OPINION OF ADVOCATE GENERAL TRSTENJAK
delivered on 16 December 2010[1]

I — Introduction

1. In this reference for a preliminary ruling under Article 267 TFEU, the Cour d'appel de Rouen (Court of Appeal, Rouen) ('the referring court') asks whether an economic operator with joint and several liability for a customs debt can successfully rely on the fact that the customs authorities partially remitted the customs debt in relation to another joint and several co-debtor and whether on that ground his customs debt should also be reduced accordingly.

II — Legal background

A — *European Union law*[2]

2. Articles 3 and 4 of Council Regulation (EEC) No 1031/88 of 18 April 1988 determining the persons liable for payment of a customs debt[3] provide as follows:

'Article 3

Where a customs debt has been incurred pursuant to Article 2(1)(b) of Regulation (EEC) No 2144/87, the person who introduced the goods unlawfully into the customs territory of the Community shall be liable for payment of such debt.

1 — Original language: German.

2 — In accordance with the terminology used in the Treaty on European Union and in the TFEU, the term 'European Union law' is used as an overall term for Community law and European Union law. Where this Opinion refers to individual items of primary law, the provisions applicable *ratione temporis* are cited.

3 — OJ 1988 L 102, p. 5.

Under the provisions in force in Member States, the following shall also be jointly and severally liable for payment of such debt:

(a) any persons who participated in the unlawful introduction of the goods and any persons who acquired or held the goods in question;

(b) any other persons who are liable by reason of such unlawful introduction.

Article 4

1. Where a customs debt has been incurred pursuant to Article 2(1)(c) of Regulation (EEC) No 2144/87, the person who removed the goods from customs supervision shall be liable for payment of such debt.

Under the provisions in force in the Member States, the following shall also be jointly and severally liable for payment of such debt:

(a) any persons who participated in the removal of the goods from customs supervision and any persons who acquired or held them;

(b) any other persons who are liable by reason of such removal.

2. The person required to fulfil, in respect of goods liable to import duties, the obligations arising from their temporary storage, or from the use of the customs procedure under which they have been placed, shall also be jointly and severally liable for payment of the customs debt.'

3. These provisions were repealed upon the entry into force of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the CC'). [4]

4. Title 1 of the CC governs general matters. The first chapter of this title defines the scope of the CC and sets out basic definitions. It includes Article 4, paragraphs 9 and 12 of which lay down that:

'…

(9) "Customs debt" means the obligation on a person to pay the amount of the import duties (customs debt on importation) or

4 — OJ 1992 L 302, p. 1.

export duties (customs debt on exportation) which apply to specific goods under the Community provisions in force.

...

(12) "Debtor" means any person liable for payment of a customs debt.

...'

5. Chapter 2 of Title I lays down in particular the rights and obligations of persons with regard to customs rules. Section 1 of Chapter 2 governs the right of representation. This section consists of Article 5, which provides as follows:

'1. Under the conditions set out in Article 64(2) and subject to the provisions adopted within the framework of Article 243(2)(b), any person may appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules.

2. Such representation may be:

— direct, in which case the representative shall act in the name of and on behalf of another person,

or

— indirect, in which case the representatives [sic] shall act in his own name but on behalf of another person.

...

4. A representative must state that he is acting on behalf of the person represented, specify whether the representation is direct or indirect and be empowered to act as a representative.

A person who fails to state that he is acting in the name of or on behalf of another person or who states that he is acting in the name of or on behalf of another person without being empowered to do so shall be deemed to be acting in his own name and on his own behalf.

5. The customs authorities may require any person stating that he is acting in the name of or on behalf of another person to produce evidence of his powers to act as a representative.'

6. Title VII of the CC governs customs debt. Chapter 2 of that title deals with the incurrence of a customs debt. Articles 202 and 203, which come under this chapter, read as follows:

'*Article 202*

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

(a) the unlawful introduction into the customs territory of the Community of goods liable to import duties,

or

(b) the unlawful introduction into another part of that territory of such goods located in a free zone or free warehouse.

For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.

3. The debtors shall be:

— the person who introduced such goods unlawfully,

— any persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful, and

— any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully.

Article 203

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

— the unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

3. The debtors shall be:

— the person who removed the goods from customs supervision,

— any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

— any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and

— where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed. …'

7. Article 213, which is also part of this chapter, lays down that:

'Where several persons are liable for payment of one customs debt, they shall be jointly and severally liable for such debt.'

8. Article 233 of the CC, which is to be found in Chapter 4 of Title VII dealing with the extinction of customs debt, provides as follows:

'Without prejudice to the provisions in force relating to the time-barring of a customs debt and non-recovery of such a debt in the event of the legally established insolvency of the debtor, a customs debt shall be extinguished:

(a) by payment of the amount of duty;

(b) by remission of the amount of duty;

...'

9. Chapter 5 of Title VII regulates the repayment and remission of duty. Article 239 of the CC, which falls within this chapter, lays down that:

'1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238:

— to be determined in accordance with the procedure of the committee;

— resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.

However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases.'

