



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 5 July 2017¹

Case C-224/16

Asotsiatsia na balgarskite predpriyatia za mezhdunarodni prevozi i patishtata (AEBTRI)

v

Nachalnik na Mitnitsa Burgas

(Request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria))

(Reference for a preliminary ruling — Customs Union — External transit — TIR Convention — Transport carried out under cover of a TIR carnet — TIR operation not discharged — Liability of the guaranteeing association — Joint and several liability — Duty of the competent authorities to require payment so far as possible from the person or persons directly liable before making a claim against the guaranteeing association — Articles 203 and 213 of the Community Customs Code — Determination of the debtors of the customs debt — Persons who acquired or held the goods and who were aware or should reasonably have been aware that they had been removed from customs supervision)

I. Introduction

1. A TIR carnet was presented to a customs office of entry at the Turkish-Bulgarian border by a Turkish company transporting goods to Romania. Although it would appear that the goods themselves were received in Romania, the TIR operation was not duly discharged at the customs office of destination in Romania. This gave rise to a customs debt. Seeking recovery of the sums due, the Bulgarian authorities first claimed payment from the TIR carnet holder. They were not successful. They now seek payment from the guaranteeing association under the TIR regime.

2. The guaranteeing association has challenged the recovery decision issued by the Bulgarian authorities. In this context, the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) seeks to establish whether the competent national authorities have fulfilled the obligation, established by the TIR Convention,² to require payment of the sums due from the persons directly liable first, before making a claim against the guaranteeing association. In particular, the referring court seeks to ascertain which measures need to be taken in order to require payment and how the persons directly liable for the customs debt can be determined.

¹ Original language: English.

² Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) of 14 November 1975 (UNTS, Vol. 1079, p. 89, Vol. 1142, p. 413), approved on behalf of the European Economic Community by Council Regulation (EEC) No 2112/78 of 25 July 1978 (OJ 1978 L 252, p. 1), with entry into force on 20 June 1983. Republished by Council Decision 2009/477/EC of 28 May 2009 (OJ 2009 L 165, p. 1).

3. In addition to these two concrete questions, the present case raises more general issues concerning the interaction between the TIR Convention rules and the provisions of the Community Customs Code ('the Customs Code')³ and the nature of the liability of the guaranteeing association under the TIR Convention.

II. Legal framework

1. The TIR Convention

4. Article 1(o) of the TIR Convention defines the term 'holder' of a TIR carnet as 'the person to whom a TIR Carnet has been issued in accordance with the relevant provisions of the Convention and on whose behalf a Customs declaration has been made in the form of a TIR Carnet indicating a wish to place goods under the TIR procedure at the Customs office of departure. He shall be responsible for presentation of the road vehicle, the combination of vehicles or the container together with the load and the TIR Carnet relating thereto at the Customs office of departure, the Customs office *en route* and the Customs office of destination and for due observance of the other relevant provisions of the Convention'.

5. According to Article 1(q) of the TIR Convention, the term 'guaranteeing association' 'shall mean an association approved by the Customs authorities of a Contracting Party to act as surety for persons using the TIR procedure'.

6. Article 8 of the TIR Convention is worded as follows:

'1. The guaranteeing association shall undertake to pay the import or export duties and taxes, together with any default interest, due under the Customs laws and regulations of the country in which an irregularity has been noted in connection with a TIR operation. It shall be liable, jointly and severally with the persons from whom the sums mentioned above are due, for payment of such sums.

2. In cases where the laws and regulations of a Contracting Party do not provide for payment of import or export duties and taxes as provided for in paragraph 1 above, the guaranteeing association shall undertake to pay, under the same conditions, a sum equal to the amount of the import or export duties and taxes and any default interest.

...

7. When payment of sums mentioned in paragraphs 1 and 2 of this Article becomes due, the competent authorities shall so far as possible require payment from the person or persons directly liable before making a claim against the guaranteeing association.'

7. Article 11 of the TIR Convention provides that:

'1. Where a TIR operation has not been discharged, the competent authorities shall not have the right to claim payment of the sums mentioned in Article 8, paragraphs 1 and 2, from the guaranteeing association unless, within a period of one year from the date of acceptance of the TIR Carnet by those authorities, they have notified the association in writing of the non-discharge. The same provision shall apply where the certificate of termination of the TIR operation was obtained in an improper or fraudulent manner, save that the period shall be two years.

³ Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), last amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1).

2. The claim for payment of the sums referred to in Article 8, paragraphs 1 and 2 shall be made to the guaranteeing association at the earliest three months after the date on which the association was informed that the operation had not been discharged or that the certificate of termination of the TIR operation had been obtained in an improper or fraudulent manner and at the latest not more than two years after that date. However, in cases which, during the abovementioned period of two years, become the subject of legal proceedings, any claim for payment shall be made within one year of the date on which the decision of the court becomes enforceable.

3. The guaranteeing association shall have a period of three months, from the date when a claim for payment is made upon it, in which to pay the amounts claimed. The sums paid shall be reimbursed to the association if, within the two years following the date on which the claim for payment was made, it has been established to the satisfaction of the Customs authorities that no irregularity was committed in connection with the transport operation in question.'

2. Customs Code

8. According to Article 203 of the Customs Code:

'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.'

9. Article 213 of the Customs Code sets out that 'where several persons are liable for payment of one customs debt, they shall be jointly and severally liable for such debt'.

3. Implementing regulation

10. Commission Regulation (EEC) No 2454/93⁴ lays down provisions for the implementation of the Customs Code. It contains the specific rules of ‘the TIR procedure’ in Section 2 of Chapter 9, under Title II of Part II (Articles 454 to 457b).⁵

11. According to Article 455 of the implementing regulation:

‘1. The customs authorities of the Member State of destination or exit shall return the appropriate part of Voucher No 2 of the TIR carnet to the customs authorities of the Member State of entry or departure without delay and at most within one month of the date when the TIR operation was terminated.

