Settlement Agreements and Confiscation under Belgian Customs Law

Soluciones acordadas y confiscación en el derecho aduanero Belga

Soluções acordadas e confiscação no direito alfandegário Belga

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Abstract

Settlement agreements allow customs offenders to avoid criminal prosecution by paying the missing duties and a lower fine. Absent a settlement, the offender will be criminally prosecuted. For certain offences, the judge must order the confiscation of the goods. When the goods are gone, the Belgian courts apply a "confiscation by equivalent": the offender must then pay the counter value of the goods to customs. While criticized by scholars, confiscation by equivalent has been embraced by the Supreme Court on numerous occasions. This article seeks to clarify the fundamentals of settlement agreements and confiscation under Belgian Customs Law, and perhaps, it can fuel some comparative discussions on the topics.

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Keywords

European Union, Belgian Customs Law, Settlement agreements, Penalties, Confiscation, Confiscation by equivalent.

Resumen

Al celebrarse un acuerdo con la aduana, se puede evitar la persecución penal por un delito aduanero pagando los derechos aduaneros y una multa inferior al monto legal. A falta de un acuerdo, el infractor será procesado penalmente. Por ciertos delitos, el juez debe ordenar la confiscación de los bienes. Cuando los bienes no se encuentran, los tribunales belgas aplican una "confiscación por equivalente": el infractor debe pagar el valor de la mercancía a la aduana. Aunque criticada por la doctrina, la confiscación por equivalente ha sido adoptada por el Tribunal Supremo en numerosas ocasiones. Este artículo tiene por objeto aclarar los fundamentos de los acuerdos de solución y la confiscación en el derecho Belga, y tal vez puede estimular algunas discusiones comparativas sobre estos temas.

Palabras claves

Unión Europea, Derecho aduanero Belga, Acuerdos de solución, Multas, Confiscación, Confiscación por equivalente.

Resumo

Ao celebrar-se um acordo com a alfandega, pode-se evitar a persecução penal por um delito alfandegário pagando os direitos alfandegários e uma multa inferior ao monto legal. À falta de um acordo, o infrator será processado penalmente. Por certos delitos, o juiz deve ordenar a confiscação dos bens. Quando os bens não se encontram, os tribunais belgas aplicam uma "confiscação por equivalente": o infrator deve pagar o valor da mercancia à alfandega. Ainda que criticada pela doutrina, a confiscação por equivalente tem sido adotada pelo Tribunal Supremo em numerosas ocasiões. Este artigo tem por objeto aclarar os fundamentos dos acordos de solução e a confiscação no direito Belga, e talvez pode estimular algumas discussões comparativas sobre estes temas.

Palavras-chave

União Europeia, Direito alfandegário Belga, Acordos de solução, Multas, Confiscação, Confiscação por equivalente.

Summary

Introduction; 1. The settlement agreement, 1.1. General, 1.2. The discretionary powers of the customs authorities, 1.3. It is only about the penalty, never about the duties, 1.4. Settlement proposals to other offenders involved, 1.5. Settlements can still be concluded after initiating criminal prosecution, 1.6. The consequences of a settlement agreement, 1.7. Settlement agreements were even more important in the past, 1.8. Conclusion; 2. Confiscation and confiscation by equivalent, 2.1. General, 2.2. The dispute, 2.3. The Belgian Constitutional Court, 2.4. The Belgian Supreme Court, 2.5. Conclusion.

Introduction

The European Union is a customs union with uniform customs legislation[2]. It means that all Member States apply the same customs rules. There is one exception: the sanctioning of customs offences has remained a prerogative of the Member States[3]. Each Member States can determine what will be considered customs offences and the applicable penalties. The penalties can take various forms, including fines, imprisonment, confiscation, temporal or permanent disqualification form the practice of commercial activities; whatever the Member State considers most appropriate to handle customs offences within its national legal system. All sanctions, however, must be proportionate[4] and both the offences and the penalties that they attract must be defined clearly in legislation[5].

Because the sanctioning of customs offences is a national competence, it is not uncommon that penalties for similar infringements differ in nature and severity among Member States. Thus, the same customs infringement can be treated differently, depending on the Member State. In one Member State, the infringement may be subject to an administrative fine while the same infringement may lead to criminal prosecution in another Member State.