10. Article 86(4) of Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code), [5] which replaced the CC but is not applicable to the present case *ratione temporis*, provides as follows:

'1. Without prejudice to Article 68 and the provisions in force relating to non-recovery of the amount of import or export duty corresponding to a customs debt in the event of the judicially established insolvency of the debtor, a customs debt on importation or exportation shall be extinguished in any of the following ways:

...

(b) subject to paragraph 4, by remission of the amount of import or export duty;

...

4. Where several persons are liable for payment of the amount of import or export duty corresponding to the customs debt and remission is granted, the customs debt shall be extinguished only in respect of the person or persons to whom the remission is granted....'

5 — OJ 2008 L 145, p. 1.

11. Article 878 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [6] ('the Implementing Regulation') reads as follows:

'1. Application for repayment or remission of import or export duties, hereinafter referred to as "application for repayment or remission", shall be made by the person who paid or is liable to pay those duties, or the persons who have taken over his rights and obligations.

Application for repayment or remission may also be made by the representative of the person or persons referred in the first subparagraph.

...'

12. Article 899 of Regulation No 2454/93 provides as follows:

'Without prejudice to other situations to be considered case by case in accordance with the procedure laid down in Articles 905 to 909, where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239(2) of the Code:

— is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned, it shall repay or remit the amount of import duties concerned.

— "The person concerned" shall mean the person or persons referred to in Article 878(1), or their representatives, and any other person who was involved with the completion of the customs formalities relating to the goods concerned or gave the instructions necessary for the completion of these formalities, is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import duties concerned.'

6 — OJ 1993 L 253, p. 1.

13. In the version introduced by Commission Regulation (EC) No 1335/2003 of 25 July 2003,[7] this provision reads as follows:

‘1. Where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239(2) of the Code:

— is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned, it shall repay or remit the amount of import or export duties concerned,

— is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import or export duties concerned.

...

3. For the purposes of Article 239(1) of the Code and of this Article, “the person concerned” shall mean the person or persons referred to in Article 878(1) or their representatives, and any other person who was involved with the completion of the customs formalities relating to the goods concerned or gave the instructions necessary for the completion of these formalities.

’,

...

14. By Commission Regulation (EC) No 3254/94 of 19 December 1994 amending Regulation No 2454/93 laying down provisions for the implementation of Regulation No 2913/92 establishing the Community customs code,[8] a point (o) was added to Article 900(1) of the Implementing Regulation. This reads as follows:

‘1. Import duties shall be repaid or remitted where:

...

(o) the customs debt has been incurred otherwise than under Article 201 of the Code and the person concerned is able to produce a certificate of origin, a movement certificate, an internal Community transit document or other appropriate document showing that if the imported goods had been entered for free circulation they would have been eligible for

7 — OJ 2003 L 187, p. 16.

8 — OJ 1994 L 346, p. 1.

Community treatment or preferential tariff treatment, provided the other conditions referred to in Article 890 were satisfied.'

B — *National law*

15. Article 1208 of the French Code civil (Civil Code) reads:

'A jointly and severally liable debtor sued by the creditor may put forward all the defences which follow from the nature of the obligation, all those which are personal to him, and those which are common to all the debtors. He may not put forward defences which are purely personal to some of the other debtors.'

III — The dispute underlying the reference for a preliminary ruling

A — *Facts and procedure before the customs authorities*

16. The company Asia Pulp & Paper France ('APP') appointed the company Rijn Schelde Mondia France ('Mondia') to transport and import paper from Indonesia. Mondia specialises in handling imports and exports of forestry products (paper, waste paper, wood pulp). Mondia holds a licence to operate customs warehouses in Rouen and Le Havre under the rules on temporary warehouses and storage areas ('régime des magasins et aires de dépôt temporaires'). These are used for the temporary storage of goods whose customs status is not determined within one day of their arrival in the Union. Under the rules, goods from such temporary warehouses and storage areas may not be released into the customs territory of the Union until they have been declared for import.

17. In turn, Mondia appointed Société de Manutention de Produits Chimiques et Miniers ('Maprochim'), a customs agent, in particular to make, on its instructions, import declarations and to pay the duties.

18. Upon their arrival in France, the goods at issue in the main proceedings were initially stored in Mondia's temporary warehouses and storage areas. During 2000 the French customs authorities investigated the import and export operations handled by Mondia and Maprochim in Le Havre and Rouen in 1998 and 1999. It came to light that Mondia

had contravened Articles 202 and 203 of the CC in that it had introduced part of the goods in question into the customs territory of the Union without declaring them and another part had not been declared until they had already been introduced into the Union. The French customs authorities then ascertained the customs duty owed by Mondia and APP under those provisions and notified them accordingly. [9]

19. On 31 October 2000 Mondia submitted applications to the French customs authorities for remission of its customs debts under Article 239 of the CC in conjunction with Article 900(1)(o) of the Implementing Regulation. It justified these applications on the ground that if the goods had been correctly declared they would have been eligible for preferential tariff treatment and that it had not acted with intent to deceive or with obvious negligence.