2. If the appropriate part of Voucher No 2 of the TIR carnet is not returned to the customs authorities of the Member State of entry or departure within two months of the date of acceptance of the TIR carnet, those authorities shall inform the guaranteeing association concerned, without prejudice to the notification to be made in accordance with Article 11(1) of the TIR Convention.

They shall also inform the holder of the TIR carnet, and shall invite both the latter and the guaranteeing association concerned to furnish proof that the TIR operation has been terminated.

...’

12. Article 455a of the implementing regulation provides that:

‘1. Where the customs authorities of the Member State of entry or departure have not received proof within four months of the date of the acceptance of the TIR carnet that the TIR operation has been terminated, they shall initiate the enquiry procedure immediately in order to obtain the information needed to discharge the TIR operation or, where this is not possible, to establish whether a customs debt has been incurred, identify the debtor and determine the customs authorities responsible for entry in the accounts.

If the customs authorities receive information earlier that the TIR operation has not been terminated, or suspect that to be the case, they shall initiate the enquiry procedure forthwith.

...

5. Where an enquiry establishes that the TIR operation was terminated correctly, the customs authorities of the Member State of entry or departure shall immediately inform the guaranteeing association and the holder of the TIR carnet and, where appropriate, any customs authorities that may have initiated a recovery procedure in accordance with Articles 217 to 232 of the Code.’

⁴ Regulation of 2 July 1993 laying down provisions for the implementation of Council Regulation No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1), last amended by Commission Regulation (EC) No 214/2007 of 28 February 2007 (OJ 2007 L 62, p. 6) (‘the implementing regulation’).

⁵ In its order for reference, the national court invoked Article 455a of the implementing regulation as amended by Commission Regulation (EC) No 1192/2008 of 17 November 2008 (OJ 2008 L 329, p. 1). However, as the Commission correctly pointed out at the hearing, according to Article 3 of that regulation, the new version of Article 455 is only applicable as of 1 January 2009 and that of Article 455a is only applicable as of 1 July 2009. In view of the facts of the present case and the deadlines established by those provisions, the applicable versions of Articles 455 and 455a correspond to those contained in Regulation No 2454/93, last amended by Regulation No 214/2007, which is cited in footnote 4 of this Opinion.

13. Article 457 of the implementing regulation sets out that:

‘1. For the purposes of Article 8(4) of the TIR Convention, when a TIR operation is carried out on the customs territory of the Community, any guaranteeing association established in the Community may become liable for the payment of the secured amount of the customs debt relating to the goods concerned in the TIR operation up to a limit per TIR carnet of EUR 60 000 or the national currency equivalent thereof.

2. The guaranteeing association established in the Member State competent for recovery under Article 215 of the Code shall be liable for payment of the secured amount of the customs debt.

3. A valid notification of non-discharge of a TIR operation made by the customs authorities of one Member State, identified as competent for recovery under the third indent of Article 215(1) of the Code, to the guaranteeing association authorised by those authorities shall also be valid where the customs authorities of another Member State, identified as competent under the first or second indent of Article 215(1) of the Code, later proceed with recovery from the guaranteeing association authorised by those latter authorities.’

III. Facts, procedure and the questions referred

14. On 11 November 2008, a TIR carnet was submitted at the customs office of entry, the Kapitan Andreevo customs checkpoint at the Turkish-Bulgarian border. Sargut OOD was the holder of the TIR carnet, a company with its head office in the Republic of Turkey. The declared destination of the goods in question was Romania.

15. The Bulgarian authorities did not receive the appropriate part of voucher No 2 of the TIR carnet within the requisite time frame. They thus sent a request to the Romanian customs authorities to enquire about the discharge of the TIR operation. The Romanian authorities replied that the goods transported under the TIR carnet had not been presented to them. The voucher No 2 of the TIR carnet that was later produced as evidence by the guaranteeing association had not been presented to the customs office of destination in Romania. According to the referring court, that voucher appears to be inaccurate or falsified.

16. On 10 September 2009, the Director of the Kapitan Andreevo customs office issued a decision against Sargut OOD specifying the amount of the customs debt owed and value added tax (VAT) incurred plus statutory interest. That decision was communicated to Sargut OOD as the TIR carnet holder, as well as to the guaranteeing association, the Asotsiatsia na balgarskite predpriyatia za mezhdunarodni prevozi i patishtata (Association of Bulgarian Enterprises for International Road Transport and Roads, ‘AEBTRI’). Sargut OOD challenged that decision, which was, however, ultimately upheld by the Varhoven administrativen sad (Supreme Administrative Court) in its judgment of 2 November 2010.

17. On 22 November 2010, AEBTRI was notified of the failure to complete the TIR operation, and was presented with a request for payment of the debt. AEBTRI did not pay within the period laid down in Article 11(3) of the TIR Convention.

18. On 7 June 2011, the Director of the Svilengrad customs office requested the competent regional directorate of the National Revenue Agency to initiate enforcement proceedings against Sargut OOD for the sums owed pursuant to the decision of 10 September 2009. However, the competent authorities later informed the Svilengrad customs office that the sums relating to the debts had not been recovered.

19. On 5 September 2012, the Director of the Svilengrad customs office issued a recovery decision in respect of the unpaid customs duties and VAT plus statutory interest ('the recovery decision'). The recovery decision was addressed to AEBTRI in its capacity as the guaranteeing association. The recovery decision indicated that all that was possible had been done to collect the debt from Sargut OOD, the TIR carnet holder.