There have been several attempts to harmonize the Member States' different sanctions systems but all have failed. Recently, the European Commission again launched a proposal to provide more uniformity in the way that breaches of

2 In particular, the EU customs legislation is enshrined in the Community Customs Code (Council Regulation (EEC) 2913/92. October 12 of 1992 establishing the Community Customs Code, OJ L 302. October 19 of 1992, p. 1, as amended) and its Implementing provisions (Commission Regulation (EEC) 2454/93. July 2 of 1993 laying down provisions for the implementation of Council Regulation (EEC) 2913/92 establishing the Community Customs Code, OK L 253. October 11 of 1993. p. 1, as amended).

3 Court of Justice of the European Union. Case C-273/90 *Meico-Fell*. [1991] ECR-I. p. 5569. pars. 9-12.

4 Court of Justice of the European Union. Cases C-213/99 (de Andrade). par. 20; C-91/02 *Hannl-Hofstetter*. [2003] ECR I-12077. par. 18; Case C-36/94 *Siesse*. [1995] ECR I-3573. pars. 12 and 24.

5 Court of Justice of the European Union. Case C-546/09 *Aurubis Balgaria*. [2011] ECR I-2531. pars. 40-43.

EU customs law are treated across the Member States[6]. It is probably the best attempt until now to creating a level playing field for economic operators in the EU customs union. The European Commission rightfully considers that there is no point in a solid, single set of customs rules if there is not also a common approach to responding when they are broken. The patchwork of the different enforcement systems in the EU creates legal uncertainty for businesses and possible competitive distortions in the EU Internal Market. It also raises questions about uniformity of the EU customs union, which is a key obligation of the EU as a WTO Member.

The proposal is a Directive, which means that Member States will have to implement it in their legal systems, if it is adopted. At this stage, it is unclear how the national legislators will react to the proposed changes. Meanwhile, each Member State retains its own system of sanctions.

One of the more severe Member States in handling customs offences is Belgium. According to the Belgian General Customs Act ("Customs Act")[7], most customs offences are subject to fines, often combined with confiscation of the goods and sometimes imprisonment[8]. Fraud, for instance, is subject to penalties up to ten times the evaded duties, confiscation of the goods, and imprisonment. The severe enforcement system is mitigated by the possibility of concluding a settlement agreement with the customs authorities. This is not to say that all customs infringements are criminally prosecuted or concluded with settlement agreements. Where the customs authorities consider that there is no element whatsoever against the economic operator, they will limit themselves to claiming the duties through civil proceedings. Where, however, the customs authorities consider that the operator can be fined, they will determine whether they should initiate criminal proceedings against the operator or propose a settlement.

A settlement agreement is an alternative to criminal proceedings and its penalties. We explain its particularities below. Further, we discuss another interesting feature of Belgian Criminal Customs Law: the penalty of confiscation and its alternative, the confiscation by equivalent. Confiscation by equivalent occurs where the goods are no longer available. The offender is then ordered to pay the counter value of the goods to customs. Interestingly, the Customs Act does not fo-

6 European Commission Press Release IP/13/1244. December 13 of 2014, Commission proposes a common approach to violations of EU customs law. The proposal is COM (2013) 884 final, 2013/0432 (COD), Proposal for a directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, 13 December 2013. See also T. Lyons. A Customs Union without Harmonized Sanctions: Time for change? GTCJ 10. No. 4 (2015). pp. 137-143 and P. Anaboli. Customs Violations and Penalties in Europe: Harmonization on the Horizon? GTCJ 5. No. 9 (2010). pp. 389-393.

7 Belgian Royal Decree. July 18 of 1977. Official Bulletin 21, September 1977.

8 Often, specific penalties are foreseen but there is also article 261 of the Customs Act which is a catch-all provision imposing penalties on customs infringements not elsewhere specified in the Customs Act.

resee such confiscation by equivalent. Scholars consider it to be an illegal penalty. The Supreme Court, however, has repeatedly confirmed its legality. In the second part of this article, we will examine the confiscation by equivalent.

