

OPINION OF ADVOCATE GENERAL

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delivered on 26 April 2005¹

1. This reference for a preliminary ruling concerns the interpretation of Article 203(3), final indent, first phrase, of the Community Customs Code.²

container of 901 boxes of 'L&M' cigarettes which it had shipped from the Brazilian town of Paranagua on board *MS Cap Trafalgar*, a vessel belonging to the company Hamburg Süd.³

2. The Hof van beroep (Appeal Court), Antwerp, asks who is responsible for paying the customs debt if goods which have been brought into the Community, presented to customs and stored, disappear before being assigned a customs-approved treatment or use.

4. On 18 June 1996 NV Seaport Terminals (now NV Katoen Natie Terminals), a freight forwarder, unloaded the cargo and stored it, while waiting for a customs designation, on land it owned and used for that purpose, situated on the quayside.

I — Facts and main proceedings

3. On 9 June 1996 NV United Antwerp Maritime Agencies (hereinafter 'Unamar') presented to the Antwerp office, together with the appropriate summary declaration, a

5. On the morning of 19 June it was found that the shipment had been stolen, with the result that it could no longer be shown to the authorities.

¹ — Original language: Spanish

² — Approved by Council Regulation (EEC) No 2913/92 of 12 October 1992 (OJ 1992 L 302, p. 1)

³ — Unamar vigorously denies having enclosed that document, a fact which is stated in the order for reference. In its observations it claims that the document was signed and submitted by Hamburg Süd

6. The Belgian Authorities sent Unamar and Seaport Terminal summonses, both dated 13 March 1998, requiring payment of EUR 785 555.04, together with interest and costs, in respect of import duties, excise duties and special excise duties.

7. Each of the companies raised an objection to the summons taken out against it. Their claims were dismissed by the Rechtbank van eerste aanleg (Court of First Instance), Antwerp, by judgment of 9 September 2002, against which they have appealed before the Hof van beroep.

II — Legal framework

A — *The legislation to be interpreted*

8. A customs debt on importation into the Community is incurred in various circumstances, listed in Articles 201 to 205 of the Code, amongst them the removal of the

goods from customs supervision, as provided in Article 203.⁴ According to Article 203(3), the debtor⁵ is to be — as well as the person who removes the goods from customs supervision and any persons who participate in such removal or who acquire or hold the goods in question and who were aware of the unlawful origin of the goods — ‘*where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods*’⁶ or from the use of the customs procedure under which those goods are placed’.

B — *Presentation to customs, the summary declaration and temporary storage*

9. An importer of goods into the Community must convey and present them to customs; the second task is also to be carried out by the person who assumes responsibility for carriage of the goods following such entry (Articles 38(1)(a) and 40 of the Community Customs Code).

4 — In accordance with Community case-law, the rule applies when an act or omission prevents, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Article 37(1) of the aforementioned Code (Case C-66/99 *D. Wandel* [2001] ECR I-873, paragraph 47; Case C-371/99 *Liberxint* [2002] ECR I-6227, paragraph 55; Case C-337/01 *Hannann International* [2004] ECR I-1791, paragraph 31; Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 47; and Case C-300/03 *Honeywell Aerospace* [2005] ECR I-689, paragraph 19).

5 — The Court of Justice, in its judgment of 23 September 2004 in Case C-414/02 *Spedition Ulustrans* [2004] ECR I-8633, paragraph 39, confirmed that the Community Code lays down exhaustively the conditions for determining who are the debtors of the customs debt. Academic lawyers maintain that the Community legislature, with commendable common sense, decided not to define the chargeable event and the taxpayer, simply giving a casuistic list of the factors which give rise to the tax charge and of the persons called upon to pay it (see Pelechá Zozaya, F., *El Código aduanero comunitario y su aplicación en España*, editorial Marcial Pons, Madrid 1995, p. 49).

6 — Emphasis added.