20. Over the course of the proceedings leading to the adoption of the recovery decision, several documents were produced as evidence: an international bill of lading indicating that Irem Corporation SRL Romania was the recipient of the goods transported; an international consignment note with the signature and stamp of the recipient; an acknowledgement of receipt of the goods, signed and stamped by Irem Corporation SRL; and a letter from the carrier (Sargut OOD) to the Svilengrad customs office stating that transport operated under the TIR regime had been completed in Romania and that the 'Romanian customs department stamped the carnet when the goods were unloaded'.

21. According to the order for reference, it can be concluded from those documents that the goods were received by Irem Corporation SRL. There is, however, no proof that those goods were declared at the customs office of destination.

22. AEBTRI challenged the recovery decision before the Administrativen sad Haskovo (Administrative Court of Haskovo, Bulgaria). That action was dismissed. AEBTRI has lodged an appeal before the Varhoven administrativen sad (Supreme Administrative Court), the referring court.

23. In the light of the foregoing, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- '(1) Does the Court of Justice have jurisdiction, with a view to forestalling divergent judgments, to interpret, in a manner binding on the courts of the Member States, [the TIR Convention], in so far as concerns the scope of Articles 8 and 11 of that convention, with regard to the assessment of liability of a guaranteeing association, also referred to in Article 457(2) of [the implementing regulation]?
- (2) Does the interpretation of Article 457(2) of the [implementing regulation], in conjunction with Article 8(7) (now Article 11(2)) of [the TIR Convention] and the explanatory notes thereto, allow for a finding that, in a situation such as that in the present case, where the debts referred to in Article 8(1) and (2) [of the TIR Convention] become due, the customs authorities have required payment thereof so far as possible from the holder of the TIR carnet, who is directly liable for those sums, before bringing a claim against the guaranteeing association?
- (3) Must the recipient, who acquired or held an item known to have been conveyed under cover of a TIR carnet, where it was not established that that item was submitted and declared before the customs office of destination, be considered to be, on account of those circumstances alone, a person who should have been aware that that item had been removed from customs supervision, and to be recognised as jointly and severally liable within the meaning of the third indent of Article 203(3), in conjunction with Article 213, of [the Community Customs Code]?
- (4) If the answer to the third question is in the affirmative, does the customs administration's failure to require payment of the customs debt from the recipient preclude the liability under Article 457(2) of the [implementing regulation] of the guaranteeing association, pursuant to Article 1[q] of the [TIR Convention]?'

24. The Bulgarian Government, the Director of the Burgas customs office (as successor of the Svilengrad customs office), AEBTRI, and the European Commission have presented written submissions. All of them, with the exception of AEBTRI, participated at the oral hearing held on 26 April 2017.

IV. Analysis

25. The present opinion is structured as follows. After dwelling briefly on the first question, concerned with the jurisdiction of the Court to interpret the TIR Convention (A), I will proceed to the second question, relating to the kind of measures to be taken by the national authorities in order to fulfil the requirements laid down in Article 8(7) of the TIR Convention (B). Next, I will jointly examine questions 3 and 4, which are concerned with the possibility and consequences of considering the recipient of the goods among the persons directly liable, in the sense of Article 8(7) of the TIR Convention (C).

A. First question: jurisdiction of the Court

26. By its first question the referring court asks whether the Court has jurisdiction to interpret the TIR Convention.

27. The Commission, the Bulgarian Government and the Director of the Burgas customs office have submitted that the answer to that question should be in the affirmative. I agree.

28. The TIR Convention was approved on behalf of the European Economic Community by Council Regulation (EEC) No 2112/78 of 25 July 1978 and entered into force on 20 June 1983.⁶ It thus became an integral part of the EU legal order. The Court has jurisdiction to give a preliminary ruling on the interpretation of an international convention that forms part of the EU legal order.⁷

29. Furthermore, it might be recalled that this is not in fact the first time that the Court has been invited to interpret the provisions of the TIR Convention.⁸

B. Second question: the duty to *so far as possible* require payment from the person or persons directly liable

1. Preliminary remarks

30. Before entering into the substantive discussion itself, there are four preliminary points that are worth underlining at this stage.

31. First, the present Opinion does not explain in any depth the functioning of the TIR Convention. This is not only for reasons of conciseness, but also because that task has already been eloquently carried out by Advocate General Léger in his Opinion in *BGL*, to which I therefore refer for this purpose.⁹

⁶ OJ 1978 L 252, p. 1. Council Decision 2009/477 has specified that the legal basis for the accession of the European Union to this international convention was the Treaty establishing the European Community, and in particular Article 133 in conjunction with first sentence of Article 300(3) thereof (now Articles 207 and 218 TFEU).

⁷ See, for example, judgment of 4 May 2010, *TNT Express Nederland* (C-533/08, EU:C:2010:243, paragraph 60 and the case-law cited).

⁸ See, for example, judgments of 23 September 2003, *BGL* (C-78/01, EU:C:2003:490); of 14 May 2009, *Internationaal Verhuis- en Transportbedrijf Jan de Lely* (C-161/08, EU:C:2009:308); and of 22 December 2010, *ASTIC* (C-488/09, EU:C:2010:820).

⁹ See Opinion in *BGL* (C-78/01, EU:C:2003:14, points 3 to 14).

32. Second, it ought to be recalled that the rights and obligations of guaranteeing associations are governed by the TIR Convention, by the EU customs legislation, and by the corresponding agreements concluded by those associations and national authorities.¹⁰ The latter agreements are subject to national law.¹¹ The present Opinion is concerned only with the TIR Convention and EU customs legislation. It therefore in no way precludes or touches upon the rights and obligations of guaranteeing associations emanating from any such agreements.