1. The Settlement Agreement

1.1. General

One of the particularities of Belgian Customs Law is the reversed burden of proof. It is a general principle of criminal law —also in Belgium— that the accused is innocent until proven guilty. The public prosecutor has the burden of proof. He must convince the judge that the accused is guilty.

That general principle, however, does not apply to customs matters. In customs matters, the offender must establish that he is not guilty. He has the burden of proof. Unless he makes plausible that he was not aware and could not have been aware that he was committing the offence, he will be guilty[9]. The fact that he did not intend to commit the offence or his good faith are not enough to exonerate him[10].

Because of the system's severity —non-compliance with a customs provision is usually enough to criminally prosecute the offender— the legislator has foreseen a settlement system, allowing the customs authorities to settle with the offender where prosecution before the criminal court would seem disproportionate. The customs authorities, for instance, may offer a settlement to the importer who was misled by the exporter. The importer will remain liable for the customs duties but the customs authorities could consider that criminally prosecuting the importer would be disproportionate. There is also the alternative for the customs authorities to claim only the duties and pursue the matter before the civil court, without any fine. When considering a settlement agreement, it means that the customs authorities consider that the economic operator must be fined, but not as much as provided for in the Customs Act.

1.2. The Discretionary Powers of the Customs Authorities

The Customs Act contains limited guidance on settlement agreements. It mentions that the customs authorities can offer a settlement with regard to the fines,

9 Belgian Supreme Court. No. P.06.0545.F (October 4 of 2006).

10 Belgian Supreme Court. No. P.06.0416.N (September 12 of 2006). Some violations however do require an intention to commit the violation. In those cases, the offender can claim that the offence was not committed intentionally.

confiscation, and the closure of establishments were mitigating circumstances exist and there is no indication of fraudulent intent. Through settlement, the offender receives a better deal.

The rest falls within the discretionary powers of the customs authorities. Customs determines on a case-by-case basis whether the offender is offered a settlement, and the terms thereof. It can offer a settlement to one of the customs offenders, but not to the other offenders involved. Those decisions, and the settlement terms, cannot be contested in court[11]. In turn, the offender can reject the settlement proposal and make a counter offer.

1.3. It is Only About the Penalty, Never About the Duties

A settlement concerns only the penalties. The fines may still be substantial. In theory, the settlement proposal must not necessarily provide a lower fine. Where the offence is subject to a fine and confiscation, the fact that the customs authorities drop the confiscation penalty would already significantly improve the offender's position and potentially make the settlement offer interesting. In general, however, the proposed settlement will seek a lower fine than the legal one.

The customs authorities cannot agree on a reduction of duties. The duties must be paid in full[12]. The missing duties must not necessarily be paid by one offender. More offenders can contribute. The duties may even be paid by a third person instead of the debtor[13].

As the conclusion of the settlement terminates the case, the customs authorities must ensure that all duties are paid before the settlement is concluded, or at least, that the settlement is made conditional upon the payment of the duties. A conditional agreement mentions that the right to criminal proceedings extinguishes only after paying the duties and the outstanding fine[14]. Where the facility is granted to pay in installments, customs charges an interest of 9.6% per year until payment[15]. Sometimes, customs is willing to grant installments without interests.

While the payment of duties is a necessary condition for a settlement, it must be clear that the payment of the duties does not automatically lead to a settlement proposal, nor does it grant the right to one. As explained, the customs authorities decide on a case-by-case basis. The duties, however, must not necessarily be paid before initiating settlement negotiations. Negotiations can start before the

11 Customs Act. Article 213. In that sense, see also article 246 of the Community Customs Code.
12 Customs Act. Article 263. Does not allow the customs authorities to conclude a settlement on the duties. See also Belgian Supreme Court. No. 6465 (October 19 of 1982).
13 Community Customs Code. Article 231.
14 Belgian Court of Appeal (Gent). FJF, 1986, 208 (January 30 of 1986).
15 Customs Act. Article 311. See also article 232 of the Community Customs Code.

duties are paid. In practice, customs will probably not start negotiations until it receives guarantees that the duties will get paid.

