

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[139] Belgian Court of Cassation 3 December 1860, *Pas* 1Belgian Court of Cassation 21 September 1999, no P.98.1346.N; Belgian Court of Cassation 29 April 2003, no P.02.1459.N and P.02.1461.N; Belgian Court of Cassation 2 September 2003, no P.01.1494.N; Belgian Court of Cassation 31 October 2006, no P.06.0928.N; Belgian Court of Cassation 12 February 2008, no P.07.1562.N; Belgian Court of Cassation 15 February 2011, no P.09.1566.N; Belgian Court of Cassation 29 April 2014, no P.14.0083.N; Belgian Court of Cassation 28 June 2016, no P.14.1132.N; Belgian Court of Cassation 13 September 2016, no P.15.0124.N; Belgian Court of Cassation 4 October 2016, no P.14.1881.N; Belgian Court of Cassation 28 May 2019, no P.17.1006.N; Belgian Court of Cassation 23 June 2020, no P.20.0020.N.

[140] Belgian Court of Cassation 28 May 2019, no P.17.1006.N.

[141] Belgian Court of Cassation 15 February 2011, no P.09.1566.N; Belgian Court of Cassation 19 January 2016, no P.14.1519.N; Belgian Court of Cassation 28 June 2016, no P.14.1132.N; Belgian Court of Cassation 13 September 2016, no P.15.0124.N.

[142] Belgian Court of Cassation 4 October 2016, no P.14.1881.N.

[143] Belgian Court of Cassation 19 January 2016, no P.14.1519.N.

[144] Belgian Court of Cassation 13 September 2016, no P.15.0124.N.

that the goods to be forfeited cannot or will not be produced. The order to pay the counter value of goods not seized does not therefore require a prior forfeiture order to have become a final character. The Court of Cassation rejected the argument that the creditor can only be released from the confiscated property when there is a definitive transfer of ownership in favour of the State.[145]

Position statement of the Belgian Constitutional Court

It was also repeatedly argued before the Constitutional Court that an order to pay the counter value of the goods in the event of non-presentation constitutes a penalty within the meaning of Articles 12 (2) and 14 of the Belgian Constitutional Law and of Article 7 of the ECHR. Such a sentence would not entail compensation for damage, but would be of a general, preventive and repressive nature by replacing another criminal sanction where one cannot be enforced. In the absence of a legal basis for such a criminal sanction, it would be contrary to the principle of penal legality.

Judgment of 1 December 2011

In its judgment of 1 December 2011, the Constitutional Court responded in rather general terms that the forfeiture of goods is a penalty expressly provided for in Article 221 (1) GLCE, and that it follows from the very nature of that penalty that any offender in the cases referred to in Article 220 GLCE can reasonably expect that, if he fails to submit the confiscated goods, the criminal court will impose payment of their monetary value.[146] In the hypothesis that the order to pay the counter value would then be regarded as a criminal sanction instead of a civil-law consequence of the forfeiture (on which the Constitutional Court does not express an opinion in that judgment), there is no violation of the principle of legality.

In the same judgment of 1 December 2011, the Constitutional Court also concluded that there had been no violation of the principle of equality and non-discrimination, in so far as the criminal court had been given the power to order persons sentenced by customs criminal law to the forfeiture of goods that had not been seized to pay the equivalent value of those goods in the event of their non-presentation, whereas, in general criminal law the same judge placed in the same circumstances does not have that power. The Constitutional Court considers this distinction to be justified because of the specific nature of customs criminal law, where the fraud is situated in a 'particularly technical, cross-border and European context'. The order to pay the counter value of the non-presented goods then constitutes a proportionate measure in the perspective of an effective fight against fraud and the safeguarding of the rights of the Treasury.