33. Third, on a general level common to all the remaining questions posed by the national court, it ought to be recalled that the rights and obligations arising from the TIR Convention should be distinguished from those arising from EU law. The TIR Convention constitutes an instrument of international law to which the EU has acceded. Consequently, the EU has adopted its own rules to implement the TIR Convention within the EU legal order. Naturally, those EU rules will then be relevant for the national authorities when they are applying the TIR Convention. However, those rules are *not determinative* for the interpretation of the TIR Convention itself. Put differently: the provisions of EU law adopted in order to implement the TIR Convention have to be interpreted in the light of that convention. This certainly does not, and should not, mean that the TIR Convention is to be interpreted in the light of EU secondary legislation.

34. Fourth, the second question referred by the national court is primarily concerned with the *kind of measures* to be taken by the competent national authorities in order to fulfil the obligation, established by Article 8(7) of the TIR Convention, to require payment ‘so far as possible’ from the person or persons directly liable before making a claim against the guaranteeing association. It is true that hidden within that question is also, to some extent, the enquiry into the circle of persons who might be deemed ‘directly liable’. However, the issue of whether the recipient of the goods can be considered amongst the persons directly liable according to Article 8(7) of the TIR Convention is specifically the aim of questions 3 and 4. I therefore consider it appropriate to examine that question, that is, the determination of ‘*person or persons directly liable*’, in the joint answer to those questions.

2. Assessment of second question

35. By its second question, the referring court asks about the interpretation of Article 457(2) of the implementing regulation, read in conjunction with Article 8(7) of the TIR Convention. It wishes to know whether, in a situation such as that in the present case, the customs authorities have required payment ‘so far as possible’ from the persons who are directly liable. That court wishes thereby to ascertain, essentially, whether the requirements set out in Article 8(7) of the TIR Convention have been fulfilled. According to that provision ‘the competent authorities shall so far as possible require payment from the person or persons directly liable before making a claim against the guaranteeing association’.¹²

36. Neither the Customs Code nor the implementing regulation contains any specific rules on the implementation of the requirement of Article 8(7) of the TIR Convention. Concrete measures to be adopted in order to require payment from the directly liable person(s) before claiming payment from the guaranteeing association are not foreseen. The provision of EU law that refers to the duties of

¹⁰ See, to that effect, judgments of 23 September 2003, *BGL* (C-78/01, EU:C:2003:490, paragraph 45); of 5 October 2006, *Commission v Germany* (C-105/02, EU:C:2006:637, paragraph 78); and of 5 October 2006, *Commission v Belgium* (C-377/03, EU:C:2006:638, paragraph 84).

¹¹ *Ibid.*

¹² As from 13 September 2012, Article 8(7) of the TIR Convention has been repealed. However, its replacement in the form of the new Article 11(2) has almost the same wording: ‘Where the payment of the sums mentioned in Article 8, paragraphs 1 and 2, becomes due, the competent authorities shall, so far as possible, require payment from the person or persons liable for such payment before making a claim against the guaranteeing association.’ (Amendment to the Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention, 1975) — According to the UN Depositary Notification C.N.326.2011.TREATIES-2 the following amendments to the TIR Convention entered into force on 13 September 2012 for all Contracting Parties, OJ 2012 L 244, p. 1.)

guaranteeing associations under the TIR transit regime is Article 457 of the implementing regulation. That provision merely sets out in its paragraph (1) that when a TIR operation is carried out on the EU's customs territory, any guaranteeing association established therein may become liable for the secured amount of the customs debt relating to the goods concerned up to the established limit.

37. The question therefore boils down to whether Article 8(7) of the TIR Convention itself requires competent authorities to issue (only) a claim for payment to the persons(s) who are directly liable or whether it also requires (all other) possible enforcement measures to be taken against those persons before requesting the payment from the guaranteeing association.

38. The views of the parties differ in this regard. AEBTRI submits that it is necessary to have exhausted all possible measures of recovery with regard to the persons directly liable before turning to the guaranteeing association. The Bulgarian Government and the Director of the Burgas customs office have submitted that, in the present case, the competent authorities have done everything possible to obtain payment from the TIR carnet holder. The Commission confirmed at the hearing that, in its view, enforcement measures against the person(s) who are directly liable are not required by Article 8(7) of the TIR Convention.

39. I agree with the view expressed by the Commission, the Bulgarian Government and the Burgas customs office. In my opinion, a literal, contextual as well as purposive reading of Article 8(7) of the TIR Convention leads to the conclusion that the competent authorities are simply obliged to ask for the payment (to notify and to claim). They are not required to have also exhausted all the possibilities for recovery through enforcement measures in order to be able to claim payment from the guaranteeing association.

40. As far as the *text* of that provision is concerned, Article 8(7) of the TIR Convention merely establishes the duty to *require* payment from the persons directly liable.¹³

41. The explanatory notes adopted for the interpretation of the TIR Convention provide for more explicit guidance in this regard.¹⁴ The explanatory note to Article 8(7) of the TIR Convention refers specifically to 'measures to be taken by the competent authorities in order to require payment from the person or persons directly liable shall include at least notification of the non-discharge of the TIR operation and/or transmission of the claim for payment to the TIR Carnet holder'.¹⁵

42. Thus, the explanatory note refers only to the *notification of the non-discharge* of the operation and to the *claim for payment* as the measures for requiring payment. It makes clear that the adoption of measures of forcible recovery is not necessary to enable the competent authorities to claim payment from the guaranteeing association under Article 8(1) and (7) of the TIR Convention.

43. As a result, the fact that a requirement to exhaust enforcement proceedings cannot be read into Article 8(7) of the TIR Convention emerges clearly from the text, further supported by the explanatory note to that provision. If payment is not forthcoming within the deadline laid down in the claim for payment, the condition to 'require payment' is, in my view, fulfilled.