10. They must also lodge a summary declaration, a procedure which, where appropriate, is carried out by the person in whose name they act (Articles 43 and 44(2) of the aforementioned Code). The aim of this document, which is signed by the person making the declaration, is to verify that the goods to which it relates are assigned a customs-approved treatment or use within the periods laid down in Article 49 of the Code (Article 183(1) and (2) of Regulation (EEC) No 2454/93,⁷ hereinafter 'the implementing regulation').

authorities. After the goods have been unloaded any person who holds them in order to move or store them assumes that responsibility (Articles 183 and 184 of the implementing regulation, in conjunction with Article 44(2) of the Code).

III — The questions referred for a preliminary ruling

11. Once these procedures have been completed, the goods acquire the status of 'goods in temporary storage' and are stored in places and under conditions laid down by the authorities, which may require the person holding the goods to provide security with a view to ensuring payment of the debt in the event that the goods registered are removed from customs supervision (Articles 50, 51 and 53(2) of the Code, in conjunction with Article 203 thereof).

13. In the light of the above circumstances, the Hof van beroep, Antwerp, has referred the following questions to the Court of Justice:

12. Until the goods listed in the declaration leave for their customs-approved destination and before they have been unloaded, the importer of the goods, the person who assumes responsibility for carriage of the goods following entry into the territory, or the person in whose name they act is responsible for the goods vis-à-vis the

- '1. May the person who must present the goods to customs (Article 40 of the Customs Code ...) be deemed to be the person required to fulfil the obligations arising from temporary storage of the goods (final indent of Article 203(3) of the Customs Code), in which connection he or his representative must lodge the summary declaration (Article 44(2)) and must sign it (Article 183(1) of the Implementing Regulation), and must present the goods to the customs authorities so long as they have not been unloaded from the means of transport carrying them at the time when they are brought into the Community and until they have been assigned a customs-approved treatment or use?

⁷ — Commission Regulation of 2 July 1993 laying down provisions for the implementation of the Community Customs Code (OJ 1993 L 253, p. 1).

2. May the person required to fulfil the obligations arising from temporary storage of the goods (final indent of Article 203(3) of the Customs Code) be deemed to be the person who, after release of the goods, holds them in order to move them or store them, in consequence of which, under Article 51(2) and 53(2) of the Community Customs Code, he is deemed to be the holder of the goods and is, therefore, required under Article 184(2) of the implementing provisions to re-present the goods whenever the customs authorities so require?

approved treatment or use, regardless of the fact that after goods are unloaded from the means of transport by which they entered the Community they were stored with or removed by the person mentioned in the second question?
3. If the first and second questions are answered affirmatively, may the persons referred to in those questions consequently be deemed to be joint and several customs debtors, it being understood that the persons mentioned in the first and second questions are different persons (in this case the representative of the shipping line by which the goods were brought into the Community and the freight forwarder responsible for the storage and removal of the goods at the unloading place or quayside indicated by the customs authorities)?
4. If the third question is answered affirmatively does the person mentioned in the first question remain the debtor until the goods are assigned a customs-approved treatment or use, regardless of the fact that after goods are unloaded from the means of transport by which they entered the Community they were stored with or removed by the person mentioned in the second question?
5. If the third question is answered in the negative must the person mentioned in the first question be regarded as remaining a customs debtor until the goods are received by the person mentioned in the second question and does the person mentioned in the second question become a debtor only from the time when he arranges the storage and removal of the goods?
6. If the first question is answered affirmatively and the second question negatively must the person mentioned in the first question continue to be regarded as the debtor until the time when the goods are received by the person mentioned in the second question or until the time when the goods have been assigned a customs-approved treatment or use?

IV — Procedure before the Court of Justice

14. Written observations have been submitted within the period laid down for the purpose by Article 20 of the Statute of the Court of Justice by the Commission, the Belgium Government, and the two companies which are the applicants in the main proceedings.

15. At the hearing held on 7 April 2005, the representatives of the parties which took part in the written stage presented oral argument.

V — Analysis of the questions referred for a preliminary ruling

A — Preliminary observations

16. It is necessary to make two preliminary points, one factual and the other legal.

17. The first refers to Unamar's categorical refusal to concede that it had submitted and signed the bill of lading, which, in this case, acts as summary declaration. This is a fact provided in the order for reference; it is for

the national court to ascertain, and the Court of Justice must remain apart from the matter. It is therefore not appropriate to enter into a debate in that respect, but to find the answer regardless of who carried out the procedure in the case.

