

JUDGMENT OF THE COURT (Fifth Chamber)

31 March 2011 \*

In Case C-546/09,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Bulgaria), made by decision of 20 October 2009, received at the Court on 23 December 2009, in the proceedings

**Aurubis Bulgaria AD**

v

**Nachalnik na Mitnitsa Stolichna**, formerly Nachalnik na Mitnitsa Sofia,

THE COURT (Fifth Chamber),

composed of J.-J. Kasel, President of the Chamber, M. Ilešič and E. Levits (Rapporteur), Judges,

\* Language of the case: Bulgarian.

Advocate General: P. Cruz Villalón,  
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 19 January 2011,

after considering the observations submitted on behalf of:

- Aurubis Bulgaria AD, by L. Ruessmann, avocat, and S. Yordanova, advokat,
- Nachalnik na Mitnitsa Stolichna, formerly Nachalnik na Mitnitsa Sofia, by T. Popgeorgieva and S. Valkova, advokati,
- the European Commission, by B.-R. Killmann and S. Petrova, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### **Judgment**

<sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Article 201(1)(a) and (2) of Council Regulation (EEC) No 2913/92 of 12 October 1992

establishing the Community Customs Code (OJ 1992 L 302, p. 1) as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1) ('the Customs Code'), read in conjunction with Articles 214, 222(1)(a) and 232(1)(b) thereof.

- 2 The reference has been made in proceedings between Aurubis Balcaria AD ('Aurubis') and Nachalnik na Mitnitsa Stolichna, formerly Nachalnik na Mitnitsa Sofia (Director of the Sofia Customs Office; 'the customs authority') concerning the amount of interest to be applied to the additional debt for which Aurubis had been declared liable by way of value added tax ('VAT') and the date from which that interest was to be applied.

## **Legal context**

### *European Union ('EU') law*

- 3 Under Article 201(1)(a) and (2) of the Customs Code:

'1. A customs debt on importation shall be incurred through:

(a) the release for free circulation of goods liable to import duties,

or

...

2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.'

4 Article 214(3) of the Customs Code provides:

'Compensatory interest shall be applied, in the circumstances and under the conditions to be defined in the provisions adopted under the committee procedure, in order to prevent the wrongful acquisition of a financial advantage through deferment of the date on which the customs debt was incurred or entered in the accounts.'

5 The first and second subparagraphs of Article 222(1)(a) of the Customs Code provide:

'1. Amounts of duty communicated in accordance with Article 221 shall be paid by debtors within the following periods:

(a) if the person is not entitled to any of the payment facilities laid down in Articles 224 to 229, payment shall be made within the period prescribed.

Without prejudice to the second paragraph of Article 244, that period shall not exceed ten days following communication to the debtor of the amount of duty owed and, in the case of aggregation of entries in the accounts under the conditions laid down in the second subparagraph of Article 218(1), it shall be so fixed as not to enable the debtor to obtain a longer period for payment than if he had been granted deferred payment.’

6 Article 232 of the Customs Code states as follows:

‘1. Where the amount of duty due has not been paid within the prescribed period:

...

(b) interest on arrears shall be charged over and above the amount of duty. The rate of interest on arrears may be higher than the rate of credit interest. It may not be lower than that rate.

2. The customs authorities may waive collection of interest on arrears:

...

(c) if the duty is paid within five days of the expiry of the period prescribed for payment.'

- 7 Article 519(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 214/2007 of 28 February 2007 (OJ 2007 L 62, p. 6), ('the Implementing Regulation') states:

'Where a customs debt is incurred in respect of compensating products or import goods under inward processing or temporary importation, compensatory interest shall be due on the amount of import duties for the period involved.'

- 8 Under Article 2(1)(d) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive') the importation of goods is to be subject to VAT.
- 9 As regards VAT due at the time of importing goods, the first paragraph of Article 211 of Directive 2006/112 provides that Member States are themselves to lay down the detailed rules for payment in respect of the importation of goods.