20. Although the French customs authorities took the view that no obvious negligence could be attributed to Mondia, they considered that it was not for them to make that judgment but for the Commission. They later decided that they themselves, and hence not the Commission, were competent to make that judgment. They nevertheless sought the Commission's advice. The Commission thereupon informed the French customs authorities that in its opinion Mondia had acted with obvious negligence. [10]

21. Subsequently, the French customs authorities initially rejected Mondia's applications for remission of the amount of duty under Article 239 of the CC in conjunction with Article 900(1)(o) of the Implementing Regulation. After Mondia had provided further information they acceded to its applications in part by decisions of 6 February and 3 March 2006 and remitted to it part of the amounts of duty. As a result, the French customs authorities demanded that Mondia pay only the amounts of duty less the remitted amount.

22. In contrast, the French customs authorities continued to demand the full amount of duty, not the reduced amount, from APP, which had not itself applied for remission.

9 — Demands for the payment of other duties (taxes, etc.) were also served on APP and Maprochim, but these were not relevant to the present reference for a preliminary ruling.

10 — For details of the proceedings before the national authorities and the Commission, see the judgment of 25 January 2007 in Case T-55/05 *Rijn Schelde Mondia France* v *Commission*, not published in the ECR.

23. The French customs authorities accused the customs agent Maprochim of having participated in Mondia's violation of Article 203 of the CC. They alleged that Maprochim had been late declaring part of the goods in question for customs, despite the fact that it knew or should have known that the goods had already left the temporary warehouses and storage areas and had been released. On that ground the French customs authorities served Maprochim with a recovery notice for a corresponding amount of duty.

24. Maprochim then applied for remission under Article 236 of the CC in conjunction with Article 890 of the Implementing Regulation. That application was rejected by the French customs authorities on the ground that Article 236 of the CC in conjunction with Article 890 of the Implementing Regulation was not applicable to a customs debt arising under Article 203 of the CC. In their opinion, Article 236 of the CC was applicable only to import or export duties that were not legally owed. The subsequent submission of certificates of origin did not have the effect that a customs debt under Article 203 of the CC had not been incurred in the first place, but could only lead to subsequent remission under Article 239 of the CC in conjunction with Article 890 of the Implementing Regulation.

B — *Proceedings before the national courts and the question referred*

25. Mondia, APP and Maprochim brought actions before the Tribunal d'instance du Havre (District Court, Le Havre) and the Tribunal d'instance de Rouen (District Court, Rouen). The actions before the Tribunal d'instance du Havre were transferred to the Tribunal d'instance de Rouen on account of the connection between the applications to the two courts. On 16 November 2007 the assets of Maprochim were transferred to the company Port Angot Développement ('PAD') by way of universal succession, so that the latter became a party to the dispute as the successor in title to Maprochim.

26. In its judgment of 11 April 2008 the Tribunal d'instance de Rouen found, inter alia, that:

— the French customs authorities had rightly granted Mondia a partial remission of duty under Article 239 of the CC and Article 900(1)(o) of the Implementing Regulation;

— Mondia had not made the application for remission as the representative of APP within the meaning of Article 5 of the CC;

— Mondia was nevertheless to be regarded as APP's representative under Article 1208 of the French Civil Code, as under that provision one jointly and severally liable debtor necessarily represents the other debtors.

27. Consequently, the Tribunal d'instance de Rouen held that the remission granted to Mondia also applied to APP and correspondingly reduced the amounts of duty assessed against APP.

28. The French customs authorities on the one hand and Mondia, APP and PAD on the other appealed to the referring court against this judgment of the Tribunal d'instance de Rouen. At issue between them is, in particular, the question whether the partial remission granted to Mondia must also be allowed in favour of APP and PAD.

29. On 17 October 2008 insolvency proceedings were initiated against PAD and Maître Bérel was appointed liquidator.

30. By judgment of 28 January 2010 the referring court ruled on some of the heads of appeal, for the remainder stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Do Articles 213, 233 and 239 of the CC prevent a jointly and severally liable debtor of a customs debt who is not the beneficiary of a decision to remit that debt from relying, against the administration responsible for collection, on a decision to remit based on Article 239 of the CC which that administration notified to another jointly and severally liable debtor, in order to be released from payment of the customs debt?'

IV — Procedure before the Court of Justice

31. The reference for a preliminary ruling was received at the Registry of the Court of Justice on 8 February 2010.

32. In the course of the proceedings APP, Mr Bérel acting for PAD, the French Government and the Commission submitted written observations.

33. On 11 November 2010 a hearing took place, at which counsel for APP, the French Government and the Commission appeared, complemented their submissions and answered questions.

V — Main submissions of the parties

34. APP submits that the partial remission granted to Mondia must also benefit APP.

35. According to APP, Mondia represented APP when it applied for remission, as such an application can also be submitted by a representative. It concedes that Mondia did not explicitly state that it was also making the application for remission in the name of APP. It maintains that in a situation such as the present one the disclosure principle under Article 5(4) of the CC does not apply. In contrast to the situation involving an import declaration, it asserts, in the case of an application for remission there is no uncertainty as to the main debtor of the customs debt. In this case the jointly and severally liable customs debtors are already known. In addition, APP maintains that it clearly has a strong interest in remission.