18. The second point, which has been noted by the Commission, relates to the fact that the Belgian authorities brought the proceedings against Unamar and Seaport Terminals pursuant to Article 202 of the Community Customs Code, on the ground that the debt was payable because the tobacco was brought into the Community unlawfully, whereas the Hof van beroep, Antwerp, considers that the relevant provision is Article 203, which refers to the withdrawal of the goods from customs supervision as the event giving rise to the charge. The Court of Justice must adhere to the latter approach, and provide an interpretation for the court which, in order to decide the case, has jurisdiction to select and apply the provision.⁸

B — The first two questions

19. The elements of the dispute in the main proceedings are clear. It is necessary to

⁸ — Apart from that, the choice is correct because the goods in question did not enter Community territory through improper channels, but following the guidelines set out in Articles 38 to 41 of the Code; it was only when they were stored and awaiting allocation of a customs-approved treatment or use that they evaded supervision.

determine who, when the goods have been removed, is responsible for the customs debt, apart the person who removed them, any person who participated in that removal and any person who receives them knowing of their unlawful origin. The provision identifies him as 'the person required to fulfil the obligations arising from temporary storage of the goods' (Article 203(3), final indent, first phrase, of the aforementioned Code), and the Hof van beroep has doubts as to who that person is.

move them and store them. Not for nothing does Article 101(a) of the Customs Code provide that the warehousekeeper is to be responsible for ensuring that while the goods are in the customs warehouse they are not removed from customs supervision.

20. The legal framework set out briefly above distinguishes three moments. The first is when the goods are presented to customs, in the summary declaration procedure. The next, in which the goods are temporarily stored in order to be shown to customs as often as that authority requires and which is crucial for the purposes of this reference for a preliminary ruling, runs from the time the goods enter Community territory until they are allocated a customs-approved treatment or use. The third moment begins when this last event occurs.

22. Therefore, if the goods, before being allocated a customs-approved treatment or use, avoid the supervision of the authorities, the duty is payable — as well as by the person who removed them from that supervision, any person who participated in that removal and the recipients of the goods — by the importer, the carrier or the person they represent, if the goods have not yet been discharged; otherwise, it is payable by any person who has them in his possession in order to move them or store them.

21. At the initial stage the duty is payable by the importer, the person responsible for the carriage of the goods after crossing the border or the person in whose name they act. At the second stage it is necessary to differentiate between two situations: if the goods are still in the same means of transport, the same persons are liable as at the first stage; if the goods have been discharged, the duty is payable by the person who has them in his possession in order to

23. This interpretation, which reflects the literal meaning of the rules involved, is also based, as the Commission points out, on their purpose: since this is to prevent illegal imports, until the goods are given a specific Customs status and are subject to payment of duty or exempt from it, either temporarily

or definitively,⁹ the person in possession of the goods has to show the imported items as many times as he is required to do so, and is answerable for their loss.¹⁰ For the same reasons, Article 51(2) of the aforementioned Code empowers the authorities, when goods are in temporary storage, to require the person holding the goods to provide security with a view to ensuring payment of the customs debt, if they avoid the relevant control.

- if the goods have been unloaded, the person who has them in his possession in order to move them or store them.

C — Questions 3 to 6

24. The above considerations lead me to suggest that the Court of Justice answer the first two questions referred for a preliminary ruling by stating that Article 203(3), final indent, first phrase, of the Community Customs Code, when it refers to the person required to fulfil the obligations arising from temporary storage, means:

- if the goods are still in the means of transport in which they entered the Community, (a) the person who brought the goods into the customs territory of the Community, (b) the person who, before and after presentation, assumes responsibility for carriage of the goods, or (c) the person in whose name either of the above persons acts;

25. By these four questions, the Belgian court wishes to clarify whether, in the two circumstances described above, the responsibility is simultaneous and joint and several or if it is incurred consecutively, and, in the latter case, to ascertain the precise moment at which the changeover occurs. The answer is implicit in the above line of reasoning and in the suggested reply to the first two questions.

