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Customs Penalties in Germany

Michael Lux[*], Thomas Möller[**], Eric Pickett[***] & Alexander Retemeyer[****]

Penalties for infringements of customs law in Germany are deeply embedded in national fiscal, criminal and administrative sanctions legislation. The adoption of Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law has so far had no impact on this legislation. This article describes the current rules and practices with regard to customs penalties in Germany and looks at the implications of the proposed Directive on customs infringements and sanctions.

1 Introduction

1.1 *General*

In 2016 the German customs authorities collected approximately EUR 5.1 billion of customs duties and released over 70 million consignments for free circulation. A total of 21,925 investigations on suspicion of violations of customs law were also opened in 2016. These figures show that customs law and compliance with customs law continues to be very important. This goes both for travellers as well as for business operations. Given that criminal and administrative sanctions have not yet been harmonized in the EU, the place at which the customs violation occurs also plays an important role, since the penalties are governed by the law of that Member State, even though customs matters are governed primarily by Union law.

In Germany infringements of the customs legislation have been subject to penalties for decades. The 'effective, proportionate and dissuasive' measures required pursuant to Article 42 of the Union Customs Code (UCC) therefore already exist under German law; even prior to the adoption of that provision German law provided for criminal and administrative penalties for a number of infringements of customs law. The penalized infringements and the corresponding sanctions are expressly set out in the various provisions of the applicable legislation.

In the broad sense infringements of the customs legislation (compare Article 5 No. 2 UCC) occur when provisions which govern cross-border trade in goods are infringed. The legal fields governing cross-border trade in goods are diverse, including not only customs law, foreign trade law or export control law, but also the wide-ranging field of prohibitions and restrictions. In the narrower sense customs infringements concern infringements of provisions which govern the levy of import and export duties within the meaning of Article 5 Nos. 20 and 21 UCC, respectively (in practice, export duties do not exist in the EU, so they will no longer be mentioned here). The third sentence of section 1(1) of the German Customs Administration Act (*Zollverwaltungsgesetz, ZollVG*) defines the term 'import duty' for the purposes of German law (and different from EU law), which, in addition to the import duties as defined in the UCC, also encompasses import VAT and excise duties, such as the tobacco duty. National German law must be consistent with EU law and Germany's obligations as an EU Member State, so the provisions of national law

Notes

[*] Former German and EU official who practices as an attorney for German, EU and international trade and customs, VAT and excise duty law, including penalties, in Belgium and Germany (www.customs-law.expert). Email: michael.lux@customs-law.expert.

[**] Head of the main customs office Osnabrück and co-editor of the German commentary on customs penalties 'Steuerstrafrecht'. Email: Thomas.Moeller@zoll.bund.de. The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of any government agency.

[***] An American who is also a licensed German lawyer (www.pickett-law.com). Eric specializes in EU and German customs matters, EU trade law and WTO law. Email: info@pickett-law.com.

[****] Senior public prosecutor in Osnabrück and co-editor of the German commentary on customs penalties 'Steuerstrafrecht'.
Email: Alexander.Retemeyer@justiz.niedersachsen.de. The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of any government agency.

may be modified by the pertinent provisions of EU law, or even rendered inapplicable.

The difference between crimes and administrative offences under German law can be described as follows. If a provision provides that the act may be subject to imprisonment, then the conduct is a crime. If the conduct is not subject to imprisonment and only a fine (roughly the equivalent of a civil fine/civil penalty) may be imposed, then it is an administrative/regulatory offence or *Ordnungswidrigkeit* in German (roughly the equivalent of a civil offence). Paralleling this terminology, which is also reflected in the UCC, we refer to 'customs crimes' and 'customs offences', which is the 'civil' counterpart. The distinction between customs crimes and customs offences is of critical importance for Article 103(2) UCC, according to which the normal prescription period of three years is extended to a period of a minimum of five years and a maximum of ten years in accordance with national law in cases where a customs debt is incurred as the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings. In Germany this period is ten years. This extended period applies even if it was not the importer but the exporter in a foreign country who committed the criminal act. However, the customs authority bears the full burden of proof, including the element of intent where this is required by law, that a crime was committed.

Other penalties such as procedural penalties (e.g. default surcharges or fiscal liability) are separate and distinguishable from customs penalties, whether criminal or administrative. Article 114 UCC foresees a higher interest rate on arrears (including on customs debts discovered in the course of post-release controls) than in the case of payment facilities (Article 113 UCC). However, Union law does not define such higher interest rate as an administrative penalty.

1.2 *Customs Crimes*

The German Fiscal Code (*Abgabenordnung*, *AO*), which provides the general legislative framework for tax law, applies also with regard to customs duties, insofar as Union law is not applicable. The Fiscal Code contains a legal definition of customs crimes. Section 369(1) AO reads in relevant part: 'The following shall be tax crimes (customs crimes)'. Thus, even though customs crimes are not defined elsewhere, they are tax crimes.

In fact, however, the legal definition in section 369(1) AO was largely not necessary. Import duties within the meaning of the UCC and the customs duties levied pursuant thereto are already regarded as taxes pursuant to section 3(3) AO, which provides that '[i]mport and export duties pursuant to Article 5 numbers 20 and 21 of the Union Customs Code shall be taxes within the meaning of this Code.' The customs crimes pursuant to the Fiscal Code are a synonym under customs law for tax crimes in respect of the tax 'customs duty'. In short, customs duties are a category of taxes. Thus, customs crimes are a special case of tax crimes. This means that, while all customs crimes under the Fiscal Code are tax crimes, not all tax crimes are customs crimes.

This type of tax crime therefore has to concern customs duties, which are taxes imposed on goods imported from another country (i.e. non-German goods). However, Germany is in a special situation: it is an EU Member State. The European Union is also a customs union (compare Article 28(1) of the Treaty on the Functioning of the European Union, TFEU). Customs duties are only levied in cross-border trade between the European Union and 'third countries', i.e. non-EU Member countries (Article 28(1) TFEU). Customs duties are therefore levied only on non-Union goods. If a German company 'imports' French wine wholly obtained in Bordeaux, for example, it cannot commit a customs crime because the French wine is a Union good (as defined in Article 5 No 23 UCC) and thus not subject to customs duties when brought into another EU Member State. However, if the (taxable) person in Germany responsible for the VAT fails to notify and pay the VAT owed on an intra-EU acquisition, a tax crime (but not a customs crime) may have been committed. If the French wine was shipped from outside the EU (e.g.: French producer → Moroccan wholesaler → German customer), then the wine may have lost its status as a Union good (compare Article 154(a) UCC) and, in that case, is a suitable object for a customs crime.

Pursuant to section 369(1) AO customs crimes are:

(1) acts which are punishable under tax legislation, which includes tax evasion pursuant to section 370 AO, smuggling pursuant to section 373 AO and receiving, holding or selling goods obtained by tax evasion pursuant to section 374 AO;

(2) the prohibited import, export, or transit of goods pursuant to section 372 AO;

(3) the counterfeiting of official stamps and preparatory acts pursuant to sections 148, 149 of the German Criminal Code (*Strafgesetzbuch, StGB*) provided the act concerns revenue stamps; and

(4) the aiding of the perpetrator of one of the aforementioned customs crimes after the fact.

The common element of most of these crimes (besides the import duty liability) is that non-Union goods are brought into the customs territory of the Union, or transit through that territory, or that non-Union goods are taken out of the customs territory of the Union. More precisely, each of these provisions requires (1) a certain customs status of the good and (2) a geographical element, namely, a crossing of the border of the customs territory of the Union (compare Article 4 UCC, which defines the customs territory of the Union and makes clear that this territory is not identical to the sovereign

territory of the Member States), and (3) a real act (e.g. bringing goods into the customs territory of the Union) or a statement (e.g. a customs declaration).

An exception to this principle is section 372 AO which covers a large range of infringements of import and export prohibitions (see section 3.2 below), and therefore does not cover offences against customs legislation, as defined in Article 5 No 2 UCC. In all other cases where provisions of Union or national external trade or customs law are infringed (e.g. the procedural rules on the export of Union goods) other legislation than the Fiscal Code is applied; such legislation is not labelled as 'customs' crime under German law. For example, sections 17 and 18 of the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz, AWG*) lay down criminal penalties for violations of embargos, Security Council resolutions etc. These provisions are beyond the scope of this article, whereas penalties for infringements of customs law not covered by the Fiscal Code (and thus not considered as 'customs' offences) are treated under section 4.3 below.

By establishing the equivalence of customs crimes with tax crimes, customs crimes are subject to the same criminal provisions of the Fiscal Code as other tax crimes. The general provisions of criminal law are therefore also applicable to customs crimes; they are the legal framework in which the Fiscal Code's criminal provisions are applied.

In addition to import duties (as defined in Article 5 No 20 UCC) the German customs authorities are responsible for administering import VAT and excise duties (e.g. on tobacco, alcohol, and energy). Import VAT pursuant to Directive 2006/112/EC is levied on imports from third countries which enter the German territory, unless the goods remain under a suspensive customs procedure (such as external transit or customs warehousing) or unless the goods are released for free circulation under procedure code 42 because they will be moved to another Member State. Pursuant to section 21(2) of the German VAT Act (*Umsatzsteuergesetz, UStG*) the customs legislation also applies *mutatis mutandis* to import VAT, though in the light of recent case law (which requires that the goods have entered into the economic circuit of the Member State in which import VAT is levied) it is dubious as to whether this legal position would withstand legal challenge in cases where the goods did not enter into the economic circuit of Germany.