36. Moreover, according to APP, when considering an application for remission under Article 239(1) and (2) of the CC and Article 899 of the Implementing Regulation from the company appointed to handle the import, the customs authorities examine not only whether the objective conditions for remission are met but also whether the subjective conditions applying to all the economic operators involved are fulfilled. APP maintains that it is clear that it fulfilled the subjective conditions of Article 239(1) and (2) of the CC and Article 899 of the Implementing Regulation. A company such as APP that employs the services of another company such as Mondia cannot, according to the case-law, rely on its lack of experience with regard to customs formalities. Rather, it must be held responsible for the conduct of its representative. Conversely, according to APP, the fact that obvious negligence cannot be attributed to its representative counts in favour of a company such as itself in the present case. If Mondia did not behave with obvious negligence, then the same must apply all the more to APP as a less experienced operator. Finally, it must be taken into account that Mondia's notification of the customs authorities was the result of information provided to Mondia by APP and that during the proceedings APP was not accused of negligence.

37. Moreover, APP argues that the partial remission granted to Mondia also has consequences that benefit APP. Article 233 of the CC provides for four situations in which the customs debt is extinguished, including, under paragraph (b), remission. That provision does not lay down that the effects of remission are confined to a particular debtor. The rules governing joint and several liability are determined by the law of the Member States. APP maintains that under the French Civil Code, and in particular Article 1208, the partial remission in relation to Mondia also applies to APP. According to APP, the

customs authorities did not remit the customs debt only in respect of Mondia. If the rules on joint and several liability do not stem from the law of the Member States but from European Union law, the same outcome has to be reached, in accordance with the assessments contained in the Civil Code.

38. *Mr Bérel* argues on behalf of PAD that under Article 233(a) of the CC the payment of the customs debt by one of the jointly and severally liable debtors extinguishes the debt, thereby also benefiting the other co-debtors. In his opinion, this must also apply if the customs debt is remitted in respect of one of the debtors under Article 233(b) of the CC.

39. According to Mr Bérel, in the absence of European Union legislation, the effects of remission for the jointly and severally liable debtors are determined according to national law. Hence the French Civil Code applies in the present case. As a result, the remission granted to Mondia also benefits the other debtors APP and PAD. Such a solution also preserves the principle of equality under European Union law.

40. Finally, according to Mr Bérel, the French customs authorities acknowledged that the decision granting partial remittance to Mondia also had effects for APP and PAD; they notified APP and Maprochim that a decision on their objections would not be taken until they had decided on Mondia's application for remission.

41. In the opinion of the *French Government*, APP and PAD/Maprochim cannot rely on the partial remission granted to Mondia. Article 239 of the CC has to be construed restrictively. Under the second paragraph of that article, an application for remission may be lodged only within a certain time-limit. Mondia lodged an application to that effect within the stated time-limit, but it did not declare that it was also acting for APP and Maprochim. Mondia therefore did not lodge its application for remission as the representative of APP and Maprochim.

42. In addition, the French Government argues that a condition for remission under Article 239 of the CC is that there was no deception or obvious negligence on the part of the applicant. The assessment of obvious negligence depends in particular on the complexity of the provisions whose contravention gave rise to the customs debt and on the professional experience and diligence of the economic operator. The customs authorities have

to assess each situation and the individual conduct of the operator concerned. Hence, a decision under Article 239 of the CC cannot be extended automatically to other jointly and severally liable customs debtors.

43. Lastly, in the opinion of the French Government, the automatic extension of remission to the other debtors is inconsistent with the objective of safeguarding the own resources of the Union.

44. In the opinion of the *Commission*, the partial remission of a customs debt under Article 239 of the CC for one jointly and severally liable debtor does not apply to the other debtors.

45. Under Article 4(9) and (12) of the CC a customs debt constitutes a link between a customs authority and a person, and not one between a customs authority and a transaction.

46. The Commission argues that the circumstances listed in Article 233 of the CC for the remission of a customs debt must be construed restrictively in view of the objective of safeguarding the own resources of the Union. This provision can therefore not be interpreted to mean that remission has absolute effects in relation to all jointly and severally liable debtors. Rather, according to the Commission, it is clear from Article 239 of the CC that remission has only relative effects. Under that provision, remission is subject not only to the occurrence of a particular objective situation but also to the subjective condition that the applicant had no intention to deceive and did not act with obvious negligence. Hence, according to the Commission, remission under Article 239 of the CC can apply only to the person making the application. This also corresponds to the intention of the Union legislature, which wished to reduce the risk that the customs debt would be uncollectable by requiring that liability be joint and several.

47. According to the Commission, under the system of the CC it is therefore for each debtor to apply for remission under Article 239 of the CC. Although it is possible for one of the debtors to represent another in lodging such an application, the rules on representation in customs matters derive not from national law but from Article 5 of the CC. Since Mondia did not act as the representative of APP or Maprochim in its application for remission, the conditions for representation under Article 5 of the CC are not fulfilled. In any case, in its application Mondia provided no information on the conduct of APP, so that it was impossible to judge whether APP could be accused of obvious negligence.

VI — Legal analysis

48. In this case three economic operators – Mondia, APP and Maprochim, the predecessor in title to PAD – are jointly and severally liable to pay amounts of duty. One of these debtors, Mondia, was granted partial remission of the amounts of duty under Article 239 of the CC in conjunction with Article 900(1)(o) of the Implementing Regulation.