1.4. Settlement Proposals to Other Offenders Involved

Once the duties were paid, the customs authorities can conclude settlements with all other offenders involved, even where they did not contribute in the payment of the duties. There is indeed only one customs debt and that was paid when concluding the first settlement. Accordingly, the identity of the payer of the duties is less important than the fact that the duties are paid. The terms of the settlement agreements may be different for each of the offenders involved.

1.5. Settlements Can Still Be Concluded after Initiating Criminal Prosecution

The initiation of criminal proceedings does not preclude a settlement. Cases can still be settled during criminal court proceedings until a final judiciary decision is reached[16]. In practice however, the customs authorities may be less inclined to leniency where the customs offender rejected the settlement proposal at first, but seeks a settlement after customs initiated the case. On can also imagine a situation where the customs authorities had no time to offer a settlement because of imminent prescription of its claim or a situation where new evidence which is favorable to the offender is discovered. In such cases, the customs authorities can consider offering a settlement.

1.6. The Consequences of a Settlement Agreement

The settlement agreement terminates the case against the signatories[17]. Following a settlement, customs cannot longer initiate criminal proceedings against the signatories. Conditional settlements terminate the dispute upon completion of its conditions. Thus, where the customs authorities agreed with a payment of duties in installments, the case against the offender is terminated only after all duties were paid. Failure to pay will result in reopening the case and criminal prosecution. Termination also means that the signatory cannot seek recovery of the duties or fines after settling[18].

16 Belgian Court of Appeal (Antwerp). RW 1988-89, 95, with commentaries from D. Merckx.
17 Customs Act. Article 228.
18 Customs, however, can only settle the customs aspects of the violation (Belgian Supreme Court. No. C.93.0501.N. January 25 of 1996). In theory, the VAT authorities could still seek recovery of any missing VAT with penalties and the public prosecutor could still prosecute the offender where the offence also violates general criminal law such as, for instance, in cases of forgery (for the latter, see Customs Act. Article 282).

The settlement agreement only protects the signatories. Other offenders can still be prosecuted for fines, not for duties. The duties were already paid in the context of the previous settlement. Otherwise, customs could never have settled.

Settlement agreements are advantageous for both customs and offenders. Customs favors settlement agreements because the duties owed are immediately collected and lengthy court proceedings are avoided. By contrast, offenders favor settlement agreements when their chances of victory in court are weak and the settlement fine is less than the statutory fine provided for in the Customs Act which is usually the case. Another advantage is that potential imprisonment and confiscation of the goods or their counter value is avoided. When the offence could lead to confiscation, the customs authorities can take that into consideration when determining the settlement fine. In most cases, the fact that confiscation could be claimed before the criminal judge will increase the settlement fine.

For completeness sake, we mention also the voluntary disclosure settlements. The law does not define the term voluntary. Yet, it can be assumed that a disclosure is voluntary when disclosed to customs before it starts investigating the related transactions. The advantage of a voluntary disclosure is that the customs authorities cannot impose penalties, even in case of fraud. But the missing duties, if any, remain due and will have to be paid[19]. Voluntary disclosures are made after internal audits, in an attempt to avoid the potential severe penalties. When making the voluntary disclosure, the discloser should seek a written confirmation from the customs authorities that the offence was disclosed and that no penalties will be imposed. The difference with the settlement agreement is that, in a settlement agreement scenario, customs is well aware of the offence and that it can fine the offender. The voluntary disclosure is similar to the settlement agreement where it terminates the case.

1.7. Settlement Agreements Were Even More Important in the Past

Settlement agreements used to be even more important. The reasons were the following. In the past, the Customs Act imposed a fixed fine per offence. Absent a settlement, customs had to claim that fine in court and the judge was not allowed to reduce it. Under the old system, it was “all or nothing”: either the importer was exonerated or the legal fine had to be imposed.

The Constitutional Court remedied the situation. It took issue with the fact that the judge in customs matters was not competent to lower the fine where mitigating circumstances existed, while in general criminal matters the judge was

19 Customs Act. Article 261/2, 2°.

allowed to reduce the fine. Therefore, the Constitutional Court confirmed that the judge in customs matters should be allowed to reduce the fine based on mitigating circumstances[20].