Excise duties are also levied on imports from third countries where such duties are applicable and not suspended (e.g. in case of external transit). Where excise duties are levied on imports from third countries the provisions of the customs legislation also apply pursuant to the relevant references to the customs legislation in the German excise legislation. Consequently, under German legislation VAT and excise duties levied upon the import of goods from third countries fall within the scope of the definition of customs crimes.

According to the principles of German criminal law a punishable criminal offence always requires that (1) the elements of the crime (both the objective elements as well as *mens rea*, commonly called the subjective element in Germany) are realized or present, (2) there is an absence of a justification, and (3) there are no exculpatory grounds. In respect of the subjective element of intent, conditional intent (*dolus eventualis*) is sufficient. Conditional intent (also called "contingent intent") is when the perpetrator considers that the realization of the elements of the offence is a serious possibility and accepts that that situation may come about. However, to obtain a conviction for tax evasion a 'double intent' must be proven according to the case law of the German Federal Court of Justice and the prevailing opinion in the literature. First, the perpetrator must have knowledge of the objective elements of the crime, e.g. that there are non-Union goods being, or having been, brought into the customs territory of the Union. He or she does not need to be aware of all the particulars of the objective elements. Contingent intent is sufficient. Second, on the prevailing view and according to case law, the perpetrator must also either know or at least believe that it is possible that the act or omission will result in an understatement of customs duties. Although it is not sufficient if the perpetrator could have known or should reasonably have known that the customs duties would be evaded in whole or in part – in that case he or she may have acted recklessly and fulfilled the conditions for imposing an administrative fine pursuant to section 378 AO – it is sufficient if the perpetrator knew that customs duties would be or might be avoided, even if the perpetrator did not know the amount of the evasion. Here as well contingent intent is sufficient.

Justifications are difficult to imagine in the context of customs crimes. The principles of general criminal law are applicable to excuses.

Under the German constitution (*Grundgesetz*, *GG*) the elements of a crime and the penalties must be codified in a statute; it is not sufficient if the mandatory legal obligation or prohibition is contained solely in administrative provisions or is set out in administrative orders issued by the customs authority. This principle is set out in Article 103(2) GG and is technically known as the principle of *nulla poena sine lege certa.* It applies both to criminal law as well as the law governing administrative offences. The principles of German constitutional law and in particular the principle of legal certainty (*nulla poena*) have led to litigation concerning the norms applicable to customs crimes and customs offences, in particular because these are 'blanket norms', insofar as they refer to other legislation (see section 2.1 below).

1.3 *Customs Offences*

Customs offences are administrative/regulatory offences. They are committed when a provision of the customs legislation is infringed and that infringement is subject to punishment by a fine, but not imprisonment, under the

applicable national legislation. In Germany customs offences are governed in sections 377–384 AO, in particular section 382 AO (endangerment of import and export duties), section 31 ZollVG (tax offences) and section 30 of the German Customs Implementing Regulation (*Zollverordnung, ZollV*) (tax offences). Sections 1–34 of the German Act on Regulatory Offences (*Ordnungswidrigkeitengesetz*, *OWiG*) also apply. In addition, pursuant to section 130 OWiG the breach of the duty of proper supervision in undertakings and companies is punishable where the underlying act subject to supervision constitutes a tax crime or tax offence.

Section 19 AWG in conjunction with sections 81, 82 AWV subjects certain infringements of customs legislation which are not related to customs duties to administrative sanctions.

1.4 *Corporate Penalties*

In German criminal law the 'corporate penalty' presents a significant problem because the punishment, at least according to the traditional German conception, is very much related to the perpetrator's *mens rea.* A legal person cannot have a state of mind/intent nor can it be 'guilty' in the sense that it can be accused of culpably not conducting itself in accordance with the law. However, where the conditions set out in section 30 OWiG are met (these are discussed in section 5.5 below), an administrative fine may be imposed on legal persons or associations of persons which are not legal persons. Such fines are administrative penalties within the meaning of Article 42 UCC.

Of particular importance to commercial entities is the issue of penalties in the form of the suspension or revocation of authorizations, e.g. the authorization as an Authorised Economic Operator (AEO). Pursuant to Article 42(2)(b) UCC administrative penalties may take the form of the revocation, suspension or amendment of authorizations held by the person concerned in addition, or as an alternative, to administrative fines. The term 'person' includes undertakings (compare Article 5 Nr. 4 UCC).

The pertinent provisions of German legislation on customs offences do not foresee this as an alternative or additional penalty, but persistent or serious customs offences may lead to either the suspension of authorizations until the matter is clarified or to the revocation of the authorization because the conditions for its issuance are no longer satisfied, e.g. the holder can no longer be regarded as being reliable (compare also Arts 23(4)(b) and 28(1)(a) UCC, Arts 16–18. of the UCC Delegated Act (UCC DA), and Article 15 of the UCC Implementing Act, (UCC IA)). In other words, it is questionable whether the suspension or revocation of an authorization under the German sanctions system can be regarded as a penalty within the meaning of Article 42(2)(b) UCC because it is merely a consequential result. A different approach would also raise the issue of whether the legal principle of *ne bis in idem* is infringed if the suspension or revocation is regarded as a sanction. This legal issue should not, however, obscure the fact that serious or persistent customs offences will jeopardize existing authorizations and create problems when applying for new authorizations. It needs to be emphasized that customs clearance in Germany is, in the interest of both economic operators and of customs authorities, based on the use of simplifications, such as simplified declarations or entry in the declarant's records, followed by a monthly supplementary declaration, combined with deferred payment on a monthly basis against a comprehensive guarantee. If the authorizations of a large number of economic operators or systemically important economic operators were suspended or revoked, the whole clearance system would no longer function smoothly. This pragmatic consideration may explain why the German diesel scandal has so far not led to the conclusion that customs authorizations (especially for AEO) had to be suspended or revoked on the grounds of 'serious criminal offences relating to the economic activity of the applicant' (compare Article 39 (a) UCC), but the legal implications are not yet fully clear. However, we believe that, in the future, the requirement to show a clean record with regard to customs, tax and other business-related offences (apart from minor and limited offences) will mean inter alia that the perpetrators will be fired by the companies so that they can maintain their authorizations. The perpetrators themselves will have to look for a job outside the area of responsibility for customs matters, at least until the sanction is removed from the official records. If the criteria of Article 39(a) UCC is applied rigorously this is an issue which concerns all EU Member States.

2 Definition and non-prosecution of customs crimes

2.1 *Blanket Law*

German customs criminal law is blanket law, i.e. the provisions lay down the legal consequence but the elements on which the consequence are based are set out in another legal source. This is particularly the case for the basic elements of tax evasion pursuant to section 370 of the Fiscal Code (*Abgabenordnung*, *AO*) and the receiving, holding or selling of goods obtained by tax evasion pursuant to section 374 AO. In order to discover what acts constitute tax evasion, the substantive provisions of the customs legislation (or the VAT Act (*Umsatzsteuergesetz, UStG*) or the applicable excise duty legislation) must be consulted; these 'fill out' the blanket norm(s) of the Fiscal Code.

The norms which 'fill out' the pertinent blanket norm of the Fiscal Code include not only German norms but also secondary European legislative acts. For example, section 382(1) AO specifically mentions the 'Regulations of the Council of the European Union or the European Commission.' This technique of referencing European

legislation has led to the increasing importance of European law for German criminal law.

Certain acts and declarations in the field of customs law are tax declarations within the meaning of the Fiscal Code and, as a rule, contain particulars which are relevant for taxes. In practice, the elements of customs crimes are complex due to the provisions of customs law which 'fill out' the blanket norms. The terminology and system of European customs legislation, as well as the interpretation of the European Court of Justice (ECJ), may conflict with the German system of (tax) crime. For example, a provision of German criminal law is subject to the German rules governing interpretation, while the provision of European law which fills out the German provision is subject to the Union rules governing the interpretation of EU law. In respect of Union law the ECJ has a monopoly over interpretation so the trial court which is seized with the case concerning the customs crime may be obliged to refer questions concerning the interpretation of provisions of Union law to the ECJ for a preliminary ruling (compare Article 267 of the TFEU). The German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) has ruled that a criminal court is obliged at every stage of the proceeding to exercise special care when examining the issue of whether there are doubts concerning the interpretation of provisions of Union law which are decisive for adjudicating the case and whether the question should be referred to the ECJ (Order of the Federal Constitutional Court of 10 July 1989, 2 BvR 751/89, NJW 1989, pages 2464 *et seq.*).

The situation becomes even more complex when one considers that the underlying infraction may involve very complex rules of customs law at the European level such as tariff classification, rules of origin, customs valuation or the rules governing the calculation of duties in the case of inward processing.

2.2 *Non-Prosecution of Customs Crimes*

2.2.1 *Surcharge as an Alternative*

Section 32 of the Customs Administration Act (*Zollverwaltungsgesetz, ZollVG*) governs the non-prosecution of tax crimes and tax offences as well as the imposition of customs surcharges. Where the understatement of import duties or special excise duties amounts to no more than EUR 250, then prosecution of the crime should not be pursued. This is why section 32 ZollVG is also called the 'smuggler's privilege': the purpose is to remove negligible customs infringements (no more than EUR 250) from criminal law. According to the wording of the provision all customs crimes fall within its scope. The surcharge imposed pursuant to this provision is, in the view of the German customs authorities, neither a criminal penalty nor a fine. It is a fee *sui generis.* The provisions of the Fiscal Code are applicable to section 32 ZollVG and the surcharge. The surcharge may be up to the amount of the import duties to be levied but may not exceed EUR 250 (section 32(3) ZollVG). The surcharge may also be imposed in cases where criminal charges are not preferred because the crime is deemed to be a petty offence within the meaning of section 153 of the German Code of Criminal Procedure (*Strafprozeßordnung*, *StPO*) or section 398 AO. From the perspective of EU law, however, the payment could also be considered as an administrative penalty in the sense of Article 42(2)(a) UCC.