¹³ In French, another authentic language of the TIR Convention, that provision reads: 'les autorités compétentes doivent, dans la mesure du possible, en requérir le paiement de la (ou des) personne(s) directement redevables de ces sommes avant d'introduire une réclamation près l'association garante'.

¹⁴ Article 43 of the TIR Convention states that the explanatory notes interpret the provisions of the Convention and describe recommended practices. Article 51 further provides that the annexes (including Annex 6 which contains the explanatory notes) form an integral part of the Convention.

¹⁵ As mentioned above in footnote 12, Article 8(7) has been replaced by the new Article 11(2). The explanatory note to the new Article 11(2) of the TIR Convention reads as follows 'the efforts to be made by the competent authorities to require payment from the persons or persons liable shall include, at least, the sending of the claim for payment to the TIR carnet holder, at his address indicated in the TIR carnet, or the person or persons liable, if different, established in accordance with national legislation. The claim for payment to the TIR carnet holder may be combined with the notification referred to in paragraph 1(a) of this Article'.

44. *Systematic* arguments also support that reading. First, it should be stressed that Article 8(1) of the TIR Convention defines the nature of the liability of guaranteeing associations as *joint and several*. That type of liability generally means¹⁶ that each debtor is liable for the full amount of the debt and that the creditor is free, in principle, to claim payment from one or more of the debtors as he chooses.¹⁷

45. Seen in this light, the requirement established in Article 8(7) constitutes an obligation that is a precondition for the activation of such liability, imposed by the TIR Convention. The authorities have to make an effort to require payment first from the directly liable person(s). However, once that procedural requirement of notification and requiring the payment from the directly liable person(s) of Article 8(7) is fulfilled, the joint and several liability of the guaranteeing association is triggered, and the national authorities can request the payment from the guaranteeing association.

46. Second, the requirement set out by Article 8(7) of the TIR Convention also has to be read in conjunction with the temporal limitations established in Article 11 of that convention. In particular, according to Article 11(2) of the TIR Convention, the claim for payment shall be made to the guaranteeing association three months after the notice of non-discharge at the earliest, but no later than two years after the same date.¹⁸ It is difficult to see how the competent authorities would be able to remain within those time limits, and still carry out all the possible enforcement measures against the direct debtor(s).

47. Finally, it has to be borne in mind that the TIR Convention's *objective* is the facilitation of the international carriage of goods. It provides that such goods shall not be subject to the payment or deposit of import or export duties and taxes at the customs offices *en route* (Article 4). This facilitation is possible due to the fact that transit operations are covered by one of the national guaranteeing associations, which are linked in a guarantee chain administered by the International Road Transport Union, supported by international insurance companies.¹⁹ In other words, there is a balance: individual Member States *en route* no longer carry out independent checks or impose duties. On the other hand, the guaranteeing associations assume liability for TIR carnet holders who are not resident in the State claiming payment, debt recovery against whom may not always be successful.

48. That principle objective (and that balance) of the TIR Convention would be put at risk if to 'require payment' of Article 8(7) of the TIR Convention were to be understood as an obligation of full enforcement measures against all the debtors a Member State would be entitled to pursue in any case. An undiplomatically blunt question could then be asked: if that is the case, why have a TIR Convention at all?

49. In the present case, and subject to the verification of the national court, it has not been contested that the deadlines prescribed by Article 11(1) and (2) of the TIR Convention have been complied with by the competent authorities. Notification of the failure to discharge the TIR operation was made to Sargut OOD and also to AEBTRI. Payment was claimed from Sargut OOD through a recovery decision which, after a judicial challenge, became enforceable. In addition to all that, enforcement proceedings were also launched against Sargut OOD. Following the lack of success of those proceedings, payment was claimed from AEBTRI.

¹⁶ That rule is called 'solidary' in some jurisdictions. See, for example, European Group on Tort Law, *Principles of European Tort Law*, Article 9:101(2) of which foresees that 'where persons are subject to solidary liability, the victim may claim full compensation from any one or more of them, provided that the victim may not recover more than the full amount of the damage suffered by him'. A similar definition is found in von Bar, C., et al., *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, III.-4:102: Solidary, divided and joint obligations: '(1) An obligation is solidary when each debtor is bound to perform the obligation in full and the creditor may require performance from any of them until full performance has been received.'

¹⁷ See, to that effect, judgment of 18 May 2017, *Latvijas dzelzceļš* (C-154/16, EU:C:2017:392, paragraph 85).

¹⁸ Or, for disputes which become the subject of legal proceedings, within one year of the date on which a court decision becomes enforceable. See, to that effect, judgment of 5 October 2006, *Commission v Netherlands* (C-312/04, EU:C:2006:643, paragraph 51).

¹⁹ See UNECE TIR Handbook, Tenth Revised Edition, ECE/TRANS/TIR/6/REV.10, New York and Geneva, 2013, pp. 9 and 27 et seq.

50. In such circumstances, I agree with the submissions of the Commission, the Director of the Burgas customs office and the Bulgarian Government that, in the present case, the Bulgarian authorities duly fulfilled the requirement of Article 8(7) of the TIR Convention.

51. From my point of view, they even went beyond what was strictly necessary under Article 8(7) of the TIR Convention: as is apparent from the argument in this section, launching enforcement proceedings against a TIR carnet holder before requesting payment from the guaranteeing association is not a requirement of the TIR Convention. It is a possibility that remains at the discretion of the authorities of the Member State in view of the factual situation of the individual case. It may be fully justified in some cases; it might be entirely redundant in others. It all depends on whether or not there are any assets that might be seized in potential enforcement proceedings.