Judgment of 31 January 2019

By interlocutory judgment of 24 January 2018, the Brussels Court of Appeal subsequently submitted four new preliminary questions to the Constitutional Court. The first question concerned the extent of the damages, arguing that the criminal judge is obliged to order the perpetrators and participants in the customs offence to pay the entire value of the missing goods, even if the Belgian State would have suffered a lesser loss, whereas in other applications of Article 1382 of the Civil Code a judge is competent to determine the extent of the damages. The second question related to the absence of a fault that could be distinguished from the customs offence and the obligation to also convict the persons who are not responsible for the failure to present the goods in question, whereas in other applications of Article 1382 of the Civil Code, damages can only be awarded if the fault, the damage and the causal link between the two are proven. The remaining questions focused on the impossibility for the criminal court

[145] Belgian Court of Cassation 28 June 2016, no P.14.1588.N; Belgian Court of Cassation 13 September 2016, no P.15.0124.N; Belgian Court of Cassation 4 October 2016, no P.14.1881.N.

[146] Belgian Constitutional Court 1 December 2011, no 181/2011.

to mitigate the order to pay the counter value of the missing goods, even when it finds mitigating circumstances, whereas the customs administration itself has that power when proposing and entering into a transactional arrangement under Article 263 GLCE and the court is also not allowed to take into account the precarious financial situation of the persons involved.[147]

In its judgment of 31 January 2019, the Constitutional Court ruled that all the aforementioned preliminary questions must be answered in the negative.[148] With regard to the first three questions, the Court does not consider the difference in treatment to be unjustified, since it can be established that the forfeiture of the goods and the order to pay the counter value of goods that have not been presented are not cumulative sanctions. Indeed, the civil penalty becomes payable only if the Belgian State is not put in possession of the goods in due time and is not intended to compensate for the loss caused by the offence itself, but rather for the loss represented by the absence of the goods to be seized. As for the financial situation of the convicted person, after the Court of Cassation, the Constitutional Court also concluded that this was a purely civil measure and not a criminal sanction. The joint and several liability based on Article 50 of the Criminal Code does indeed imply that each convicted person can be required to pay the full value of the missing goods, but on the other hand, he can always exercise a right of recourse against other perpetrators or participants.

Doctrinal criticisms

Although the above-mentioned case law of the Belgian Court of Cassation and the Belgian Constitutional Court is convergent and consistent, it often proves to come up against criticism in legal doctrine.[149] In the description of the conviction as a criminal sanction, reference is invariably made to the absence of a legal basis in the customs legislation for a forfeiture per equivalent and to the inadmissibility of turning an object confiscation during execution into a value confiscation that is not regulated by law. The description of the conviction as a civil law consequence raises the question whether the criminal court is competent to award compensation to the prosecuting party for damage that is not directly causal to the criminal offence, where it only affects the execution of a sentence and essentially concerns an error that occurs after the compensation has already been awarded by the court.

Legal opinion of the Court of Justice of the European Union

With the judgment of 4 March 2020 the Court of Justice of the European Union has also ruled on the issue.[150] In this judgment, the disputed order to pay the counter value of the missing goods was tested against European customs law for the first time.

Concrete case and legal question

The Bulgarian subsidiary of a well-known German transport group was a warehouse keeper and thus the holder of a customs warehouse licence, which, according to the customs procedure declared, should normally have contained thirteen containers of timber. However, a check showed that only 12 of those containers were present. For this reason, the company was accused of removing a container of timber from customs supervision and, in accordance with Bulgarian customs legislation, the Bulgarian customs authority issued a decision imposing an administrative fine of approximately EUR 12,225.00 and the obligation to pay an equivalent amount based on the value of the missing goods. Contrary to the Belgian GLCE, the Bulgarian

[147] Diaz Gavier, P., & Van Dooren, E., 2013. 70-71.
[148] Belgian Constitutional Court 31 January 2019, no 16/2019.
[149] Van Der Eecken, N., 2012. 1058-1066; De Nauw A., 2013. 48-53; Waeterinckx P., 2014. 319-326; Claes A., 2020. 352-362.
[150] Case C-655/18 *Schenker,* ECLI:EU:2020:157.