A — *No representation within the meaning of Article 5 of the CC*

49. The referring court has to adjudicate on the appeals against a judgment in which it was ruled that the partial remission in favour of Mondia also benefits its co-debtor APP. The court of first instance based this finding on Article 1208 of the French Civil Code, under which a jointly and severally liable debtor sued by the creditor may rely in particular on all the defences and objections which result from the nature of the obligation and all those which are common to all the debtors. The referring court has doubts as to whether this is compatible with Articles 213, 233 and 239 of the CC.

50. The crux of the present reference for a preliminary ruling is thus the question whether Articles 213, 233 and 239 of the CC prevent the application of national legislation under which the partial remission granted to the jointly and severally liable debtor Mondia also benefits the other debtors, which would lead to a corresponding reduction in the amounts of duty owed by them (section B below). Before addressing this question, I first wish to set out briefly the reasons why in the present case Mondia cannot be regarded as the representative of APP or Maprochim/PAD (section A below).

51. The referring court held that Mondia cannot be regarded as a representative within the meaning of Article 5 of the CC because it submitted the application for remission of the customs debt only in its own name and not also in those of APP and Maprochim. It ruled that in the present case the disclosure principle under Article 5(4) of the CC prevents the assumption that Mondia acted as a representative within the meaning of that provision.

52. To the extent that in these proceedings for a preliminary ruling APP argues that the disclosure principle under Article 5(4) of the CC is not applicable to an application for remission or that by implication Mondia lodged the application for remission in APP's name as well as its own, it seems to me that these arguments already go beyond the scope of the question referred. In the context of a reference for a preliminary ruling under Article 267 TFEU only the referring court determines the

subject-matter of the question referred. The parties are therefore denied the right to determine the subject-matter of the question. [11] Since the referring court has not referred a question with regard to Article 5 of the CC, I wish to set out below merely for the sake of completeness the reasons why it was right to rule that there was no representation within the meaning of Article 5 of the CC.

53. Representation in customs matters is governed by Article 5 of the CC. Under Article 5(1) of the CC any person may appoint a representative in his dealings with the customs authorities to perform the acts and formalities laid down by customs rules. Under the first indent of the first subparagraph of Article 5(2) of the CC, representation may be direct, in which case the representative acts in the name of and on behalf of another person. Under the second indent of that subparagraph, it can also be indirect, in which case the representative acts in his own name but on behalf of another person. Article 878 of the Implementing Regulation makes it clear that a debtor may also appoint a representative to submit an application for remission.

54. For there to be effective representation in customs procedures, however, the conditions of Article 5 of the CC, which include in particular the disclosure principle under the first subparagraph of Article 5(4) of the CC, must be fulfilled. Under that provision, the representative must declare that he is acting for the person he represents. He must also state whether the representation is direct or indirect. The second subparagraph of Article 5(4) of the CC specifies that where disclosure is not made the representative is deemed to be acting in his own name and on his own behalf.

55. In this connection the referring court found, first, that Mondia lodged the application for remission explicitly only in its own name. Furthermore, Mondia's statement that it declared goods for import in the name of APP did not necessarily mean that by implication Mondia was also acting in APP's name. In addition, there was no indication whether representation was direct or indirect. For that reason, in the opinion of the referring court, Mondia had not submitted the applications for remission as the representative of APP.

56. APP's objections to this finding are unconvincing.

57. First, contrary to the opinion of APP, the disclosure principle under Article 5(4) of the CC also applies to an application for

11 — See, to that effect, Joined Cases 28/62 to 30/62 *Da Costa en Schaake and Others* [1963] ECR 31, at p. 38; Case 62/72 *Bollmann* [1973] ECR 269, paragraph 4; Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 31; and Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 41 et seq.

remission. As the referring court rightly held, the disclosure principle under Article 5(4) of the CC is a generally applicable rule that also holds good for an application for remission. [12] This is clear from the systematic location of this provision at the beginning of the Customs Code, from the title of the relevant chapter 'Sundry general provisions...', and not least from the wording of the provision itself.

58. Secondly, in a case such as the present one it cannot be assumed that Mondia was by implication acting in the name of APP. As the referring court rightly held, the fact that APP appointed Mondia to handle the declaration of the goods in question for importation does not necessarily mean that Mondia also intended to act in the name of APP when lodging its applications for remission under Article 239 of the CC in conjunction with Article 900 of the Implementing Regulation, since an application for remission can succeed only if there was no deception or obvious negligence on the part of the applicant. In proving that this condition is fulfilled, the interests of the economic operator who actually imported the goods in question and those of the economic operator in whose name the goods were or should have been imported are not necessarily identical. It is entirely possible to imagine situations in which the representative attempts to justify his own conduct by placing responsibility for customs offences on the shoulders of the person represented. The customs authorities cannot conclude merely from the fact that an operator declared goods for importation in the name of another person that he necessarily also wishes to apply for remission in the name of that person.

59. Contrary to the opinion of APP, the referring court therefore rightly ruled that Mondia did not submit the application for remission as a representative within the meaning of Article 5 of the CC.