2.2.2 *Dispensing Misdemeanours*

In addition, in cases of misdemeanours (misdemeanours are unlawful acts punishable by a term of imprisonment of less than one year or by a fine, section 12(2) of the Criminal Code (*Strafgesetzbuch, StGB*)) criminal action may be dispensed with pursuant to section 153a StPO. Dispensing with a case pursuant to this provision requires the consent of the court competent to order the opening of the main proceedings and the consent of the accused. Prosecution will not be sought only if the conditions which are concurrently imposed are fulfilled, e.g. public service or payment to an approved non-profit institution. Furthermore, this option is only open where the conditions are of such a nature as to eliminate the public interest in criminal prosecution and the degree of guilt does not present an obstacle. Where the condition for not bringing charges is a payment to a non-profit institution, this payment is not considered to be a surcharge in the sense of section 32 ZollVG. It is not considered to be an administrative penalty though the amount of public service or money to be spent is in fact determined during the 'settlement' phase. From the perspective of EU law, however, the payment could also be considered an administrative penalty in the sense of Article 42(2)(a) UCC.

Where the understatement of taxes was only minor, criminal prosecution can also be dispensed with pursuant to section 398 AO. In contrast to section 153a StPO, section 398 AO does not require the consent of the court responsible for opening the main proceedings. This option is available for only minor understatements of taxes or where only minor tax advantages have been derived. The threshold amounts for a 'minor' understatement of taxes or 'minor' benefits is unsettled and, in practice, varies by region. Furthermore, the perpetrator's degree of guilt must be slight and this option is not available if there is a public interest in the prosecution.

Where the offence was committed by a foreigner in Germany on a foreign ship or aircraft, the public prosecutor may dispense with the criminal prosecution (section 153c(1) No 2 StPO).

2.2.3 *Voluntary Self-Disclosure*

Section 371 AO governs voluntary self-disclosures (hereinafter 'VSD') to avoid criminal penalties in cases of tax evasion. A valid VSD constitutes personal grounds for

quashing a sentence. Although not specifically mentioned in the provision, VSDs extend to the evasion of import duties.

In order for a VSD pursuant to section 371 AO to be valid, it must fully correct the incorrect particulars submitted to the revenue authority, in this case the customs authority. The information provided must cover all tax crimes for one type of tax that have not become time-barred, and at least all tax crimes for one type of tax within the last ten calendar years. There is no legal definition of 'one type of tax'; the interpretation of this term is a contentious issue.

The VSD serves the purpose of allowing the perpetrator to subsequently discharge his or her tax obligations. It also serves to uncover sources of taxable revenue which had previously not been disclosed. From the point of view of criminal policy it opens the opportunity for the perpetrator to comply with the tax/customs law in the future. The conditions for lodging a valid VSD and thus avoiding criminal penalties were significantly tightened in Germany on 1 January 2015. This reform had the practical effect that it is now difficult at best to lodge a valid VSD.

According to the clear wording of section 371(1) AO, the VSD pursuant to this provision has effect only for crimes committed pursuant to section 370(1) AO (see section 3.1 below). Furthermore, section 371(2) AO restricts the circumstances under which a VSD may be lodged (exclusions). For example, where the person involved in the act or his representative has been notified of an audit order, a VSD will not operate to exempt the person lodging it from punishment pursuant to section 370 AO for the material and temporal tax matters within the scope of the ordered external audit (section 371(2) No. 1(b) AO). The exemption from punishment is also contingent on the payment of any back taxes owed or repayment of any tax benefits derived, plus interest (section 371(3) AO).

A VSD in accordance with section 371 AO is not applicable to section 372 AO (see section 3.2 below), but such disclosure would nonetheless encompass this offence where it was committed concurrently with tax evasion. When assessing the level of sentencing for a violation of section 372 AO, a VSD can be taken into consideration as a mitigating factor in those cases where the VSD does not encompass the violation of that provision.

There is no 'smuggler's privilege' (see section 2.2.1 above) for violations of section 372 AO because that privilege extends solely to fiscal interests, not to legally protected goods beyond it, which is what section 372 AO in conjunction with the underlying prohibition protects (e.g. health or the environment, see section 3.2 below).

Similarly, the scope of application of section 371 AO does not extend to sections 373 or 374 AO (see sections 3.3 and 3.4 below). Where a 'VSD' was filed in these cases, it will be treated as a confession and mitigating circumstance.

3 The specific customs crimes

3.1 *Evasion of Customs Duties (Basic Offence)*

Section 370(1) of the Fiscal Code (*Abgabenordnung*, *AO*) lays down three types of acts/omissions which constitute evasion of customs duties, which are discussed in detail below. Although each of these types of acts or omissions may appear straight forward at first glance, appearances are deceiving.

The cross-border trade in goods is characterized by a wide range of goods, means of transport, transport routes and customs procedures which seem complicated for non-specialists. An appropriate systematization of customs infringements for the purpose of determining when an evasion of customs duties has been committed is difficult. As pointed out above, section 370 AO is a blanket law (see section 2.1 above). It is 'filled out' by the provisions of substantive customs law, so it is necessary to refer to the provisions of customs law set out in particular in the UCC and the related UCC DA and UCC IA.

The customs legislation links the acceptance of the customs declaration requesting the release of non-Union goods for free circulation with the incurrence of a customs debt (Article 77(2) UCC). The declarant is the debtor, and in the case of indirect representation also the person represented; furthermore, the person who provided wrong information and knew or should have known that it was false is also a debtor (Article 77(3) UCC). The general obligation to provide correct information and documents to the customs authorities is set out in Article 15 UCC.

A customs debt may also be incurred due to non-compliance (compare in particular Article 79 UCC). The incurrence of a customs debt due to irregularities is directly based on infringements of obligations under customs law. The pool of potential customs debtors is larger in these cases because the person(s) acting, the person(s) involved and/or the person(s) receiving or acquiring the goods are all customs debtors. In the language of Article 79(3) and (4) UCC these are:

- any person who was required to fulfil the obligations concerned;
- any person who was aware or should reasonably have been aware that an obligation under the customs legislation was not fulfilled and who acted on behalf of the person who was obliged to fulfil the obligation, or who participated in the act which led to the non-fulfilment of the obligation;
- any person who acquired or held the goods in question and who was aware or should reasonably have been aware at the time of acquiring or receiving the goods that an obligation under the customs legislation was not fulfilled;

– the person who is required to comply with the conditions governing the placing of the goods under a customs procedure or the customs declaration of the goods placed under that customs procedure or the granting of a duty exemption or reduced rate of import duty by virtue of the end-use of the goods.

The acts or omissions which give rise to the incurrence of the customs debt may also be relevant in the context of criminal law. However, the criminal acts or omissions pursuant to section 370(1) AO do not necessarily directly correspond to the irregularities which may give rise to a customs debt. For example, where non-Union goods are temporarily removed from customs supervision, this may give rise to a customs debt, but that act does not in and of itself necessarily result in a violation of section 370(1) AO because customs duties may not have been evaded by this act (e.g. separating documents from the goods or using a different route than that prescribed for external transit).

In the following, the three types of acts/omissions which constitute evasion of customs duties and thus taxes pursuant to section 370(1) Nos. 1 to 3 AO are presented in detail.

3.1.1 *Incorrect or Incomplete Declarations*

The first type of act or omission consists of furnishing incorrect or incomplete particulars relevant for taxation (section 370(1) No 1 AO). This variant of the evasion of customs duties is a 'statement offence' because the elements of the criminal act are realized by making incorrect or incomplete statements to the customs authorities insofar is the particulars concerned are relevant in the context of customs duties.

The elements of this offence can also be realized by an omission pursuant to the general principles of criminal law, which are also applicable to sections 370 et seq. AO. This means that the omission is criminal only where the person is responsible under law to ensure that the result does not occur and the omission is equivalent to the realization of the statutory elements of the offence through a positive act (section 13 of the Criminal Code (*Strafgesetzbuch, StGB*)).

The elements of this variant are generally realized by a positive act: the statements made to the customs authority about relevant particulars are false (e.g. description, quantity, origin, value of the goods). Under customs law, information allowing for the customs supervision of goods is also covered (e.g. about the fact that a container has been unloaded from a ship).

The customs legislation is also characterized by a number of real acts (e.g. bringing goods into or taking goods out of the customs territory of the Union, which may constitute a customs declaration, compare Arts 138–141 UCC DA) and procedural acts (e.g. lodging an entry summary declaration, the presentation of the goods or lodging a customs declaration) which contain a statement to the customs authority of particulars relevant for taxation.

False statements about the existence of goods can be made in many ways (e.g. hidden or concealed goods), asserting claims for customs exemptions (e.g. asserting that they are returned goods, have preferential origin, or claiming conditions for duty relief), regarding the reduction of the assessment basis (e.g. false statements concerning the tariff classification of the goods or an understatement of the customs value) or when requesting a customs procedure (e.g. false statements for placing non-Union goods under the Union transit procedure).

The concept of a statement is broad and includes implied statements. For example, when a traveller uses the green channel for customs, he or she is stating that there is nothing to declare.

Pursuant to section 25(2) StGB where more than one person is involved, the acts, including the statements, of the person actually carrying out the offence are attributed to the joint perpetrators or organizers behind the scenes. Pursuant to section 25(1), 2nd alternative StGB, where the person making the statements was used by the organizer(s) as an innocent agent, they themselves are indirect perpetrators.