Customs Law explicitly states that *"smuggled goods shall be subject to confiscation for the benefit of the State, irrespective of who owns them; if they are not available or have been disposed of, the offender shall be ordered to pay the equivalent of their customs value, or, in the event of exportation, the value of the goods."*

According to the Bulgarian customs authority, the additional payment obligation did not constitute a second administrative sanction, but merely an order to pay, albeit in addition to the fine, but only as a legally determined measure for the recovery of the disappeared goods and therefore by analogy with a seizure of those goods in favour of the customs authority. By way of derogation from that principle, however, the Supreme Administrative Court of Bulgaria wished to know from the Court of Justice of the EU, for a preliminary ruling, whether the obligation to pay the equivalent of the goods which are the object of the customs offence should not, under European Union law, be regarded as an administrative penalty and, if so, whether such an obligation to pay is compatible with the essential characteristics which should underpin such a penalty. After all, it follows from Article 42 (1) of the Union Customs Code (hereinafter 'UCC') that each Member State of the European Union is free to determine the penalties it applies for failure to comply with the European customs legislation, except that the penalties chosen must always be effective, proportionate and dissuasive.[151] The Member States therefore have three options when it comes to customs enforcement: 1) a system that only involves criminal penalties, 2) a system that only involves administrative penalties[152], or 3) a system that combines both criminal and administrative penalties. In all systems, the requirements of effectiveness, proportionality and dissuasiveness apply to all sanctions.

Decision and scope

The Court of Justice disagrees with the Bulgarian customs authoritiy and leaves no doubt that the obligation to pay an amount corresponding to the value of the goods removed from customs supervision constitutes a penalty within the meaning of Article 42 (1) UCC. Thus, a double administrative penalty was imposed on the warehouse keeper. In the Court's view, that obligation to pay is therefore not an alternative to confiscation as a measure for the disappearance or destruction of goods that have been the subject of a customs offence.[153] Confiscation applies only to goods which have been intercepted and are likely to have been seized, and therefore in the possession of the customs authoritiy. In this way the Court makes an unambiguous distinction between, on the one hand, the situation of seized goods and their removal from circulation and, on the other, the situation in which the goods are physically absent. In the latter case, of course, there is no removal of the goods and the substitute payment of their counter value cannot serve the same purpose.

The judgment does not expressly state this, but it follows from the Bulgarian case that only an administrative sanction can be intended here. It would therefore be going too far to read the judgment in such a way that the Court of Justice also intended to qualify the order to pay the counter value of the missing goods as a criminal sanction. This does not alter the fact that by means of a substantive evaluation that also takes into account the case law of the ECHR, the exercise could be made to what extent on this point a 'criminal sanction' within the meaning of Article 6 (1) ECHR.

However, the qualification of the payment obligation as a sanction as referred to in Article 42 (1) UCC, regardless of whether this sanction can be characterised as administrative or penal, is

[151] On the other hand, the development of an enforcement system is by no means optional for the Member States. Article 4.3 (2) TEU provides that Member States shall take all appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
[152] Article 42 (2) UCC specifies that an administrative penalty may take the form of a pecuniary charge imposed by the customs authority or the revocation, suspension or amendment of any authorisation held by the person concerned.
[153] Art 198 (1) UCC.

sufficient to require effectiveness, proportionality and a deterrent nature. With reference to the general scope of the mandatory nature of penalties imposed by the Member States for any failure to comply with European Union law, of which Article 42(1) UCC is an application of customs law, the Court of Justice holds that an additional penalty, on top of the administrative fine, consisting in the payment of the equivalent value of the missing goods is disproportionate in relation to the customs debt incurred as a result of the customs offence and in relation to the objective pursued of preventing the removal of goods from customs supervision. To that extent, the Bulgarian customs legislation, which provides for double administrative penalties, appears to be at odds with Article 42 1) UCC, which enjoys primacy.