*National law*

- <sup>10</sup> Article 59(2) of the Law on VAT (Zakon za danak varhu dobavenata stoynost, DV No 63 of 4 August 2006) as amended (DV No 52 of 29 June 2007) ('the VAT Law') provides:

'Where, under customs legislation, an obligation to pay interest on the customs duties which result from the customs debt has arisen, an obligation to pay interest on the uncollected tax shall also arise.'

- <sup>11</sup> Article 60 of the VAT Law, which is entitled 'Payment of tax on importation' provides:

1. The tax collected by the customs authorities shall be taken into account in the budget of the Republic in the manner and within the time-limits laid down for the payment of customs duties.

2. The tax authorities and the customs authorities may not offset tax collected by the customs authorities on importation of goods into the country against other claims.'

## **Facts and the questions referred for a preliminary ruling**

- 12 During the period from 6 to 30 November 2007, Aurubis imported copper concentrate originating from Macedonia. Those goods were ‘released for free circulation’.
- 13 The customs declarations were made on the basis of a provisional price, shown on the seller’s invoice and fixed in accordance with the method laid down in the commercial contract between the seller and Aurubis.
- 14 The final price for the goods was fixed by the final invoice dated 18 February 2008.
- 15 On 20 June 2008, Aurubis submitted, on its own initiative and in accordance with Article 78(1) of the Customs Code, a letter to the customs authority informing it that the supplier had issued the final invoice for the imported goods and asking it to act in accordance with its statutory powers if it considered that a retroactive amendment of the customs value of the goods was necessary.
- 16 On 15 July 2008, the customs authority adopted a decision finding that an additional debt to the State had been incurred, for VAT in the amount of BGN 113 822.82, payable together with statutory interest from the date on which the customs debt had been incurred (‘the decision of 2008’). That decision, which gave Aurubis seven days in which to pay the tax, was served on Aurubis on 16 July 2008.



- 17 Aurubis paid the VAT debt fixed by the decision of 2008 by a money order of 23 July 2008. That debt was entered in the accounts on 24 July 2008.
- 18 Challenging the obligation imposed by the decision of 2008 to pay interest on arrears, Aurubis referred the matter to the Administrativen sad Sofia-Grad (Sofia Administrative Court), which, by judgment of 19 March 2009, upheld the decision of 2008.
- 19 On 3 April 2009, Aurubis brought an appeal on a point of law before the Varhoven administrativen sad (Supreme Administrative Court) disputing the legality of the judgment of the Sofia Administrative Court.
- 20 Relying on Articles 201 and 214 of the Customs Code, the customs authority contended that interest on arrears in respect of customs and VAT debts paid subsequently is owed from the date on which the goods are ‘released for free circulation.’ For its part, Aurubis argues that interest on arrears is owed from a later date and, specifically, from the date – subsequent to the entry in the accounts of the customs debt and its communication to the debtor – on which the period laid down for payment of the customs debt entered late in the accounts expires.
- 21 In those circumstances, the Varhoven administrativen sad decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are national courts to interpret Article 232(1)(b) of [Regulation No 2913/92] as meaning that customs authorities may charge interest on arrears in respect of the amount of additional customs debts only in relation to the period following entry in the accounts, communication to the debtor and expiry of the period laid down

by the customs authority pursuant to Article 222(1)(a) of the regulation for payment of the additional customs debts?

- (2) Is Article 214(3) of [Regulation No 2913/92] to be interpreted, in the absence of corresponding provisions in [Regulation No 2454/93], as meaning that national authorities may not charge compensatory interest in respect of the period between the date of the original customs declaration and the date of the subsequent entry in the accounts?
- (3) Are the provisions of [Regulation No 2913/92] and of [Regulation No 2454/93] to be interpreted as meaning that, where there are no national legal provisions which expressly provide for an increase in the customs duty or another national penalty equal to the amount that would have been charged as interest on arrears in respect of the period between the date on which the customs debt was incurred and the date on which the subsequent entry in the accounts was made, Community law does not permit national courts to effect such an increase or impose such a penalty?

### **Admissibility of the reference for a preliminary ruling**

- <sup>22</sup> Since the dispute in the main proceedings concerns liability to pay interest on arrears in relation to an additional debt, concerning VAT, it must first be determined whether

the reference for a preliminary ruling, which concerns the interpretation of the EU customs rules, is admissible.