B — *The effect of partial remission under Article 239(1) of the CC in conjunction with Article 900(1)(o) of the Implementing Regulation for the other joint and several debtors*

60. The referring court has to adjudicate on the appeals against a judgment in which it was ruled that although Mondia did not act as the representative of APP in accordance with Article 5 of the CC when lodging its application for remission, as a jointly and severally liable debtor it necessarily represented the other debtor APP under Article 1208 of the French Civil Code.

12 — As also stated by Reiche, K., in: Witte, P., *Zollkodex*, Beck, 4th edition, 2006, Article 5, paragraph 5.

61. It must first be observed in this connection that the conditions for effective representation in customs procedures are set out in Article 5 of the CC. As this article constitutes a regulatory act under Article 249(2) EC, it takes precedence over national law, so that a national provision such as Article 1208 of the French Civil Code cannot be relied upon in order to argue that an effective representation in customs procedures exists notwithstanding Article 5 of the CC.

62. In any event, the present case has less to do with representation in the true sense than with the question whether the partial remission of a customs debt in favour of a jointly and severally liable debtor such as Mondia also benefits APP and Maprochim as other debtors. This question of the effect of remission for the other debtors is not covered by Article 5 of the CC.

63. It must therefore first be determined whether the answer to that question is to be sought in European Union law or in the law of the Member States.

1. The applicable law

64. Article 213 of the CC lays down that where several persons are liable for payment of one customs debt, they shall be jointly and severally liable for such debt. The CC contains no other provisions that explicitly govern the arrangements for joint and several liability.

65. The question therefore arises whether the law of the Member States is applicable in this regard. This can be assumed to be the case only if there is express reference to national law or if it is clear from the relevant provisions of European Union law that the Union legislature wished to leave this question to the law of the Member States. [13]

66. The CC does not make specific reference to national law at this point. Nor does it make any reference to the 'provisions in force', which under Article 4(23) of the CC is to be construed as a reference to national provisions in the absence of corresponding provisions in European Union law. Rather, an interpretation of Article 213 of the CC based on its history and genesis, that is to say a comparison between this provision and the corresponding provisions that went before, militates against a comprehensive reference to national law. Articles 3 and 4 of Regulation No 1031/88, which applied before the CC came into effect, provided explicitly that

13 — Case C-314/06 *Société Pipeline Méditerranée et Rhône* [2007] ECR I-12273, paragraph 21; Case C-103/01 *Commission* v *Germany* [2003] ECR I-5369, paragraph 33; Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 30; and Case C-75/09 *Agra* [2010] ECR I-5595, paragraph 32 et seq.

the joint and several liability of persons liable for payment of a customs debt should be determined 'under the provisions in force in the Member States'. Article 213 of the CC no longer contains such a reference to the law of the Member States. Hence it cannot be assumed that a comprehensive reference to the law of the Member States was intended.

67. It must therefore first be examined whether European Union law lays down requirements as to the details of the system of joint and several liability. If no such rules exist, the national law of the Member States is applicable as a complement to European Union law.

68. Hence in the present case it is necessary to examine first whether any requirements follow from the CC as to the effect on the other debtors of a partial remission of duty for one jointly and severally liable debtor under Article 239 of the CC in conjunction with Article 900(1)(o) of the Implementing Regulation.

2. The requirements of the CC

69. It should first be noted that this question relates only to the relationship between APP and PAD on the one hand and the French customs authorities on the other. It therefore concerns the relationship between customs debtors and customs authorities, and not the relationship between the individual debtors. I consider this distinction significant, because the legal characteristics of the relationship between the customs authorities and the debtors has a direct impact on customs duty and hence on the own resources of the Union. It can be argued that questions relating directly to the extinction of the customs debt in the relationship with the customs authorities, and hence to the own resources of the Union, are dealt with uniformly in the CC. On the other hand, the legal characteristics of the relationship between the individual co-debtors, and especially the question of the extent to which within this relationship between them they must each ultimately bear liability for the customs debt, have no direct effect on own resources. It seems to me, in the present state of European Union law, that here there is definitely greater scope for national legal systems.

70. The claim of APP and Maprochim that they must also enjoy the benefits of the remission granted to Mondia is based first on the wording of Article 233(b) of the CC. Under this provision, a customs debt is extinguished, in particular, by remission of the amount of duty. Indeed, this provision could well be interpreted, on the basis of its wording alone, as meaning that remission in favour of one of

the jointly and severally liable debtors leads to extinction of the customs debt in relation to all the debtors.

71. In addition, APP and Maprochim cite the systematic relationship between Article 233(a) and (b) of the CC. Article 233(a) of the CC provides for extinction in another situation, where a customs debt is extinguished by payment of the amount of duty by one of the jointly and severally liable debtors. It is obvious that in the situation covered by Article 233(a) of the CC it is not only the debtor paying the duty but also the other debtors who are released from the customs debt. After all, a feature of a joint and several liability is that the creditor can indeed demand payment from each of the debtors, but only once. [14] Given that the first paragraph of Article 233 of the CC uses the term 'extinction' both for payment of the customs debt and for its remission, it could be argued that not only payment of the customs debt under (a) but also remission of the amount of duty under (b) leads to extinction of the customs debt for all of the jointly and severally liable debtors.