3.1.2 *Failing to Provide Information About Relevant Particulars*

The second variant of duty evasion – not informing the customs authorities of particulars concerning matters relevant for taxation (section 370(1) No 2 AO) – has special importance for classical smuggling. Diverse customs obligations must be discharged in connection with the import of goods. The customs administrative procedure has special features in comparison to the typical tax assessment (e.g. the entry summary declaration or the presentation for the purposes of temporary storage or a customs procedure so that the customs authorities are made aware that the goods have arrived). Facts which are relevant for taxation are therefore not only particulars which are factors for calculating the amount of customs duties, but also information which alerts the customs authorities that the goods exist in the first place (e.g. goods hidden in a lorry and not covered by the declaration).

According to the prevailing view section 370(1) No 2 AO is a crime which can only be committed by a certain group of offenders. As is the case for taxes based on possession and transactions, where customs duties are at issue the question arises as to who is obliged to inform the customs authorities. What is decisive for section 370(1) No 2 AO is that the declarant (1) has an obligation to make a statement to the customs authorities, and (2) failed to make the statement properly or failed to make the statement at all.

As a rule the customs legislation specifies who is obliged to inform the customs authorities of the relevant

particulars. For example, the person who brings goods into the customs territory of the Union is responsible for properly performing the act of bringing and presenting the goods. The act of bringing goods into the customs territory is a real act which can be performed only by the carrier (compare Article 135 UCC), while the presentation is a notification of the place where the goods (which must be specified) are located in the customs territory; such notification can be made by person other than the carrier (compare Article 139(1)(b) and (c) UCC, and for the meaning of the term 'presentation' Article 5 No 33 UCC). The data to be declared varies by type of declaration or notification and is set out in the Annexes to the UCC DA and UCC IA.

The obligations in respect of statements of intent or facts laid down in the customs legislation do not have to be personally discharged because the UCC permits the use of customs representatives (Arts 18, 19 UCC). In such case, there are (at least) two persons who are obliged to make true and accurate statements: the principal and the representative. This shows that, where a person is subject to obligations pursuant to the customs legislation, such obligations do not necessarily constitute special personal characteristics within the meaning of section 28(1) StGB, meaning that only specific persons can be considered as the perpetrator. An example for such exception is the obligation on the part of the holder of a customs warehouse authorization to keep records (Article 214 UCC), such records also being statements.

For the purposes of criminal law the perpetrator is generally the person who carried out the real act, e.g. carried the goods across the border without declaring them, even where he or she is merely acting on behalf of another person (e.g. the driver of a logistics company). Where the driver had no knowledge that the undeclared or wrongly declared goods were in the lorry, for instance, he or she had no criminal intent and therefore no criminal liability. The principal may have criminal liability under section 25 StGB, as discussed above.

The example of the lorry driver also shows the divergence between the liability to pay the customs duties and criminal liability. Where the driver in our example has no criminal liability under section 370(1) AO because he or she was unaware that the goods were on board, he or she is still a debtor under the UCC and liable for payment (compare Article 79(3)(a UCC), given that the rules on the incurrence of a customs debt do not require fault in the sense of intent or even negligence.

3.1.3 *Non-Use of Revenue Stamps*

The third variant of tax evasion consists of omitting to use revenue stamps, although there is an obligation to use them pursuant to section 370(1) No 3 AO. Today this has importance only for the import of tobacco products (tobacco revenue stamps). The tobacco duty arises when tobacco products are released for free consumption (section 15(1) of the German Tobacco Duty Act (*Tabaksteuergesetz, TabStG*)). The tobacco duty is to be paid by the use of revenue stamps, i.e. the validation and affixation of the revenue stamps. Tobacco revenue stamps having the prescribed official form must first be ordered from the *Steuerzeichenstelle Bünde* of the Main Customs Office (*Hauptzollamt*) Bielefeld. This is also the corresponding tax declaration.

3.1.4 *Extension to Import Duties Evaded in Other Countries*

Section 370(6) AO extends the scope of application to import duties which are administered by another Member State of the European Union or to which a Member State of the European Free Trade Association (EFTA) or a country associated therewith is entitled. This means that such crimes may be pursued in Germany even where the success was realized abroad.

3.1.5 *Range of Punishment for All Variants*

Tax evasion pursuant to section 370(1) AO is punishable by up to five years' imprisonment or a monetary fine. Particularly serious cases are punishable by imprisonment for a term of between six months and ten years (section 370(3) AO). A particularly serious case exists inter alia where the perpetrator deliberately understates taxes on a large scale (section 370(3) No. 1 AO). Where the evasion is in an amount of EUR 1 million or more imprisonment is, for practical purposes, mandatory according to German case law. This has implications for commercially active parties, especially where anti-dumping or anti-subsidy (countervailing) duties are at issue, since this amount is easily reached, especially when considering that the relevant period for the duties owed is ten years and that the relevant amount is the sum total of all duties owed.

3.1.6 *Attempt*

The attempt is punishable (section 370(2) AO). Systematically the provision refers to section 370(1) AO. However, it is settled case law that this extends to particularly serious cases pursuant to section 370(3) AO. Section 370(6) AO, which extends the scope of application to foreign countries, specifically references subsection 2, meaning that the attempt is punishable in those cases, as well.

3.2 *Prohibited Import, Export, or Transit of Goods*

Whoever imports, exports or transports goods in violation of a prohibition shall be deemed to have illegally

imported, exported or transported goods (section 372(1) AO). The functional purpose of section 372 AO is to qualify the acts enumerated in section 372 AO as tax crimes and thus to establish the jurisdiction of the customs administration to pursue the crime, even where the illegal importation, exportation or transport of goods does not have anything to do with collecting customs duties.

Section 372 AO is a blanket norm: the prohibitions which fall within its scope are set out in other legislative acts, e.g. the German Narcotics Act (*Betäubungsmittelgesetz, BtMG).* The interests which may be protected by the prohibition are wide-ranging, including e.g. public morality, public policy or public security, the protection of the health and life of humans, animals or plants, the protection of the environment, the protection of national treasures possessing artistic, historic or archaeological value and the protection of industrial or commercial property (compare Arts 134(1) and 267(3)(e) UCC).

Importation, exportation and transit is the real act of bringing a relevant good into the territory, taking it out of the territory or transporting it across the territory. However, the provision does not and cannot make a direct reference to the customs legislation to define the term 'territory'. Rather, section 372 AO has its own, independent protected territory. That territory is determined by the relevant prohibition legislation which 'fills out' the provision. This means that the geography of the protected territory varies on a case-by-case basis, depending on the underlying prohibition (example: Helgoland is outside the customs territory pursuant to Article 4(1) UCC but a specific prohibition may nonetheless apply).

The illegal import, export, or transit of goods is an offence of commission, whereby a simple real act is sufficient; a particular outcome or success is not required.

Pursuant to section 372 AO the illegal import, export, or transit of goods is punishable pursuant to section 370 (1) and (2) AO. In practice, where the perpetrator has violated section 372 AO, as a rule, he or she has also concurrently committed evasion of customs duties if the goods concerned are subject to such duties. However, a concurrence of offences is not possible for narcotics and counterfeit money because, in these cases, a debt for import duty does not arise pursuant to Article 83(2) UCC. Thus under German law it is not necessary to rely on the solution offered by Article 83(3) UCC, according to which, for the purposes of customs penalties, the customs debt shall nevertheless be deemed to have been incurred where, under the law of a Member State, import duty or the existence of a customs debt provides the basis for determining penalties.

If the act is subject to criminal penalties or a regulatory fine under more specific legislation, then the act is not punishable pursuant to section 372 AO (principle of subsidiarity). Otherwise the perpetrator shall be punished in accordance with section 370(1) AO, i.e. up to five years' imprisonment or a monetary fine.

Section 372(2) AO refers to section 370(2) AO, meaning that the attempt is punishable, but only where the act is not subject to punishment or a monetary fine as a violation of import, export, or transit prohibitions pursuant to other provisions.

Given that most of the laws and regulations pertinent to section 372 AO also foresee the threat of criminal penalties or administrative fines, the scope of application of this provision in practice is somewhat diminished. Whether or not escaping sentencing as a tax evader is advantageous for the perpetrator will depend on the applicable provision. For example, the penalty for violating an embargo is imprisonment for a term of from three months to five years (section 18(1) of the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*, *AWG*), i.e. there is a mandatory prison sentence, which is less advantageous. On the other hand, where a person leaves although a customs officer has ordered him or her to stay, he or she has committed a customs offence (compare section 31(2) No 1 in conjunction with section 10(1) sentence 2 AWG). Punishment in accordance with these provisions of the Customs Administration Act is more advantageous than punishment for tax evasion pursuant to section 370(1) AO.

3.3 *Smuggling (Aggravated Tax Evasion)*

Section 373 AO lays down more severe penalties for the professional, organized or violent avoidance of customs duties (so-called aggravated tax evasion). Each of these three variants represents an independent aggravating circumstance.

Section 373 AO can only be applied where the basic offence, i.e. section 370 or 372 AO, is fulfilled in respect of both its objective as well as subjective elements and at least one of the aggravating circumstances is present. In respect of excise duties, these only fall within the scope of section 373 AO where they arise as import duties, i.e. when they are to be levied on goods brought into the territory from a third country. In those cases where section 372 AO constitutes the basic offence, it is not material whether the illegal import, export or transport is to be pursued pursuant to section 370 AO or pursuant to the provisions governing criminal and administrative sanctions of a special prohibition statute.