The Constitutional Court also warned that the system of a unique fixed fine per offence (for instance, offence A is sanctioned with a fine of 10 times the evaded duties) could result in disproportionate and illegal sanctions. Accordingly, it proposed that the legislator provides a penalty range between a minimum and a maximum fine per offence, instead of a single fine (for example, a fine "ranging from five to ten times the evaded duties" instead of "a penalty of ten times the evaded duties"). The Customs Act was amended accordingly. The existing fines were retained as maximum fines and minimum fines were inserted[21].

At present, the customs authorities can take into consideration mitigating circumstances in prosecution by adjusting their claim before the Judiciary within the range. Likewise, the judge can impose a fine within the range, depending on the particularities of the case.

The judge can lower the fine even further where mitigating circumstances mandate an even lower fine. The Constitutional Court indeed considered that it was discriminatory that the customs authorities could reduce the penalty in the context of a settlement but not the Judiciary when the case comes before it[22]. Mitigating circumstances are not defined in law but determined on a case-by-case basis. They often include the circumstances and consequences of the offence; the degree of cooperation with the investigation; whether the duties were paid; the offender's degree of knowledge; his criminal record or any other relevant element.

The judge, however, cannot reduce all penalties. Take, for instance, the penalty of confiscation. The judge must order the confiscation of the goods or the payment of their counter value, irrespective of the offender's guilt[23]. One could, however, argue that a situation where a judge cannot waive the confiscation while the customs authorities can in settlement negotiations is discriminatory. The particularities of confiscation are discussed below. The impossibility to waive confiscation during court proceedings is definitely an important incentive for the offender to settle the case.

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20 Belgian Constitutional Court. Case 199/2006 (December 13 of 2006). Official Journal 12 February 2007.

21 Belgian Constitutional Court. Case 140/2008 (October 30 of 2008). Official Journal 13 November 2008. p. 59258. Subsequently, the legislator adopted the Law of 21 December 2009 containing fiscal provisions which amended the Belgian Customs Act to provide for minimum and maximum penalties (Law of 21 December 2009 containing fiscal provisions, Official Journal 31 December 2009. p. 3773).

22 Customs Act. Article 281-2. Belgian Constitutional Court. No. 138/2006 (September 14 of 2006). Official Journal 26 October 2006. p. 57840.

23 Belgian Supreme Court. No. 6135 (June 14 of 1989); Belgian Constitutional Court. No. 38/2002 (February 20 of 2002). Official Journal 22 may 2002. p. 21632.

1.8. Conclusion

We have seen that settlement agreements allow customs offenders to avoid criminal prosecution by paying the missing duties and a lower fine. We have also seen that settlement offers fall within the discretionary power of the customs authorities and that customs decides on whether or not to prosecute the offender, and on the settlement conditions. The settlement landscape has changed over the last years with the possibility for the judge to mitigate the fines. The fact that the Judiciary can mitigate the fines provides some leverage to customs offenders when the settlement offer is considered too severe in relation to their chances before the criminal court. Yet, it many cases, a settlement offer should remain the best option available.

2. Confiscation and Confiscation by Equivalent

2.1. General

As mentioned above, confiscation is one of the penalties foreseen by Belgian Customs Law for certain offences, including fraudulent imports[24]; import, export or transit with false declarations[25]; import, export or transit of goods subject to permissions without a valid license[26]. On top, fines can be imposed.

Confiscation means that the goods related to the customs offence become property of the customs authorities and must be handed over to them. Confiscation is not a compensation for the customs violation[27]. Where the customs authorities were able to seize the goods, the execution of the confiscation is not problematic. In most cases, however, the offender no longer holds the goods. Then, the courts order payment of the counter value of the goods. The latter is referred to as "confiscation by equivalent". It must be borne in mind, however, that not all cases where confiscation is possible result in actual confiscation by equivalent. As explained above, customs can enter into an agreement with an offender to settle a customs infringement as an alternative to initiating legal proceedings, without confiscation or confiscation by equivalent (where confiscation would have been a possibility, the customs authorities may take that into consideration when determining the amount of the fine).

24 Customs Act. Article 221.
25 Customs Act. Article 231§1.
26 Customs Act. Article 231§2.
27 Belgian Supreme Court. P021461N (April 29 of 2003). Being a penalty, confiscation does not prevent the recovery of evaded or missing duties.