- <sup>23</sup> Those EU customs rules are applicable to this dispute only by virtue of Bulgarian law and, specifically, by virtue of Articles 59(2) and 60(1) of the VAT Law which defer to customs law in so far as they provide, respectively, that where, under customs legislation, an obligation arises to pay interest on the customs duties relating to the customs debt, an obligation to pay interest on the uncollected VAT is also to arise and that account is to be taken of VAT in accordance with the procedures and time-limits laid down for the payment of customs duties.
- <sup>24</sup> In that regard, it is sufficient to point out that, in accordance with settled case-law, the Court has jurisdiction to rule on questions referred by the national court even where the facts of the proceedings before that court fall outside the scope of EU law, provided that, in regulating situations not covered by EU law, the domestic legislation has adopted the same solutions as those adopted under EU law. The Court has consistently held that the legal order of the European Union clearly has an interest in ensuring that, in order to forestall future divergences of interpretation, every provision of EU law is interpreted uniformly, irrespective of the circumstances in which that provision is to apply (see, to that effect, *inter alia*, Case C-130/95 *Giloy* [1997] ECR I-4291, paragraphs 19 to 28; Case C-267/99 *Adam* [2001] ECR I-7467, paragraphs 23 to 29; Case C-43/00 *Andersen og Jensen* [2002] ECR I-379, paragraphs 15 to 19; Case C-3/04 *Poseidon Chartering* [2006] ECR I-2505, paragraphs 14 to 19; and Case C-205/09 *Eredics and Sápi* [2010] ECR I-10231, paragraph 33).
- <sup>25</sup> In those circumstances, the reference for a preliminary ruling must be declared admissible.

## Consideration of the questions referred

### *The first question*

- <sup>26</sup> By its first question, the national court is essentially asking whether Article 232(1)(b) of the Customs Code is to be interpreted as meaning that interest on arrears in relation to customs duties still to be recovered may be charged under that provision only in respect of the period falling after the deadline by which those duties were to be paid.
- <sup>27</sup> In that regard, it should be noted that, according to the actual wording of Article 232(1)(b) of the Customs Code, interest on arrears is to be charged over and above the amount of duty 'where the amount of duty has not been paid within the prescribed period.'
- <sup>28</sup> As a consequence, the collection of interest on arrears is conditional upon failure to pay the duty by the deadline set and such collection may not be made where the debtor has paid the customs debt within the time allowed.
- <sup>29</sup> Interest on arrears is thus intended to offset the consequences arising as a result of the payment not having been made by the deadline set and, in particular, to prevent the person who owes the customs debt from taking unfair advantage of the fact that the amounts owing by way of customs debt remain available to him beyond the deadline set for its settlement. It is against that background that Article 232(1)(b) of the Customs Code provides that the rate of interest on arrears cannot be lower than the rate of credit interest.

- 30 That interpretation, both literal and teleological, is confirmed by the broad logic of Article 232 of the Customs Code, in that Article 232(2)(c) provides that the customs authorities may waive collection of interest on arrears if the duty is paid within five days of the expiry of the period prescribed for payment.
- 31 The fact that payment of the customs debt in the five days following the deadline entitles the authorities to waive the interest on arrears necessarily means that that deadline must also be the starting point for calculating that interest.
- 32 Consequently, in accordance with Article 232(1)(b) of the Customs Code, interest on arrears may be charged only in respect of the period falling after the deadline for payment of the customs debt, since it is not the role of that provision either to prevent the financial losses sustained by the customs authorities or to compensate for the advantages accruing to traders because of the delay, brought about by the behaviour of those traders, before the customs debt is entered in the accounts for the purposes of the Customs Code and before the amount of the debt, or the debtor owing the debt, is determined.
- 33 Where the customs debt is incurred on the basis of Articles 202 to 205 and Articles 210, 211 and 220 of the Customs Code, all of which concern situations involving breach by the trader concerned of the EU customs legislation, neither the Customs Code nor the implementing regulation provides for specific measures, such as an increase in the customs duty corresponding to the amount which would have been incurred by way of interest on arrears for the period falling between the date on which the customs debt was incurred and the date of its entry in the accounts, or between the date on which the customs debt originally entered in the accounts fell due and the date on which it was subsequently entered in the accounts (see, to that effect, Case C-91/02 *Hannl-Hofstetter* [2003] ECR I-12077, paragraphs 19 and 23).