Section 373(4) AO extends the scope of application to import or export duties which are administered by another Member State of the European Union or to which a Member State of the EFTA or a country associated therewith is entitled. This means that such crimes (e.g. false statements of preferential origin) may be pursued in Germany even where the success was realized abroad. Given the wide range of preferential agreements, one may question why this extension applies only to EFTA countries and not to other preferential partners of the European Union.

Notwithstanding the heading of the provision, the application of aggravated sentences is not limited solely to cases which the general public would regard as smuggling or where the customs debt arises due to misconduct. Rather, the aggravated penalties extend to all manifestations of evasion of import duties (e.g. including understating import duties by making false statements in the customs declaration where this is done on a professional basis).

In should be pointed out that professional smuggling does not mean that the act takes place in a commercial context or that the person(s) involved 'do it for a living' as a 'steady job'. Rather, there must be the intent to obtain a continuous source of income for him- or herself for a certain period and in a certain amount by repeatedly committing crimes of the same nature. Savings, e.g. stating an incorrect tariff classification to save on the amount of duties owed, is regarded as a source of income. Where the act was 'selfless', i.e. the perpetrator did not intend to receive any benefits for him- or herself (including savings), 'professional smuggling' was not committed. Where the intent element is present, the perpetrator need only commit the crime once to realize the element 'professional smuggling'. If the perpetrator did not have access to the fruits of the crime or ready access to the pecuniary benefits derived therefrom, he or she did not commit the crime of professional smuggling. The element 'professional' is a special personal characteristic within the meaning of section 28(2) StGB (see section 3.1.2 above).

The rules governing the criminal liability of accomplices to aggravated smuggling are guided by several principles. A conviction for professional smuggling or smuggling as member of a group (minimum: three people) formed for the purpose of repeatedly smuggling requires that the accomplice him- or herself makes a relevant contribution to the crime. It is only in the absence of such a contribution that the accused cannot be considered to be a joint perpetrator. In such cases he or she may be convicted of aiding or abetting the group.

Carrying a firearm or weapon during the commission of the crime is not a special personal characteristic within the meaning of section 28(2) StGB, meaning that the aggravating circumstance does not have to be realized in the person of the joint perpetrator or person aiding or abetting the crime. However, the person who did not carry the firearm or weapon during the commission of the crime had to have knowledge of it. Thus, where a firearm or weapon was carried by one of the perpetrators, all the perpetrators and accomplices may be convicted of violating section 373 AO, irrespective of whether the aggravating circumstance was realized in the person of the defendant, provided they knew of the firearm or weapon.

Section 373(4) AO extends the scope of application to import or export duties which are administered by another Member State of the European Union or to which a Member State of the EFTA or a country associated therewith is entitled. This means that such crimes may be pursued in Germany even where the success was realized abroad.

In comparison to the basic offence of tax evasion (sections 370 and 372 AO), the level of sanctions pursuant to section 373 AO is markedly more severe. It is punishable by imprisonment for a period of six months to ten years; a fine as an alternative is not foreseen. The second sentence of section 373(1) AO opens the possibility for the imposition of a reduced sentence in less serious cases: imprisonment for up to five years or a monetary fine.

The attempt is punishable (section 373(3) AO).

3.4 *Receiving, Holding or Selling Goods Obtained by Tax Evasion*

Anyone who:

- purchases or otherwise acquires for himself or for a third party,
- sells or helps to sell products or goods
- in connection with which

(1) excise duties or import duties pursuant to Article 5 No. 20 UCC have been evaded or

(2) the illegal import, export or transit of goods pursuant to section 372(2) and section 373 AO has been committed

- with the aim of enriching himself or a third party

has committed a violation of section 374 AO.

The wrongfulness of the offence consists in perpetuating a situation which is in violation of the tax law (compare Article 79(3) (c) UCC which extends duty liability to such persons without, however, requiring the aim of enrichment).

Section 374 AO requires (1) a violation of section 370 or 372 AO as a predicate offence and (2) another person who (3) has entirely completed the predicate offence before (4) the act which violates section 374 AO is undertaken. The person who committed the predicate offence cannot also commit a violation of section 374 AO, meaning that the act pursuant to section 374 AO is a subsequent lesser offence which is regarded as already punished by the sentence for the predicate offence. However, this does not exclude the possibility that a person may be guilty of aiding or abetting a violation of section 374 AO even though he or she participated in the predicate offence. The elements of the predicate offence must be realized and there can be no justification for the predicate offence, but the absence of an excuse is not necessarily mandatory in order to convict a person for aiding and abetting the predicate offence. In other words, even where no one was convicted of a predicate offence because the accused was able plead an excuse, the accessory after the fact may still be convicted pursuant to section 374 AO.

The act which results in the criminal offence is the purchase or acquisition of the goods or the sale or help to sell the goods for the purpose of benefiting himself or third party. One sees why this is called 'tax fencing' (*Steuerhehlerei*) in German. The elements 'selling' or 'helping to sell' within the meaning of section 374 AO requires that the good successfully be sold. Until such time the offence has not been accomplished.

In respect of *mens rea*, the person committing an offence pursuant to section 374 AO must have knowledge of the predicate offence. Otherwise there is a mistake of fact which excludes intent (section 16(1) StGB). Contingent intent (*dolus eventualis*) is sufficient.

Section 374(4) AO extends the scope of the offence to import duties which are administered by another Member State of the European Union or to which a Member State of the EFTA or a country associated therewith is entitled.

Pursuant to section 374(1) AO violations are punishable by imprisonment for up to five years or a monetary fine. Section 374(2) AO imposes more severe penalties for cases where the crime was committed on a professional basis or as a member of a group formed for the purpose of repeatedly committing crimes pursuant to section 374(1) AO. In these cases the punishment is imprisonment for between six months and ten years, though for less serious cases the penalty is imprisonment for up to five years or a monetary fine.

The attempt is punishable (section 374(3) AO).

4 Customs offences

The provisions governing customs offences are blanket laws, like the provisions governing customs crimes. The customs offences of primary importance in practice are the reckless understatement of taxes pursuant to section 378 of the Fiscal Code (*Abgabenordnung*, *AO*), the endangerment of import duties pursuant to section 382 AO, and failure of proper supervision pursuant to sections 30 and 130 of the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz, OWiG*).

The structure for examining punishable administrative offences parallels the structure of criminal offences (see section 1.2 above), so only acts which (1) fulfil the objective and subjective elements of a customs offence, (2) are unlawful and (3) culpable are punishable.

4.1 *Reckless Understatement of Customs Duties*

Section 378 AO requires that the objective elements of tax evasion pursuant to section 370(1) Nos 1–3 AO be realized. The difference is that the perpetrator did not act intentionally, but rather recklessly. The concept of recklessness is comparable to gross negligence. More precisely, a person acts recklessly when he or she fails to exercise the due care which he or she is obligated to exercise and which he or she is capable of exercising, having regard to the specific circumstances of the case and his or her own personal knowledge and abilities, although it must have been evident to the perpetrator that this would result in an understatement of customs duties or in an unjustified tax benefit being granted. This is the case when, having regard to the specific circumstances of the matter and the perpetrator's individual capacities, the perpetrator was in a position to comply with the duties of care required by the applicable legal provisions; such conclusion requires an overall evaluation of the perpetrator's conduct. Due regard must be had in particular to the person's education, expertise and personal knowledge when evaluating the perpetrator's individual capacities.

The perpetrator does not need to be aware that he or she is acting recklessly. However, in particular where the perpetrator knows that the conduct is reckless, the issue of whether he or she acted with contingent intent, which is a question of fact, not law, will become contentious.

There must be a connection between the reckless conduct and the understatement of customs duties. Where the reckless conduct caused the understatement of customs duties but the understatement would have occurred even if the perpetrator had exercised the duty of care applicable to him or her, then the causal link is broken.

The administrative offence is punishable by a monetary fine of up to EUR 50,000.

An attempt is not possible.

4.2 *Endangerment of Customs Duties*

Section 382 AO concerns the endangerment of import and export duties. It broadly sanctions 'the liable party or the person looking after the affairs of a liable party, [who] intentionally or negligently contravenes [inter alia] customs regulations, ordinances issued in connection therewith', but as a blanket norm does not specify what acts fall within the scope of the provision. These acts are specified in section 31 of the Customs Administration Act (*Zollverwaltungsgesetz, ZollVG*) and section 30 of the Customs Implementing Regulation, (*Zollverordnung, ZollV*) which set out a comprehensive and exhaustive catalogue of acts which fall within the scope of section 382 AO (see section 4.2.2 below).

The object and purpose of section 382 AO is to safeguard import and export duties. As the abstract endangerment of customs duties is sanctioned, it is not material whether the act actually results in an underpayment (or no payment) of the customs duties owed. Consequently, a notification or assessment of the duties is not necessary. A customs offence may be committed even in the case of duty-free goods, e.g. where the route specified by the customs authority for the import or export of the goods is not taken (compare section 31(1) No 1 ZollVG).

Section 382(1) AO provides that both intentional as well as negligent infringements are subject to sanctions.

Negligence in this sense means that the perpetrator failed to exercise the due care which he or she is obligated to exercise and which he or she is capable of exercising, having regard to the specific circumstances of the case and his or her own personal knowledge and abilities.

Pursuant to section 382(3) AO customs offences pursuant to sections 31 ZollVG and section 30 ZollV are punishable by a fine of up to EUR 5,000 where the action cannot be punished as a reckless understatement of taxes (section 378 AO).

Attempt is not punishable.

4.2.1 *Section 30 of the Customs Implementing Regulation*

Section 30 ZollV sets out no fewer than sixty-three customs offences, not including alternatives. All of these concern section 382 AO (endangerment of import or export duties).