It is also worth noting that confiscation in customs matters deviates from confiscation under general criminal law. Under general criminal law, confiscation can be ordered only where the offender is the owner of the goods. Confiscation in customs matters, however, is broader. It can be ordered, even where the goods at issue are property of a third person. The fact that the third person was not involved in the offence, or has been acquitted, is irrelevant. The fact that confiscation, or confiscation by equivalent, will be ordered irrespective of the offender's guilt, is an important element in favor of settlement agreements.

It was argued before the Belgian Constitutional Court that confiscation in customs matters should not be different from confiscation under general criminal law. In particular, the claimants took issue with the fact that, in customs matters, the owner of the goods who was unrelated to the offence could see his goods confiscated while that would not occur in a general criminal case. They considered that the mere character of the offence could not justify the different treatment of the owner. The Constitutional Court disagreed and held that confiscation in customs matters can be different because customs offences are offences against the Treasury. But the owner must be allowed to demonstrate that he was not involved to prevent confiscation[28].

2.2. The Dispute

The "confiscation by equivalent" has divided scholars and the Judiciary. Confiscation by equivalent is not a new concept and it is expressly foreseen in the criminal code as the alternative penalty where the goods cannot be confiscated. Article 43 bis, 2 of the Criminal Code provides: where the goods cannot be found in the patrimony of the convicted offender, the judge will assess their value and a corresponding amount will then be confiscated". Therefore, it is undisputed that confiscation by equivalent is a penalty under common criminal law.

The argument, according to scholars, is that the penalty of confiscation by equivalent is not provided for in the Customs Act and that the abovementioned article 43 bis do not apply to customs matters, none of which is disputed. In their view, confiscation by equivalent is a penalty because it replaces the penalty of confiscation and it has all the characteristics of a penalty. It replaces the penalty of confiscation because it is intended to ensure that the penalty of confiscation is not simply avoided by the fact that the goods cannot be returned. Confiscation

28 Belgian Supreme Court. P021461N (April 29 of 2003); Belgian Constitutional Court. Case 38/2002 (February 20 of 2002). Official Journal 22 may 2002. p. 21632; Belgian Constitutional Court. Case 162/2001 (December 19 of 2001). Official Journal 9 march 2002. p. 9660. It remains to be seen whether the offender would then be ordered to pay the counter value of the goods, where the owner's claim succeeds. Belgian Supreme Court. P.02.1461.N (April 19 of 2003).

by equivalent simply replaces the object of confiscation (their value instead of the goods)[29]. Therefore, it is a penalty and it would have to have an explicit legal basis or it is unauthorized.

On the other side of the spectrum are the Constitutional Court and the Supreme Court. Both have validated the use by customs of confiscation by equivalent on many occasions. The reluctance to accept the Supreme Court's view is shown by the continuous stream of cases on the topic brought before it[30].

2.3. The Belgian Constitutional Court

In 2011, the Constitutional Court accepted that confiscation by equivalent is permitted without an explicit legal basis, even if it were considered a penalty[31]. Therefore, the court can order payment of the counter value of goods that cannot be confiscated.

According to the Constitutional Court, the penalty of confiscation would otherwise become meaningless in most customs matters because the confiscation of goods is often hampered by their mobility. The need for an effective and equal punishment for customs offenses must prevent that the offender would avoid the penalty of confiscation by disposing of the goods concerned. Thus, according to the Court, it follows from the very nature of the penalty of confiscation in customs matters that an offender can reasonably expect to be ordered to pay the counter value of the goods when the goods cannot be confiscated.

Another question before the Constitutional Court was whether operators in customs matters are not discriminated against because, in common criminal cases, confiscation by equivalent requires an explicit legal basis which is missing for confiscation by equivalent in customs matters. The Court dismissed the argument. According to the Court, the different regime is justified by the particular nature of customs legislation. Allowing the order to pay the counter value of the goods is an important measure to combat fraud effectively and secure the State's treasury.

Finally, it must be noted that the discussion before the Constitutional Court evolved around the premise that the obligation to pay the counter value of the

29 For an overview, see P. Waeterinckx. Juridische 'creativiteit' ten die nste van de-'kaalpluk' bij accijns- en douanefraude. Nullum Crimen 2014. pp. 319-326.