26. In the situations referred to in Article 203, the person required to fulfil the obligations arising from temporary storage is also liable for the customs duties. These requirements, fundamentally that of maintaining the goods available to the authorities, are binding on the person in possession of them, who is defined in Article 184 of the implementing regulation according to an objective criterion: the unloading of the goods. The liability is therefore not concurrent and joint and several, but consecutive, so that the person required to present the goods to customs, and to prepare and sign the summary declaration is liable until the moment they are unloaded, from which

9 — Goods imported from countries or territories outside the European Union acquire the status of Community goods through release for free circulation, an operation which entails the charging of any customs duties legally due (Articles 79 and 201(1) of the Code). However, they may be under the external transit procedure, in storage, under the inward processing procedure or subject to the temporary importation procedure, in which case, in principle, duty is not chargeable (Articles 91, 98, 114 and 137).

10 — Under Article 37 of the Code, goods introduced into the Community remain under supervision, and subject to control by the authorities. This situation lasts for as long as necessary to determine their customs status.

time the person who assumes responsibility for moving and storing them becomes the debtor.

27. Bearing in mind the purpose of the provision, with which I have already dealt, the crucial element is who holds the goods and, consequently, has physical control of them: the person who has them in his possession, and is therefore responsible for their safety, has to fulfil the customs obligations if, while he has control of them, they are removed from customs supervision. This can be inferred from Article 51(2) of the Code itself, which, during temporary possession, encourages the requirement for security to be provided with a view to ensuring payment of the customs duties if the goods avoid that control.

28. Under Article 213 of the Code, where several persons are liable for payment of one customs debt, they shall be jointly and severally liable for such debt. However, this rule presupposes that the obligation is concurrent, which is not the position in this case, since, as I have already suggested, Article 184 of the implementing regulation rules out the possibility of concurrence, by making the liability consecutive with the reference to unloading.

29. As the Belgian Government points out, the person who makes the declaration or the persons to whom Article 44(2) of the Code refers are required to initiate the formalities necessary for the goods to be assigned a customs-approved treatment or use, and to bear the costs incurred as a consequence of the measures taken by the authorities to regularise their situation (Article 187 of the implementing regulation in conjunction with Article 53 of the Code), but these provisions are unconnected with those referred to in Article 203(3), final indent, first phrase, of the Code, which refers to the tasks relating to storage, in particular, putting the goods into customs custody. That is to say, the latter provision is a rule for establishing who is liable for the duty when the controls have been avoided and holds liable, amongst others, the person required to fulfil the obligations arising from temporary storage of the goods, whereas Article 187 provides for a different situation, in which it is necessary to guide the goods towards their customs-approved treatment or use, so that they may leave the customs domain, following the relevant procedures.

30. Accordingly, the persons referred to in the first and second questions are not jointly and severally but consecutively liable, so that those mentioned in the first question are liable only until the goods, after being unloaded, are handed over to the persons mentioned in the second question who, from that moment, become the only persons liable under Article 203(3), final indent, first phrase, of the Code.

VI — Conclusion

31. In the light of the foregoing considerations, I propose that the Court of Justice answer the questions referred for a preliminary ruling by the Hof van beroep, Antwerp as follows:

- (1) Article 203(3), final indent, of the Community Customs Code, approved by Council Regulation (EEC) No 2913/92 of 12 October 1992, when it refers to 'the person required to fulfil the obligations arising from temporary storage', means:
 - if the goods are still in the means of transport in which they entered the Community, (a) the person who brought the goods into the customs territory of the Community, (b) the person who, before and after presentation, assumes responsibility for carriage of the goods, or (c) the person in whose name either of the above persons acts;
 - if the goods have been unloaded, the person who has them in his possession in order to move them or store them.
- (2) The two previous groups are not simultaneously and jointly and severally liable but consecutively liable, so that the persons in the first group are liable only until the goods, after being unloaded, are handed over to the persons who constitute the second group, who, from that moment, are the only persons liable under Article 203(3), final indent, first phrase, of the aforementioned Code.