Currently subsections 4–5a still refer to the old Customs Code (Regulation 2913/92) and subsection 6 to the old Customs Code Implementing Regulation – CCIP (Regulation 2454/93). These Regulations were repealed with effect as of 1 May 2016 (Article 286(2) in conjunction with Article 288(2) UCC, and Regulation 2016/481 with regard to the CCIP). The German courts have not yet ruled on whether section 31(4)–(6) ZollV satisfies the principle of legal certainty laid down in Article 103(2) of the German Constitution (Grundgesetz, *GG*) since those provisions expressly refer to repealed laws. The matter is further complicated by Article 286(3) UCC, which states that '[r]eferences to the repealed Regulations shall be construed as references to this Regulation and shall be read in accordance with the correlation tables set out in the Annex.' This is particularly concerning because section 382 AO is a blanket norm which is filled out by section 30 ZollV which refers to a repealed law meaning that the correlation table to the UCC – which is not even mentioned by the pertinent German legislation – must be used to find the corresponding Union provision in force, which may or may not be identical in substance to the now repealed Union provision to which the ZollV refers. Insofar as the ZollV refers to the CCIP, a correlation table between the old and the new provisions has not even been published in the Official Journal of the Union, so that the applicability of these provisions is even more doubtful.

For the purposes of this article the most important types of acts or omissions can be described as relating to:

- the failure to lodge the necessary declarations, information or documents with the customs authority or the failure to do so properly and accurately/correctly and/or in a timely manner,
- the failure to keep records and/or retain documentation,
- infringements of the rules on free zones or customs warehouses,
- infringements concerning supplies or victualling storage, e.g. for ships or planes,
- the failure to present goods, and
- infringements concerning the movement of goods.

As with section 382 AO, these are abstract endangerments, so the acts enumerated in this provision do not need to result in an actual underpayment of customs duties.

Section 30 ZollV merely fills out section 382 AO, i.e. specifies which acts fall within the scope of the latter provision, so it is neither necessary nor possible to specify the level of the penalty for committing the enumerated acts. The penalty is set in section 382 AO.

4.2.2 *Section 31 of the Customs Administration Act*

Section 31 ZollVG fills out section 382 AO and in this way is comparable to section 30 ZollV. It sets out thirteen acts which endanger customs duties within the meaning of section 382 AO.

For the purposes of this article the most important types of acts can be described as relating to the failure to present the goods, the entry or exit of goods through other than the prescribed routes, the failure to provide identification or transport documents and the failure to acquiesce in the taking of samples without compensation. This provision does not make references to Union law. The penalty is set in section 382 AO.

4.3 *Administrative Offences Pursuant to Section 19 of the German Foreign Trade and Payments Act*

Section 19 of the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*, *AWG*) subjects certain negligent acts to administrative sanctions. This provision is a blanket law. In particular section 19(3) Nos 3–5 AWG refer to certain obligations in the context of the export procedure which, though regulated by Union law, are addressed in general terms in section 27 AWG. The punishable infringements are enumerated in sections 81, 82 of the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung, AWV*). Section 81(2) AWV covers non-compliance with certain export-related procedural provisions, such as removing the goods from the place of presentation before the customs office of export has examined them or before the waiting time has expired, as stipulated in section 14 AWV. Section 82(10) AWV refers directly to certain provisions of the UCC IA in the context of the export procedure, such as failing to indicate to the customs office of exit the particulars prescribed by Article 331 UCC IA.

Pursuant to section 19(6) AWG a fine of up to EUR 30,000 may be imposed in such cases.

4.4 *Violations of Obligatory Supervision in Operations and Enterprises*

Pursuant to section 130 OWiG the owner of an operation or undertaking has committed a regulatory offence when he or she intentionally or negligently fails to take the supervisory measures required to prevent infringements within the operation or undertaking, where such infringements carry a criminal or administrative penalty and the infringement would have been prevented, or made much more difficult, if there had been proper supervision. Although the wording of the provision only mentions the owner, the pool of potential persons concerned is greatly expanded by section 9 OWiG to include, e.g., legal representatives and person otherwise authorized to represent the company. In practice a compliance officer is expressly authorized and obligated to prevent violations of the law or regulations in a particular field and is therefore an 'otherwise authorized person' within the meaning of the first sentence of section 9(2) OWiG.

Within the context of customs law, where the company is the importer or exporter of record it is liable for lodging true and accurate customs declarations, performing the real acts required by the customs legislation, etc. The situation is similar where it is the holder of an authorization, e.g. AEO or simplifications for clearance. The company also has an obligation to ensure that its employees act such that the company complies with the relevant customs or tax provisions, so the obligation is related to the company.

Section 130 OWiG only applies where the underlying violation is subject to criminal penalties or an administrative fine. It does not need to be committed by the responsible supervisor and can even be committed by persons not belonging to the company, e.g. a visitor who removes non-Union goods from a customs warehouse. The infringing act must be attributable to the company and the failure to properly discharge the supervisory duty must be causal for the infringement. The prevailing view requires that there is specific causal relationship between the protective purpose of the supervisory duty and the infringement. This plays a role where, for example, an error in the selection of an employee bore no relation to the nature of the infringement and thus was not causal.

In practice the relevant issues are the level of supervision required and whether the person responsible/company satisfied its supervisory obligations and, if not, the degree to which the supervisory obligation was infringed. The level of supervision which can reasonably be required can only be judged on a case by case basis. These include the size of the company, the complexity of the provisions and operations, institutional or personal experience, etc. Other factors which may be taken into account include organizational and operational instructions, the frequency of trainings, the existence of a compliance management system, and control measures, such as internal audits conducted at appropriate intervals.

The wording 'or made much more difficult' means that mere fact that an infringement occurred does not by itself indicate that there was a breach of duty to properly supervise the operations or personnel. However, in practice where an infringement has occurred and the customs authorities assume that this was due to a failure of proper supervision, the person concerned/company will have to demonstrate the opposite, e.g. that the measures in place at the time were adequate and that the measures were properly implemented.

Section 130 OWiG plays a significant role in practice because it allows section 30 OWiG to be applied, i.e. the authorities are then able to impose a regulatory fine on the company (see section 4.5 below).

The level of the regulatory fine depends on the underlying infringement. Where the infringement carries a criminal penalty, the fine may be up to EUR 1 million (section 130(3) sentence 1 OWiG). Where the breach of the duty of proper supervision was only negligently committed, then the maximum level of the fine is only half of the maximum level of the fine which may be imposed (section 17(2) OWiG), i.e. EUR 500,000 in this case.

Where the underlying offence is only subject to a regulatory fine the maximum regulatory fine for breach of the duty of supervision is determined by the maximum regulatory fine imposable for the underlying offence. This also applies where a breach of duty is simultaneously subject to a criminal penalty and a regulatory fine, provided that the maximum regulatory fine imposable for the breach of duty exceeds EUR 1 million (section 130(3) sentence 3 OWiG).

4.5 *Fine Imposed on Legal Persons and on Associations of Persons*

Only natural persons may commit regulatory offences and crimes. German criminal law recognizes criminal penalties only against natural persons. Likewise, administrative fines are generally only imposed against natural persons. However, where a natural person is acting in his or her capacity as an organ entitled to represent the entity, as a member of the board of directors or under another authority to represent the legal person, an unincorporated association or partnership when committing the crime or regulatory offence, then an administrative fine may be imposed not only against the natural person, but also against the legal person or association he or she represented (section 30 OWiG). The pool of persons who fall within the scope of this provision is set out in section 30 (1) Nos 1–5 OWiG; compliance officers generally fall within the scope of No 5 (on the conditions compare section 4.4 above).

A duty which the company was obliged to discharge had to be infringed by one of the persons within the scope of the first subsection. To put it another way, a 'company-related' obligation had to be infringed. In addition to the duties under the customs legislation (e.g. making full and accurate customs declarations where the company is the importer of record, complying with the requirements laid down in an authorization where the company is the holder of the authorization) this also includes the duty of proper supervision (compare section 130 OWiG).

The legal person or association is treated as if it itself had committed the offence, namely *via* its representative. However, where several persons were responsible for the same infringement, e.g. because of the failure to establish and maintain proper organizational structures, a fine against the company may be imposed only once and not several times, e.g. once for each person responsible.

The level of the fine parallels that of section 130 OWiG. However, section 30(3) OWiG expressly refers to section 17(4) OWiG. Pursuant to that provision the regulatory fine shall exceed the financial benefit that the perpetrator has obtained from commission of the offence. If the statutory maximum does not suffice for that purpose, it may be exceeded. In the light of certain recent developments in European law, and in particular the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (Directive 2014/42/EU; see also section 8 below), the reference to this provision is one of the primary reasons why the German customs authorities are likely to increasingly rely on section 30 OWiG to prosecute crimes and offences.

5 Voluntary self-disclosure in case of administrative offences

Pursuant to section 378(3) of the Fiscal Code (*Abgabenordnung*, *AO*), if the perpetrator can correct the incorrect particulars, supplement the incomplete particulars or furnish the previously omitted particulars before he, she or his or her representative has been notified of the initiation of criminal or administrative offence proceedings resulting from the act, no fine shall be set (VSD). This provision has a certain a parallel to Article 173(3) UCC according to which the declarant can request after the release of the goods and within three years an amendment of the customs declaration, so that he or she can comply with his or her obligations relating to the placing of the goods under the customs procedure concerned. Some authors have even concluded on the basis of Article 23(2) UCC that there is an obligation to inform the customs authorities in cases where the holder of a decision (the notification of the customs debt contains a decision, compare Article 5 No 39 UCC) made by those authorities becomes aware that the decision is or might be incorrect and therefore might have to be amended or revoked. Furthermore, this type of self-disclosure can also lead to the customs debt being extinguished (Article 103(e) UCC DA).