Transposition to Belgian customs enforcement law

The discussed case from Bulgaria shows remarkable parallels with Belgian customs enforcement law. Without explicit embedding in the national customs legislation, but supported by the highest courts, an order to pay the counter value of the goods in the event of a customs violation will almost always be issued in Belgium as well. Unlike in Bulgaria, in Belgium this will always take place in a criminal context. The removal of goods from customs supervision is an offence stipulated in Article 257 (3) GLCE. In this case, the guilty perpetrator or participant shall be liable to a term of imprisonment of at least four months and a maximum of one year or, in certain cases[154], five years, and to a fine of five to ten times the amount of the duties evaded, calculated on the basis of the higher rate of these customs duties. Both penalties are in principle cumulative. The offender who commits the crime again is sentenced, in addition to the prison sentence, to a fine of ten to twenty times the evaded customs duties. If the goods removed from customs supervision could not be seized, the criminal court shall additionally order the person concerned to pay the value of those goods as calculated by the customs administration. Subsequently and in application of Article 283 GLCE, the person concerned may also be ordered to pay the evaded customs duties under tax law.[155] In the hypothesis that the obligation to pay the counter value of the goods should also be qualified in Belgium as a sanction within the meaning of Article 42 (1) UCC, the proportionality test to be complied with by that provision seems rather awkward, even in a Belgian constellation and when weighed against the tax debt incurred. In any case, the total number of convictions after a guilty verdict for a customs offence in Belgium far exceeds the all in all modest administrative fine that follows a similar offence in Bulgaria.

Furthermore, it is important to remember from the judgment of the Court of Justice of the EU that a distinction must be made between two situations: 1) the goods, which are the object of the customs offence, have been seized and can still be removed from circulation; 2) the goods are physically absent and probably traceless. According to paragraphs 36 and 37 of the judgment of 4 March 2020, the Court of Justice seems to exclude any analogy between the two situations under the UCC and to reserve the forfeiture of the goods only for the first situation. On closer examination, such a conclusion could also be deduced from a textual reading of Article 221 (1) GLCE, which stipulates that "the goods shall be seized and confiscated". Indeed, unlike the Bulgarian customs law, the Belgian customs law itself remains silent as to whether this mandatory forfeiture extends beyond a mandatory seizure.

Comment

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[154] If the offence was committed with fraudulent intent or with the intent to harm and in the context of serious fiscal fraud, organised or otherwise, or has or would have seriously harmed the financial interests of the European Union, or was committed in a state of repetition.

[155] Diaz Gavier, P., & Van Dooren, E., 2013. 72.

The Court of Justice's decision of 4 March 2020 has the merit of removing the issue of an order to pay the counter value of missing goods from the national enforcement context. In the Belgian context it should be borne in mind that Articles 220 (1), 221 (1) and 257 (3) GLCE date back to the 19th century and that the established case law in cassation, as outlined above, dates back to 1860. Since the second half of the last century, however, the practical application of customs law has also taken into account both the supranational Europeanisation of customs law and the fundamental rights that have been embodied in several human rights treaties. It goes without saying that customs criminal law cannot escape scrutiny in this respect either.

In addition, the fact that by Act of 21 December 2009, Book I of the general Criminal Code was made applicable to the offences made punishable in the GLCE cannot be ignored either. Consequently, except for divergent provisions in the GLCE, there is nothing to prevent Articles 42 and 43bis of the Criminal Code, as amended by the Law of 17 July 1990, from being applied in Belgian customs criminal law. If the goods removed could not be stopped by the customs authorities, it would be reasonable to assume that they were put to use and that an unlawful financial advantage exceeding the amount of customs duties evaded was generated. The advantage thus created would then be, as it were, a substitute for the physical absence of the goods. The deprivation of this advantage, which may also be estimated, in addition to the recovery of the tax debt on the basis of a tax claim in application of Article 283 GLCE, must not be considered impossible at present by Belgian law. Nor does this prevent the customs administration from also instituting a civil action for compensation for the additional costs and efforts as a result of, for example, the unsuccessful tracing of the missing goods. The extent of the compensation would then, of course, have to be limited to covering the proven damage.

The question is whether, in the light of European customs law as currently interpreted by the Court of Justice of the EU, such a scenario might not suffice to compensate for the impossibility of objectively confiscating the disappeared goods. Customs criminal law would thus also be in line with common criminal law. After all, seized narcotics can also be confiscated as an object of the crime. If the drugs have ended up on the market and have thus created illegal profits, the criminal court, at the request of the public prosecutor, will calculate a capital gain on which both an object confiscation and a value confiscation can be based. The fact that the narcotics were not produced could then be included in the deprivation of benefit by the court. In anticipation of what the European Court of Human Rights will decide in this respect, we will however have to look out for how Belgian case law on this issue will evolve.

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