52. I propose therefore that the answer to the second question posed by the referring court is that Article 457(2) of the implementing regulation, read in conjunction with Article 8(7) of the TIR Convention, must be interpreted in the sense that the competent customs authorities may claim payment from the guaranteeing association where, in circumstances such as those in the present case, they have required payment through a claim of payment from the TIR carnet holder as the directly liable person.

C. Third and fourth questions: the recipient as a directly liable person

53. By its third question, the referring Court asks about the position of the recipient of the goods in case he acquired or held an item known to have been conveyed under cover of a TIR carnet, where it was not established that that item was submitted and declared before the customs office of destination. The referring court enquires whether that recipient can be considered to be, by reason of those circumstances alone, a person who should have been aware that that item had been removed from customs supervision, and to be recognised as jointly and severally liable within the meaning of the third indent of Article 203(3), in conjunction with Article 213 of the Customs Code.

54. By the fourth question the referring court wishes to know, essentially, whether the customs administration's failure to require payment from that recipient precludes the liability under Article 457(2) of the implementing regulation of the guaranteeing association pursuant to Article 1(q) of the TIR Convention.

55. In my opinion, those questions should be answered together. They both relate to the possibility to consider the recipient of the goods as a 'directly liable person' under Article 8(7) of the TIR Convention.

56. I shall provide such a joint answer in this part of this Opinion in three steps. First, I will outline the relationship between Article 8(1) and (7) of the TIR Convention (1). Second, I will analyse the issue of whether, according to Article 203 of the Customs Code, a recipient of goods may be considered among the customs debtors in the framework of the TIR regime for the purposes of determining the person(s) directly liable to which Article 8(7) of the TIR Convention refers (2). Third, I will examine the effects that the regime of joint and several liability established by Article 213 of the Customs Code has on the condition established in Article 8(7) of the TIR Convention (3).

1. Article 8(1) and (7) of the TIR Convention

57. Article 8(1) of the TIR Convention establishes the primary framework of reference for the obligations of guaranteeing associations: they are *jointly and severally* liable with the persons who are obliged to pay import or export duties and taxes and any default interest.

58. As already mentioned,²⁰ joint and several liability means that each debtor is liable for the full amount of the debt. The creditor is free, in principle, to claim payment from any one of them, according to his choice.

59. Article 8(7) of the TIR Convention is a provision somewhat procedurally *limiting* that choice, but *without altering* the nature of that liability. That provision establishes a condition in the specific framework of the TIR Convention in order for the authorities of the State Party concerned to be able to trigger the liability of the guaranteeing association: it is necessary to require payment from the directly liable person(s) first.

60. Who are the ‘person or persons directly liable’ under Article 8(7) of the TIR Convention?

61. The Bulgarian Government and the Director of the Burgas customs office have submitted that under the TIR Convention, no persons other than the TIR carnet holder can be considered as ‘directly liable’. In particular, they argue that the TIR Convention does not contain any obligations with regard to the recipient of the goods.

62. I do not agree.

63. On the one hand, it is true that Article 8(7) remains silent as to the determination of the person(s) directly liable. The interpretative guidance of the explanatory note to Article 8(7) of the TIR Convention does not offer any clarification on this point. Indeed, the explanatory note expressly mentions only the TIR carnet holder as the addressee of the minimum measures that can be taken.

64. However, this cannot be understood, in my view, as excluding any other potential debtors. The explicit mention of the TIR carnet holder might also be understood as simply indicating that *prima facie*, the principal debtor will be the TIR carnet holder in the majority of cases. Indeed, under Article 1(o) of the TIR Convention, the TIR carnet holder is defined as the person ‘responsible for presentation of the road vehicle, the combination of vehicles or the container together with the load and the TIR Carnet relating thereto at the Customs office of departure, the Customs office *en route* and the Customs office of destination and for due observance of the other relevant provisions of the Convention’. Thus the TIR carnet holder is in charge of presenting the goods to customs after transit at the customs office of destination.

65. On the other hand, what is perhaps more important than the express mention of the TIR carnet holder alone is the fact that Article 8(7) of the TIR Convention clearly refers to ‘person or *persons* directly liable’. The use of the plural in the text and also in the explanatory note clearly indicates that there might be more than one person who is directly liable. The drafters thus evidently foresaw the possibility of there being more debtors than just the TIR carnet holder.

66. It may therefore be concluded that Article 8(7) of the TIR Convention leaves open the issue of who precisely the directly liable person(s) is/are. They are therefore to be determined according to the domestic rules of the contracting parties.

²⁰ See above, point 44 and footnotes 16 and 17.

2. The determination of debtors under Article 203 of the Customs Code

67. Within the EU legal framework, the determination of debtors is exhaustively provided for in the Customs Code.²¹ Article 203 of the Customs Code sets out the cases of a customs debt arising from importation through the unlawful removal from customs supervision of goods liable to import duties.²² Article 203(3) of the Customs Code lists the debtors of a customs debt on importation in a rather broad manner.²³ Along with the person who removed the goods from customs supervision, that provision also lists the person who acquired the goods in question as a ‘debtor’.

68. With regard to those who acquired the goods in question, namely the recipients of the goods, qualifying those persons as debtors is however dependent on a subjective condition being fulfilled: they ‘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’. Therefore, Article 203(3) of the Customs Code establishes a distinction: the person who removed the goods from customs supervision is unconditionally liable for the debt, but the person who acquired the goods in question becomes a debtor only if he fulfils the subjective condition mentioned above.²⁴

69. In its third preliminary question, the national court refers to the situation in which a recipient who acquired or held an item knowing that that item had been conveyed under cover of a TIR carnet, where it was not established that the item was submitted and declared before the customs office of destination.