In contrast to the VSD pursuant to section 371 AO, the VSD pursuant to section 378(3) AO was not substantively affected by the reforms (see also section 2.2.3 above). A valid VSD pursuant to section 378(3) AO does not require that one type of tax be corrected for the relevant period, which is three years in the case of customs duties because these are extinguished three years after they have arisen (Article 124(1)(a) in conjunction with Article 103 UCC). Nevertheless, the correction should cover all situations in which the same mistake was made during the past three years in order to ensure that no further instances in which the same mistake was made will be found (which may lead to a penalty).

In contrast to a VSD pursuant to section 371 AO, there is only one reason which would prevent the lodging of a valid VSD pursuant to section 378(3) AO: the perpetrator or his or her representative has been notified of the initiation of criminal or administrative offence proceedings resulting from the act. This means that a person may lodge a valid VSD even after the offence has been discovered by the authorities, e.g. in the course of an audit, provided the perpetrator has not yet been informed of the initiation of criminal or administrative offence proceedings.

What acts are required for a 'correction' and what substantive criteria are to be placed on a valid VSD pursuant to section 378(3) AO are very controversial issues, in particular in cases where the infringement has already been discovered. Nor does the case law provide any easily identifiable criteria. Where, for example, the taxable person/debtor cooperates with the auditor, providing the auditor with information from his or her own sources to clarify the situation, this is sufficient. Recognizing the results of the field audit is also sufficient because this expresses that the result is true and complete. In contrast to this case law the German Federal Court of Justice (*Bundesgerichtshof, BGH*) has held that a 'correction' within the meaning of section 378(3) AO requires an independent act on the part of the perpetrator to contribute to the correction of the previously supplied information which goes beyond the investigating activities of the authority. Consequently, some courts and scholars take the view that only acts which bring to light facts that the authority was otherwise unaware of are able to be considered.

Section 153 AO restricts the risk that the perpetrator will abuse a VSD pursuant to section 378(3) AO. Pursuant to section 153(1) AO, where the taxable person subsequently discovers that an error can or has already led to an understatement of taxes, he or she is obliged to indicate the error without undue delay and to effect the necessary corrections. Failure to do so realizes the conditions for tax evasion pursuant to section 370 AO, meaning that only a VSD pursuant to section 371 AO is possible.

The VSD is contingent on the perpetrator paying, within the reasonable period of time allowed to him, the taxes that were understated to his or her benefit on the basis of the correction.

The scope of a VSD pursuant to section 378(3) AO does not include the 'endangerment provisions' (i.e. sections 379–382 AO), meaning that, even where a valid VSD pursuant to section 378(3) AO has been lodged, the authorities may still impose administrative fines pursuant to these provisions.

There is some controversy whether a valid VSD pursuant to section 378(3) AO also precludes the imposition of a fine pursuant to section 130 (*Ordnungswidrigkeitengesetz*, *OWiG*). The prevailing view is that a VSD does preclude a fine being imposed on the basis of section 130 OWiG. Where a managing director, partner, etc. lodges a valid VSD pursuant to section 378(3) AO, this also extends to the company he or she represents, so it operates to exclude a fine being imposed on the company pursuant to section 30 OWiG.

6 Limitation periods for prosecution

Arts 103, 124 UCC govern the period of limitations for the collection of a customs debt. Ordinarily the period for notifying a customs debt is three years (Article 103(1) UCC), but where a customs debt is incurred as the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the period is extended to between five years and ten years in accordance with national law (Article 103(2) UCC). In Germany the period for assessment is ten years where taxes have been evaded. The reckless understatement of taxes is merely an administrative offence, not a crime, so there is no extension of the three-year notification period in these cases. The legal situation pursuant to the UCC means that the second sentence of section 169(2) of the Fiscal Code (*Abgabenordnung*, *AO*), which provides that the period of assessment in cases where taxes have been recklessly understated, is modified so as to be consistent with the UCC: the 'five-year period' is only three years in the case of import and export duties in accordance with Article 124(1)(a) in conjunction with Article 103 UCC, i.e. the five-year period is reduced to three years.

The aforementioned provisions govern the obligation to pay the customs duties incurred and do not govern the statute of limitations for pursuing crimes and administrative offences. The period of limitation for the prosecution of customs crimes and customs offences is a matter of the national law of the Member State in question.

6.1 *Limitation Periods for the Prosecution of Crimes*

In Germany, the general provisions of criminal law form the starting point for determining the period of limitations for tax/customs crimes because section 369(2) AO prescribes that tax crimes shall be subject to these unless otherwise provided for by the tax laws' provisions on crime. Section 78 of the Criminal Code (*Strafgesetzbuch, StGB*) lays down the periods of limitation for the prosecution of crimes and links that period to the level of the highest penalty as follows (section 78(3) StGB):

- No 3: ten years in the case of offences punishable by a maximum term of imprisonment of more than five years but no more than ten years;
- No 4: five years in the case of offences punishable by a maximum term of imprisonment of more than one year but no more than five years;
- No 5: three years in the case of other offences.

Section 376(1) AO sets out special rules governing the period of limitation which takes precedence over the general rules pursuant to the Criminal Code: In the cases of particularly serious tax evasion referred to in section 370 (3), second sentence Nos 1 to 5 AO, the limitation period is ten years. It should be noted that an understatement of taxes 'on a large scale' (section 370(3) No 1 AO) already begins where the evaded tax liability is at least EUR 50,000.

This may create a disjunction between the period for the notification of the customs debt and the period for the prosecution of the crime. For example, the period for the notification of customs duties in the case of tax evasion is ten years in Germany (section 169(2), second sentence AO). This provision is consistent with the customs legislation and in particular Article 103(2) UCC, and therefore fully applicable. Consequently, the customs debt may be notified up to ten years after it arose. However, the period of limitation for the prosecution of simple tax evasion (section 370(1) AO) is five years (section 78(3) No 4 StGB). This means that, where the crime is discovered six years after it was committed, it is no longer able to be criminally prosecuted, but the customs debt may still be notified.

6.2 *Limitation Periods for the Prosecution of Administrative Offences*

Section 31(2) of the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz, OWiG*) sets out the periods of limitations for the prosecution of administrative offences as follows:

- No 1: after three years in the case of regulatory offences for which a maximum regulatory fine of more than EUR 15,000 may be imposed;
- No 2: after two years in the case of regulatory offences for which the maximum regulatory fine ranges from more than EUR 2,500 to EUR 15,000;

– No 3: after one year in the case of regulatory offences for which the maximum regulatory fine ranges from more than 1,000 to 2,500 EUR; and

– No 4: after six months in all other cases involving regulatory offences.

Pursuant to section 384 AO the period of limitation for the prosecution of tax-related administrative offences pursuant to sections 378 to 380 AO shall become time-barred after five years. This means that, even though the customs debt cannot be notified after three years if the import duties were recklessly understated (Article 103(1) UCC), the customs offence can still be pursued for up to five years, i.e. two years beyond the period for the notification of the customs debt.

Whereas the maximum period for prosecuting a tax crime is ten years and thus does not exceed the period for notifying the customs debt, the situation is different in the case of certain administrative offences. As already seen, the period for prosecuting reckless understatement of taxes exceeds the period for notifying the customs debt, so the offence is subject to prosecution even where the customs debt cannot be collected as such. However, due to the principle that the offender should not benefit from the offence and that he or she should therefore be deprived of the benefits, the understated amount will form a part of the fine, so in the end the evaded amount is still 'paid', albeit in a different context. In practice, however, audits usually cover a period of only the previous three years due to the three-year notification period of the customs debt, so offences which are older than three years are unlikely to be discovered. To compensate for this the customs authorities generally schedule customs audits every three years.

7 Proceedings for customs crimes and offences

7.1 *Preliminary Investigation*

In Germany the proceedings for customs crimes mostly follow the general principles of criminal law, but are supplemented and modified by special features of customs criminal law. These principles include the right to a fair proceeding, the right to be heard, a right not to testify against oneself, the principle of proportionality, the presumption of innocence, the principle of establishing the truth, the '*in dubio pro reo*' principle, the principle of a speedy proceeding (Article 6(1) of the European Convention on Human Rights), and the principle of mandatory prosecution in criminal cases.

A preliminary investigation may be initiated when the customs authorities have reasonable cause on the basis of their own information or on the basis of a complaint from another person. A VSD may, and in practice will, trigger an investigation. Where there is a suspicion that a customs crime has been committed, the customs authority, specifically the main customs office having jurisdiction over the matter, will conduct the investigation on its own. Units responsible for penalties have also been established within the main customs offices. The public prosecutor is responsible for conducting certain investigations (e.g. where fraud pursuant to general criminal law was concurrently committed) and may exercise the right of evocation and take over the conduct of the investigation (e.g. due to fundamental importance).

Measures which may be taken during the investigation include confiscations, searches, requesting another authority to provide information, questioning witnesses and hearing expert opinions or interrogating the person concerned. The investigating authority will take measures when and as necessary.

Proceedings for the imposition of administrative fines may be initiated for customs offences. The same procedural principles as in criminal law also apply here.

7.2 *Conclusion of the Preliminary Investigation*

7.2.1 *Criminal Investigation*

The following provides an overview of the possible courses of action after the preliminary criminal investigation has been concluded:

(1) Discontinuance of the criminal investigation on the grounds of (1) insignificance, (2) fulfilment of the conditions for the termination of the investigation or (3) due to insufficient evidence for a charge.

Where appropriate these cases are then referred back for proceedings for the imposition of administrative fines.