34 Accordingly, in the light of the foregoing considerations, the answer to the first question is that Article 232(1)(b) of the Customs Code must be interpreted as meaning that interest on arrears in relation to customs duties still to be recovered may be charged under that provision only in respect of the period falling after the deadline by which those duties were to be paid.

*The second question*

35 By its second question, the national court is essentially asking whether, in the absence of corresponding provisions in the Implementing Regulation, Article 214(3) of the Customs Code is to be interpreted as meaning that national authorities may not, on the basis of that provision, charge the person owing the customs debt compensatory interest in respect of the period between the date of the original customs declaration and the date of the subsequent entry in the accounts.

36 In that regard, it is sufficient to point out that Article 214(3) of the Customs Code expressly provides that the circumstances and the conditions for the application of compensatory interest are to be 'defined in the provisions adopted under the committee procedure'.

37 Provision is made under Article 519(1) of the Implementing Regulation for compensatory interest to be applied only where a customs debt is incurred in respect

of compensating products or import goods under inward processing or temporary importation.

<sup>38</sup> Accordingly, the customs authorities cannot rely on Article 214(3) of the Customs Code as a basis for applying compensatory interest in the context of other customs procedures.

<sup>39</sup> Consequently, the answer to the second question is that, in the absence of corresponding provisions in the Implementing Regulation, Article 214(3) of the Customs Code must be interpreted as meaning that national authorities may not, on the basis of that provision, charge the person owing the customs debt compensatory interest in respect of the period between the date of the original customs declaration and the date of the subsequent entry in the accounts.

*The third question*

<sup>40</sup> By its third question, the national court is essentially asking whether EU law precludes national authorities from applying, for a customs offence, a penalty for which no express provision is made under the national legislation.

<sup>41</sup> In that regard, it should be borne in mind that, as regards customs offences, the Court has pointed out that, in the absence of harmonisation of EU legislation in that field, the Member States are competent to choose the penalties which seem appropriate to them. They must, however, exercise that competence in accordance with EU law

and its general principles (see Case C-213/99 *de Andrade* [2000] ECR I-11083, paragraph 20, and *Hannl-Hofstetter*, paragraph 18).

- <sup>42</sup> Those principles include the principle of the legality of criminal offences and penalties (see Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 46). That principle implies that legislation must define clearly offences and the penalties which they attract. That requirement is satisfied where the individual concerned is able, on the basis of the wording of the relevant provision and, if need be, with the help of the interpretative guidance given by the courts, to know which acts or omissions will make him criminally liable (see *Advocaten voor de Wereld*, paragraph 50, and judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa v Commission* [2008], not published in the ECR, paragraph 39).
- <sup>43</sup> In the light of the foregoing, the answer to the third question is that the general principles of EU law and, in particular, the principle of the legality of criminal offences and penalties preclude national authorities from applying, to a customs offence, a penalty for which no express provision is made under the national legislation.

## Costs

- <sup>44</sup> Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.



On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 232(1)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006, must be interpreted as meaning that interest on arrears in relation to customs duties still to be recovered may be charged under that provision only in respect of the period falling after the deadline by which those duties were to be paid.**
  
2. **In the absence of corresponding provisions in Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, as amended by Commission Regulation (EC) No 214/2007 of 28 February 2007, Article 214(3) of Regulation No 2913/92, as amended by Regulation No 1791/2006, must be interpreted as meaning that national authorities may not, on the basis of that provision, charge the person owing the customs debt compensatory interest in respect of the period between the date of the original customs declaration and the date of the subsequent entry in the accounts.**
  
3. **The general principles of EU law and, in particular, the principle of the legality of criminal offences and penalties preclude national authorities from applying, to a customs offence, a penalty for which no express provision is made under the national legislation.**

[Signatures]