30 Some examples are: Belgian Supreme Court. P.14.0083.N (April 29 of 2014); P.09.1566.N (February 15 of 2011); P.09.1185N (December 8 of 2009); P.07.1562.N (February 12 of 2008); P.06.0928.N (October 31 of 2006); P.011494N (September 2 of 2003); P.02.1459-02.1578.N (April 29 of 2003); P.98.1346.N (September 21 of 1999).

31 Belgian Constitutional Court. Case 181/2011 (December 1 of 2011). Official Journal 7 February 2012. p. 8719.

goods where confiscation is impossible is a penalty. In that respect, it must be noted that the premise was dictated by the referring court. However, the Constitutional Court did not consider whether the said confiscation by equivalent is indeed a penalty. That would in fact have been problematic for the Constitutional Court because, according to the Supreme Court, it is not a penalty. Having said that, we now turn to the Supreme Court's qualification of the confiscation by equivalent.

2.4. The Belgian Supreme Court

For years, the Supreme Court has ruled that confiscation by equivalent, i.e. the obligation to pay the counter value of the goods, is not a penalty. Instead, it is the civil law consequence of the impossibility to comply with the penalty of confiscation. Under Articles 1382 and 1383 of the Civil Code, a debtor must reimburse the creditor when he cannot return the creditor's goods. In particular, those articles foresee that a person must reimburse the damage caused by his mistakes (Article 1382) or negligence (Article 1383).

According to the Supreme Court, the same principles apply in customs matters. When goods are confiscated, they become property of the customs authorities and they must be returned (confiscation) or reimbursed (confiscation by equivalent). The owner of the goods, i.e. the customs authorities, cannot be left empty handed. Without the possibility of a confiscation by equivalent, confiscation would often be an empty measure. The most recent case on confiscation by equivalent is the Supreme Court judgment of 29 April 2014[32]. But more cases will be brought to complete the long list of failed attempts to overturn the Supreme Court's position of justifying confiscation by equivalent.

As the penalty argument fails —at least for now— scholars and litigators have thrown a "competence argument" into the discussion. It argues that the criminal court judge cannot compensate for failure to return the goods. He can only compensate damages directly resulting from an offence. The offence is the customs law violation, not confiscation, which is only the penalty. Since an order for payment of the counter value of the goods aims at compensating for a missed confiscation —instead of compensating for the customs offence— it is not permissible. In their view, the case for confiscation by equivalent must be brought before the civil court judge, not before the criminal court judge. The criminal judge would then have to declare himself incompetent to handle the case.

32 Belgian Supreme Court. P.14.0083.N (April 29 of 2014). It has been settled case law for years. For prior Supreme Court judgments in the same way, see Belgian Supreme Court judgments P.09.1566.N (February 15 of 2011); P.09.1185N (December 8 of 2009); P.07.1562.N (February 12 of 2008); P.06.0928.N (October 31 of 2006); P.011494N (September 2 of 2003); P.02.1459-02.1578.N (April 29 of 2003); P.98.1346.N (September 21 of 1999).

The Supreme Court also dismissed the competence argument, invoking the same general civil law principle. Also here, the Court reiterated that the competence of the criminal court judge to order payment of the counter value of the goods stems from the general principle that a debtor must reimburse the creditor when he cannot return the creditor's goods.

2.5. Conclusion

Confiscation is a criminal penalty. Where confiscation is not possible, the customs authorities are entitled to the counter value of the goods. This confiscation by equivalent is criticized by the scholars, mainly because it is considered a penalty without legal basis. But the Supreme Court has validated it over and over again. According to the jurisprudence, confiscation by equivalent is not a penalty but the civil law consequence of the impossibility to comply with the penalty of confiscation. Under Articles 1382 and 1383 of the Civil Code, a debtor must reimburse the creditor when he cannot return the creditor's goods. When the Belgian Customs Act is reviewed and amended in the near future, the lawmakers should take the opportunity to settle the issue, eventually by adding confiscation by equivalent in the Customs Act. In the meantime, more cases will be brought in an attempt to overturn the settled case law —which will be difficult—, or at least to flag its problematic character and prepare the way for a legislative action.