(2) Application for the issuance of a penal order (summary proceedings without trial).

(3) Handing the matter over to the public prosecutor (prosecution proceedings).

When determining the sentence the degree of guilt is the basis for the level of the penalty. In respect of evaded customs duties the degree of guilt is determined in particular by the amount by which the customs duties were culpably understated. As pointed out above, where the evaded customs duties cumulatively exceed the EUR 50,000 threshold, it is a 'serious case' within the meaning of section 370(3) No. 1 of the Fiscal Code (*Abgabenordnung*, *AO*) and the degree of guilt must be qualified as high. However, the quantum of evaded customs duties is but one factor amongst many, e.g. the degree of criminal energy. Similarly, where a VSD was invalid or where it is not possible (e.g. VSDs do not apply in cases of aggravated smuggling), it will be deemed to be a confession and will be taken into consideration as a mitigating factor.

7.2.2 *Investigation of Administrative Offences*

The following shows the possible outcomes when the proceedings for administrative offences are concluded:

(1) The main customs office discontinues the proceedings where punishment does not appear to be required.

(2) The main customs office issues a warning, with or without a cautionary fine (EUR 5.00 to EUR 55.00) where the violation was insignificant.

(3) The main customs office issues an administrative order imposing a fine. Where an objection is lodged against the administrative order, the matter will be decided by the local court (*Amtsgericht*). The result which could follow may be more favourable (e.g. setting aside the order or a lower fine) to the person concerned, but it may also be less favourable.

The main customs office has discretion regarding the prosecution of a customs offence after duly evaluating the circumstances (section 47(1) sentence 1 of the Act on Regulatory Offences – *Ordnungswidrigkeitengesetz*, *OWiG*). This provision expresses the principle of discretionary prosecution, which stands in sharp contrast to the principle of mandatory prosecution, which is the principle which generally governs criminal matters. Under the principle of discretionary prosecution the main customs office is entitled to refrain from prosecuting a customs offence when this is justified by objective considerations such as negligible guilt or the absence of a public interest.

The range of the level of the fine for a customs offence varies with the applicable provision. The primary provisions and range of fines are as follows:

– Section 378(2) AO (reckless understatement of taxes): up to EUR 50,000,

– Section 382(3) AO (endangerment of import and export duties): up to EUR 5,000,

– Section 19(6) AWG (fines for infringements under the Foreign Trade and Payments Act): up to EUR 30,000 with regard to customs related issues,

– Section 30(2) No 1 OWiG (fines imposed on legal persons and on associations of persons): up to EUR 10 million (where a criminal offence was committed with intent),

– Section 30(2) No 2 OWiG (fines imposed on legal persons and on associations of persons): up to EUR 5 million (where a criminal offence was committed negligently).

When determining the level of the fine the severity of the customs offence and the accusation which the offender is charged with are taken into account. Furthermore, the fine should exceed the financial benefit that the perpetrator has obtained from the commission of the regulatory offence; the statutory maximum fine does not apply where the financial benefit obtained from the commission of the regulatory offence exceeds the maximum fine (section 30 (3) in conjunction with section 17(4) OWiG). This ensures that the legal person or association is deprived of any economic benefit it received from the crime or administrative offence, and thus prevents such offences from becoming economically attractive.

7.3 *Confiscation of Assets*

To effectively combat cross-border crime it is not only necessary to establish who the perpetrator is and to ensure that he or she is punished. Rather, it is important that the material benefits obtained from the crime or offence are disgorged in order to deprive the perpetrator of them and to compensate the victims for the damages which they suffered. The confiscation of criminal enrichments ('assets') is sequenced as follows: finding the assets, ordering the confiscation of the assets by the court, forfeiture of the assets (i.e. the confiscation order becomes final), and disbursal of the assets (or auction proceeds), which may also involve distributing the assets or proceeds between several parties, depending on the circumstances. Where the confiscation of a particular object is impossible due to the nature of what was obtained or for some other reason, the court shall order the confiscation of a sum of money which corresponds to the value of what was obtained (section 73c of the Criminal Code – *Strafgesetzbuch, StGB*).

Confiscation in the context of criminal law concerns the execution of a measure which aims to deprive the perpetrator of the economic benefits derived from a crime. In order to prevent assets from being hidden, protective remedies may be taken as soon as the person concerned is informed of the initiation of a proceeding. It should be borne in mind that assets must also be released under certain circumstances, in particular where the facts of the case as established by the German law enforcement authorities do not rise above initial reasonable suspicion and the public prosecutor does not bring charges or the court acquitted the accused after a trial. Once the court's original confiscation order becomes final, title to the ownership of the assets which had been declared forfeit generally passes to the State (section 75 StGB). By appropriate execution measures the State is put into a position where it can dispose over the assets afterwards. The forfeiture of the assets essentially ends the disgorgement of assets.

8 Harmonization of customs penalties

In the EU infringements of the customs legislation are subject to different sanctions. Sanctions are prosecuted in accordance with the law of the Member State having jurisdiction (compare with regard to the responsibility for customs debts Article 87 UCC; this responsibility normally coincides with the jurisdiction for penalties). For example, whereas certain infringements are punishable

by small fines in some EU Member States, in others the same infringements may be punishable by imprisonment.

Prior to the adoption of Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law the Commission had already put forward its Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions (COM (2013) 884 final, 13 December 2013, referred to hereinafter as 'the Proposal'). The Proposal lays down a common list of acts which are regarded as infringing Union customs legislation. The infringements are categorized according to their seriousness and whether they were committed intentionally, negligently or are subject to strict liability (i.e. no-fault liability). The Proposal also sets out a scale of the sanctions to ensure that the type and level of sanctions applied are effective, proportionate and dissuasive. The sanctions range from pecuniary fines of 1% of the value of the goods in the case of unintentional or administrative irregularities to pecuniary fines of 30% of the value of the goods (or EUR 45,000 where the customs infringement is not related to specific goods) for the most serious offences. Harmonized limitation periods for prosecuting customs infringements are proposed. Furthermore, administrative proceedings concerning a customs infringement are to be suspended where criminal proceedings have been initiated against the same person on the basis of the same set of facts.

According to the Commission, Member States whose systems foresee both criminal and non-criminal infringements and sanctions have different financial thresholds to decide on the nature of the customs infringement – whether criminal or non-criminal – and therefore the nature of the customs sanction (Table 1 of the Proposal). Thus the financial thresholds vary between EUR 266 and EUR 50,000 (Table 1 of the Proposal).

The Commission found that a large majority of Member States have time limits to initiate a sanction procedure, to impose a customs sanction and to execute it. These time limits vary from one to thirty years (Table 1 of the Proposal).

The general procedural rules of German criminal procedures provide the framework for customs criminal matters. This means that only a natural person, such as a managing director of a company, may be sentenced to imprisonment or payment of a fine. There is no corporate criminal law in Germany.

Under German law there are only two possibilities for imposing financial penalties against companies: first, there is the confiscation of the benefits the company received from the infringement, for example where the managing director committed the crime but the financial proceeds flowed to the company. Second, a very heavy fine may be imposed against a company pursuant to sections 30, 130 of the Act on Regulatory Offences. Companies conducting business in Germany should prepare for the criminal prosecuting authorities making increased use of the latter possibility (i.e. section 130 OWiG) going forward. From their point of view this has the advantage that extensive investigations are no longer necessary to establish who in the company specifically committed the crime. Furthermore, the German authorities regard this as implementing the requirements of the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, pursuant to which the proceeds resulting from crimes are to be recovered.

Pursuant to Article 3 of the Proposal Member States would have to ensure that a number of acts or omissions (specifically 17) constitute customs infringements 'irrespective of any element of fault'. Pursuant to Article 9 of the Proposal:

> Member States shall ensure that effective, proportionate and dissuasive sanctions are imposed for the customs infringements referred to in Article 3 within the following limits:
>
> (a) where the customs infringement relates to specific goods, a pecuniary fine from 1% up to 5% of the value of the goods;
>
> (b) where the customs infringement is not related to specific goods, a pecuniary fine from EUR 150 up to EUR 7 500.

From the clear wording of the proposed provision as well as in the light of recitals, the 'pecuniary fine' cannot be regarded as merely being the 'cost of doing business'; it is a criminal or administrative sanction which must be imposed 'irrespective of any element of fault'. This is potentially problematic from the point of view of German law, because the German legal system requires that there be some fault in order to impose a criminal or administrative sanction, whether this takes the form of intent or negligence. The existing statutory provisions of the Fiscal Code, Criminal Code and Act on Regulatory Offences also require some form of fault in this sense. Assuming that the Proposal is adopted in its current form (which is unlikely, given the current opposition of thirteen Member States), it remains to be seen whether the German legislature will amend the existing statutory provisions accordingly and, if so, whether the German courts will uphold a challenge.

9 Conclusion

German legislation on customs crimes and offences is complex because various legal fields are intertwined, notably fiscal, customs, foreign trade, criminal and administrative offences law. The specific obligations which must be met, and for which sanctions may be imposed in case of non-compliance, are often laid down in Union law to which the national law then refers. When national 'blanket norms' refer to Union law, this raises the issue of legal

certainty, especially in cases where the provision referred to has been changed in the meantime. Due to this complexity the interpretations by local authorities and by different (fiscal and criminal) courts sometimes diverge.

Penalties in Germany can only be imposed where a person has intentionally or negligently infringed the rules, whereas a customs debt may be incurred in case of non-compliance on the basis of strict liability. The proposed Directive on customs penalties is problematic from a German perspective insofar as it foresees sanctions irrespective of any element of fault, i.e. intent or negligence.