70. In my opinion, such a situation could fulfil the subjective condition laid down in the third indent of Article 203(3) of the Customs Code, if it is established that that recipient was aware or, in the specific circumstances of the case, should have been aware that the goods at issue had been removed from customs supervision. The determination of those elements remains within the remit of the national court, since it concerns considerations of a factual nature.²⁵

71. It might be recalled in this regard that the Court stated that the phrase ‘should reasonably have been aware’ (in Article 202(3) of the Customs Code) ‘relates to the conduct of a reasonably circumspect and diligent trader’.²⁶ It is therefore for the national court, in carrying out an overall assessment of the circumstances of the case, including the information available to the trader, to ascertain whether the recipient should have been aware of the customs obligations, and whether, in that case, he took all the steps which could reasonably be expected of him to ensure that the goods had not been removed from customs supervision.²⁷

72. In the circumstances of the present case, which concern removal of goods from customs supervision, a recipient could be considered as a debtor if the subjective condition mentioned above is met. This conclusion is also valid for the purposes of the TIR regime. Indeed, the general provisions regarding a customs debt arising are applicable to transit regimes.²⁸

21 See, for example, judgment of 17 November 2011, *Jestel* (C-454/10, EU:C:2011:752, paragraph 12 and the case-law cited).

22 On the concept of ‘unlawful removal’ see, for example, judgment of 12 June 2014, *SEK Zollagentur* (C-75/13, EU:C:2014:1759, paragraph 28 and the case-law cited).

23 See, by analogy, judgments of 23 September 2004, *Spedition Ullustrans* (C-414/02, EU:C:2004:551, paragraphs 25 and 31), and of 25 January 2017, *Ultra-Brag* (C-679/15, EU:C:2017:40, paragraph 25).

24 See, to that effect, judgment of 1 February 2001, *D. Wandel* (C-66/99, EU:C:2001:69, paragraph 49), or also, by analogy, judgment of 23 September 2004, *Spedition Ullustrans* (C-414/02, EU:C:2004:551, paragraph 27 et seq.).

25 See, to that effect, judgment of 17 November 2011, *Jestel* (C-454/10, EU:C:2011:752, paragraph 21 and the case-law cited).

26 Judgment of 17 November 2011, *Jestel* (C-454/10, EU:C:2011:752, paragraph 22).

27 See, to that effect, judgment of 17 November 2011, *Jestel* (C-454/10, EU:C:2011:752, paragraphs 23 to 25).

28 See, for example, with regard to the community transit regime, judgment of 18 May 2017, *Latvijas dzelzceļš* (C-154/16, EU:C:2017:392, paragraph 91). With regard to the TIR regime see, for example, judgment of 29 April 2010, *Dansk Transport og Logistik* (C-230/08, EU:C:2010:231, paragraphs 103 to 107), or of 22 December 2010, *ASTIC* (C-488/09, EU:C:2010:820, paragraphs 25 and 26).

73. In sum, the recipient of the goods who fulfils the subjective condition of Article 203(3) of the Customs Code may be considered amongst the persons directly liable under Article 8(7) of the TIR Convention. However, in my view, the relevant issue in the present case is a different one, namely whether failure to require payment from a recipient eventually found to be a debtor under the Customs Code can preclude the possibility to claim payment from the guaranteeing association. I turn to that question now.

3. On the effects of joint and several liability (Article 213 of the Customs Code)

74. What are the implications of Articles 203 and 213 of the Customs Code when it comes to ascertaining whether the requirement of Article 8(7) of the TIR Convention has been fulfilled?

75. According to Article 213 of the Customs Code, when there are several persons liable for payment of a customs debt, they are jointly and severally liable for that debt.

76. The Commission maintains that in order to trigger the liability of the guaranteeing association under Article 8(1) of the TIR Convention the procedural requirement of notification and transmission of the claim under Article 8(7) of that convention to the directly liable person(s) may include the transmission to the person(s) liable under Article 203 of the Customs Code. The Commission concludes that in this case, the Bulgarian authorities were not obliged to claim payment from the recipient first because they did not have proof or confirmation from the Romanian authorities concerning the status of the recipient as debtor of the customs debt. However, if such a document was already available to the Bulgarian customs authorities when they established the existence of the customs debt in 2009, it would have meant that those authorities had the duty to verify whether it was possible to obtain payment of the debt from the recipient.

77. The reading proposed by the Commission would effectively mean that, in order to fulfil the requirement under Article 8(7) of the TIR Convention, the national authorities would need to claim payment from *every* debtor under Article 203 of the Customs Code, before ever being allowed to turn to the guaranteeing association.

78. Without questioning the fact that Articles 203 and 213 of the Customs Code are applicable under EU law to determine the ‘person or persons directly liable’, I disagree with the Commission’s interpretation of Article 8(7) of the TIR Convention.

79. First, and foremost, that reading amounts to the insertion of additional requirements which do not result from the wording of the TIR Convention. It has the effect of inserting Article 203(3) of the Customs Code into Article 8(7) of the TIR Convention. It creates a list of debtors, all of whom it would be compulsory to address before the competent authorities can turn to the guaranteeing association.

80. Second, and more fundamentally, such a reading would entirely alter the nature of the liability of the guaranteeing associations, set out in Article 8(1) of the TIR Convention. The reading proposed by the Commission would turn *joint and several liability* of the guaranteeing association into a sort of *conditional, subsidiary liability* that could only be triggered if, and only if, the national authorities required payment from all the potential debtors under Article 203(3). It would also disregard the fact that the rule of joint and several liability entails that the associations can seek redress through a civil action against the other debtors.