72. Such an interpretation of Article 233(b) of the CC, which is advocated in some of the literature, [15] would not, however, be consistent with the objectives pursed by Articles 202, 203, 213, 233 and 239 of the CC and would undermine their effectiveness.

73. It must first be taken into account that, under Articles 202(3) and 203(3) of the CC, the persons liable for the customs debt are not only those who themselves committed the customs offence (first indent in each case) but also those who participated in this offence (second indent in each case) as well as other economic operators (see the other indents in each case). This multiple safeguard is designed to reduce the risk that the customs debt will be uncollectable where the goods are not correctly declared. It should be seen especially in the light of the fact that customs duties are part of the own resources of the Union and hence a component of the Union budget. In interpreting Articles 233(b) and 239 of the CC, account must therefore also be taken of the need to protect the own resources of the Union. That objective may not be prejudiced by creating new grounds for the extinction of a customs debt. [16]

74. It must also be noted that in the present case Mondia was granted remission of the customs debt under Article 239 of the CC and Article 900(1)(o) of the Implementing Regulation. Article 900(1)(o) of the Implementing Regulation relates in particular to cases

14 — Witte, P., in Witte, P. (cited in footnote 12 above), Article 233, paragraph 12.

15 — See Henke, R., Huchatz, W., 'Das neue Abgabenverwaltungsrecht für Ein- und Ausfuhrabgaben', *Zeitschrift für Zölle und Verbrauchsteuern*, 1996, p. 226 et seq. and p. 231.

16 — Case C-112/01 *SPKR* [2002] ECR I-10655, paragraph 31; Case C-459/07 *Elshani* [2009] ECR I-2759, paragraph 31; and Case C-230/08 *Dansk Transport og Logistik* [2010] ECR I-3799, paragraph 51.

in which goods were not correctly declared before importation and the customs debt was incurred under Articles 202 and 203 of the CC as a result of this contravention. In this case the customs debt is determined without taking into account the possibility of European Union treatment or preferential tariff treatment. Nevertheless, for cases in which the goods could have been eligible for these advantages if they had been declared correctly, Article 900(1)(o) of the Implementing Regulation provides for the possibility of subsequent remission on grounds of fairness. Remission on such grounds is subject not only to the condition that if the goods had been declared correctly they would have been entitled to European Union treatment or preferential tariff treatment, but also to the subjective condition that no deception or obvious negligence may be attributed to the applicant.

75. An interpretation of Article 233(b) of the CC to mean that the partial remission to Mondia under Article 239 of the CC in conjunction with Article 900 of the Implementing Regulation automatically also benefited its co-debtors APP and Maprochim (or PAD) would not pay sufficient regard to the objectives described above. First, it is difficult to see why in the present case the European Union should forgo own resources merely because remission is justified in respect of Mondia but not necessarily also in relation to the other co-debtors. It is more in keeping with the abovementioned [17] principle of multiple safeguards that in such a case the customs authorities must uphold their claim on the other jointly and severally liable debtors if they have not been granted remission of the corresponding amount. [18] Secondly, I do not consider it justified, even on grounds of fairness, that a customs debtor who may have acted with intent to deceive or with obvious negligence should benefit from a remission merely because he is jointly and severally liable and another debtor has been granted remission in view of his own conduct. [19]

76. An interpretation according to which remission under Article 239 of the CC in conjunction with Article 900(1)(o) of the Implementing Regulation applies only to the applicant who meets the conditions of these provisions also accords with the principle that remission constitutes an exception to the normal import and export procedure and that, consequently, the provisions which

17 — See paragraph 73 of this Opinion.

18 — Witte, P., cited in footnote 14 above, Article 233, paragraph 12.

19 — To this effect, see also Witte, P., cited in footnote 14 above, Article 213, paragraph 11, and Article 233, paragraph 12. The author points out that the remission of a customs debt in favour of a debtor is required on grounds of fairness and that in this way amends can be made that is not possible by the exercise of discretion.

provide for such remission are to be interpreted strictly. [20]

77. Moreover, the wording of Article 233(b) of the CC does not preclude such an interpretation. This provision can be construed as governing only the relationship between the particular debtor and the customs authorities. In so far as Article 233(b) of the CC provides that the customs debt is extinguished by remission, in the present case this means only the relationship between Mondia and the customs authorities, but not that between APP and Maprochim/PAD on the one hand and the customs authorities on the other.

78. Lastly, it is appropriate to observe at this point that such an interpretation corresponds to the legal situation under Article 86(4) of the Modernised Customs Code, according to which remission applies only in respect of the jointly and severally liable debtor concerned. It is true that this provision is not applicable to the present case *ratione temporis*, but nothing can be deduced from the legislative proceedings that led to the adoption of the Modernised Customs Code to indicate that the Union legislature intended to alter the existing legal situation in this respect. To that extent, the rules laid down in Article 86(4) of the Modernised Customs Code can be relied upon as confirmation of the interpretation that remission under Article 239 of the CC in conjunction with Article 900(1)(o) of the Implementing Regulation benefits only the person who applied for it.