81. Third, such an interpretation would certainly be at odds with the purpose of the TIR Convention, which aims at facilitating the international carriage of goods on the basis of a trade-off: State Parties agree not to require payment or deposit of import or export duties and taxes at the customs offices *en route*, on the basis of a system of guarantee through guaranteeing associations. The interpretation put

forward by the Commission would considerably limit the effectiveness of the system of guarantee established by the TIR Convention.²⁹

82. Finally, turning to EU law itself, that interpretation also runs counter to the objectives of the broad definition of ‘debtor’ under Article 203(3) of the Customs Code and of the system of joint and several liability established by Article 213 of that code. The objective of Article 213 of the Customs Code is precisely to achieve the actual recovery of the customs debt. It constitutes ‘an additional legal device made available to the national authorities to strengthen the effectiveness of the action they take for the recovery of customs debts’.³⁰

83. However, in the reading proposed by the Commission, the fact that a broad range of potential debtors is included in Article 203(3) of the Customs Code would effectively work to the detriment of the possibilities of national authorities to trigger the liability of the guaranteeing association. However, as the Director of the Burgas customs office has correctly recalled, the national authorities are obliged to take all measures necessary in order to protect the resources of the Union.³¹

84. Thus, in order to fulfil the requirement of Article 8(7) of the TIR Convention as a condition to trigger the joint and several liability of associations under Article 8(1) of that convention, national authorities are obliged to require payment from the directly liable person(s). However, the guaranteeing association remains jointly and severally liable with the persons from whom the payments are due by virtue of Article 8(1) of the TIR Convention. Those persons themselves are, by virtue of Article 213 of the Customs Code, also jointly and severally liable amongst themselves.

85. Logically, pooling two sets of joint and several liability means that there will be, ultimately, one set of joint and several liability, subject to the requirements of Article 8(7) of the TIR Convention. The practical operation of this pooling then means that under EU law, national authorities have *the choice* to require that payment from any of the persons that may be identified as (directly liable) debtors under the specific provision of the Customs Code. The exercise of that choice will be based on the circumstances of an actual case, the nature of the parties, and also the type of infringement or irregularity.

86. In the present case, even if the recipients at the point of destination were known, the Bulgarian authorities have fulfilled the obligation under Article 8(7) by requiring payment from Sargut OOD, the TIR carnet holder. The competent Bulgarian authorities were certainly not obliged to require payment from every possible debtor that was jointly and severally liable under Article 213 of the Customs Code before being able to claim payment from the guaranteeing association. It follows from the nature of the mechanism of joint and several liability that the authorities have the possibility, but not the obligation, to engage the liability of the different potential debtors.³²

87. I therefore propose that the answer to the third and fourth questions shall be that:

- Article 457(2) of Regulation No 2454/93, read in conjunction with Article 8(1) and (7) of the TIR Convention, is to be interpreted as meaning that, before claiming payment from the guaranteeing association, the competent authorities are not obliged to require payment from all persons who are jointly and severally liable in accordance with Article 213 of the Customs Code, as determined by the provisions of that code.

²⁹ See also above, in points 47 and 48 of this Opinion.

³⁰ See judgments of 17 February 2011, *Berel and Others* (C-78/10, EU:C:2011:93, paragraph 48), and of 18 May 2017, *Latvijas dzelzceļš* (C-154/16, EU:C:2017:392, paragraph 88).

³¹ See, generally, with regard to the obligations under the TIR regime, judgments of 5 October 2006, *Commission v Germany* (C-105/02, EU:C:2006:637); of 5 October 2006, *Commission v Belgium* (C-377/03, EU:C:2006:638); and of 19 March 2009, *Commission v Italy* (C-275/07, EU:C:2009:169).

³² See, to that effect, judgment of 18 May 2017, *Latvijas dzelzceļš* (C-154/16, EU:C:2017:392, paragraph 89).

- A recipient, who acquired or held an item known to have been conveyed under cover of a TIR carnet, where it was not established that that item was submitted and declared before the customs office of destination, can be considered to be a ‘debtor’ in the sense of Article 203(3) of the Customs Code if he was aware or should have been aware that that item had been removed from customs supervision, which is for the national court to verify. However, failure to require payment from the recipient of the goods does not preclude the liability of the guaranteeing association if the competent authorities have chosen to require payment from another directly liable person pursuant to Article 8(7) of the TIR Convention.

V. Conclusion

88. In the light of all the foregoing considerations, I propose that the Court should give the following answer to the questions referred for a preliminary ruling by the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria):

- The Court has jurisdiction to interpret the Customs Convention on the international transport of goods under cover of TIR carnets of 14 November 1975 (TIR Convention).
- Article 457(2) 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, last amended by Council Regulation (EC) No 1791/2006 of 20 November 2006, read in conjunction with Article 8(7) of the TIR Convention, must be interpreted in the sense that the competent customs authorities may claim payment from the guaranteeing association where, in circumstances such as those in the present case, they have required payment through a claim of payment from the TIR carnet holder as the directly liable person.
- Article 457(2) of Commission Regulation (EEC) No 2454/93, read in conjunction with Article 8(1) and (7) of the TIR Convention, is to be interpreted as meaning that, before claiming payment from the guaranteeing association, the competent authorities are not obliged to require payment from all persons who are jointly and severally liable in accordance with Article 213 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as determined by the provisions of that code.
- A recipient, who acquired or held an item known to have been conveyed under cover of a TIR carnet, where it was not established that that item was submitted and declared before the customs office of destination, can be considered to be a ‘debtor’ in the sense of Article 203(3) of Regulation No 2913/92 if he was aware or should have been aware that that item had been removed from customs supervision, which is for the national court to verify. However, failure to require payment from the recipient of the goods does not preclude the liability of the guaranteeing association if the competent authorities have chosen to require payment from another directly liable person pursuant to Article 8(7) of the TIR Convention.