3. The other arguments put forward by APP and PAD

79. The other arguments put forward by APP and PAD in support of their claim that the partial remission granted to Mondia should also apply to them are unconvincing.

80. *First*, APP argues that the remission for Mondia also had to apply to APP because when the French customs authorities examined Mondia's application for remission they implicitly also investigated or should have investigated whether there was deception or obvious negligence on the part of APP.

81. I am not convinced by this argument.

82. In the first place, it must be noted that remission under Article 239 of the CC and Article 900(1)(o) of the Implementing Regulation is granted only on *application* submitted by

20 — Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 52, and Case C-156/00 *Netherlands* v *Commission* [2003] ECR I-2527, paragraph 91.

the debtor concerned. [21] Application must be made within a specified period, which as a rule is 12 months from the date on which the amount of the duties was communicated to the debtor. As the referring court has stated, APP itself did not apply for remission under Article 239 of the CC and Article 900(1)(o) of the Implementing Regulation within the time-limit, nor did Mondia submit its application for remission as the representative of APP.

83. In any case, in my view APP's premise that the French customs authorities implicitly examined or should have examined APP's conduct when examining Mondia's application is incorrect. As a matter of principle, when examining an application for remission under Article 239 of the CC in conjunction with Article 900(1)(o) of the Implementing Regulation, the customs authorities must take account of the subjective conditions laid down in these provisions only with regard to the applicant. It is true that an operator who is represented by a customs agent for import purposes must be held responsible for obvious negligence on the part of his representative. [22] That is self-evident, because the conduct of the representative must be attributed to the operator himself. In such a case an application for remission submitted by the *person represented* can be subject to the condition that the conduct of his *representative* will also be examined indirectly. Contrary to the opinion of APP, that does not mean that conversely, in other words where the *representative* has applied for remission, the authorities must examine whether there was deception or obvious negligence on the part of the *person represented*. The person represented is not acting in the name of the representative, so that the conduct of the person represented must not necessarily be attributed to the representative when the latter's own conduct is examined.

84. Secondly APP attempts to rely on Article 899 of the Implementing Regulation to support its view that the remission granted to Mondia also applies to APP. According to APP, this provision requires that, in a case such as the present one, upon receiving the application from Mondia the customs authorities should also have considered the remission of APP's customs debt. APP maintains that according to the wording of this provision the conduct of all parties involved should be examined.

85. This cannot be accepted either. It cannot be deduced from Article 899 of the Implementing Regulation that an application from a customs debtor for remission triggers an obligation on the part of the customs authorities to examine whether all of the jointly and

21 — By contrast, under other provisions the authorities may remit on their own initiative; see the third subparagraph of Article 236(2) of the CC.

22 — Case C-38/07 P *Heuschen & Schrouff Oriëntal Foods Trading* v *Commission* [2008] ECR I-8599, paragraphs 53 and 54.

severally liable debtors of the customs debt intended to deceive or acted with obvious negligence.

86. In the first place, the wording of Article 899 of the Implementing Regulation does not suggest such an interpretation. It merely speaks of 'the person concerned' in the singular, and not of 'the persons concerned' in the plural. Clearly only the applicant in question is meant.

87. The rule in Article 899 of the Implementing Regulation, which provides that the customs authorities shall decide on the application on the basis of the grounds stated in the application, also militates against APP's claim. As stated above, [23] the interests of individual jointly and severally liable debtors with regard to an application for remission may easily be opposed, so that it cannot be assumed that the applicant will necessarily base his application on grounds that are favourable to the other parties involved.

88. *Thirdly*, Mr Bérel observes on behalf of PAD that Maprochim was also affected by the customs authorities' decision to grant partial remission to Mondia. He claims that the French customs authorities had informed APP and Maprochim that they would take a decision on those companies' objections once they had decided on Mondia's application for remission.

89. In this regard, is it sufficient to point out that, in the context of a reference for a preliminary ruling under Article 267 TFEU, it is not for the Court of Justice but for the national court to determine the content of a decision of the national authorities. The Court of Justice must therefore as a matter of principle base its reasoning on the findings of the referring court. [24] It is clear from the reference for a preliminary ruling that it is the understanding of the referring court that the decisions of the customs authorities only remitted part of Mondia's customs debt.

C — *Summary*

90. It is clear from Articles 213, 233 and 239 of the CC that a decision of the customs authorities to grant partial remission under Article 239 of the CC and Article 900(1)(o) of the Implementing Regulation to one jointly and severally liable debtor cannot have an automatic effect to the benefit of the other debtors liable for this customs debt. Those provisions therefore prevent the application of a national provision which provides for such an effect.

23 — In paragraph 58 of this Opinion.

24 — See Case C-360/06 *Heinrich Bauer Verlag* [2008] ECR I-7333, paragraph 15, and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42.

VII – Conclusion

91. On the basis of the above considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling:

Articles 213, 233 and 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code are to be interpreted as meaning that in a case such as the present one a jointly and severally liable debtor of a customs debt who is not the beneficiary of a decision to remit that debt cannot rely on a decision to remit based on Article 239 of this Regulation in conjunction with Article 900(1)(o) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code which was made in respect of another jointly and severally liable debtor in order to be released from payment of the customs debt.