

JUDGMENT OF THE COURT (Sixth Chamber)

3 March 2005<sup>\*</sup>

In Case C-195/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Hof van Beroep te Antwerpen (Belgium), by decision of 7 May 2003, received at the Court on 12 May 2003, in the proceedings

**Ministerie van Financiën**

v

**Merabi Papismedov and Others,**

intervening parties:

**KBC Lease Belgium NV,**

**Volvo Truck Finance Belgium NV,**

<sup>\*</sup> Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of J.-P. Puissochet, acting as President of the Sixth Chamber, S. von Bahr and U. Löhmus (Rapporteur), Judges,

Advocate General: J. Kokott,  
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Papismedov, by E. Gevers, advocaat,
- the Belgian Government, by A. Snoecx, acting as Agent,
- the Finnish Government, by T. Pynnä, acting as Agent,
- the Commission of the European Communities, by X. Lewis, acting as Agent, assisted by F. Tuytschaever, advocaat,

after hearing the Opinion of the Advocate General at the sitting on 30 September 2004,

gives the following

### **Judgment**

- 1 The reference for a preliminary ruling concerns the interpretation of Articles 202 to 204 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, hereinafter ‘the Customs Code’).
- 2 The reference was made in the course of proceedings between the Ministerie van Financiën (‘Ministry of Finance’), on the one hand, and Messrs Papismedov, Geldof, Ben-Or, R. Peer, M. Peer, Tavdidischvili, Janssens, Hoste, Decock and Joris, and Mrs Vanbellegheem, on the other hand, as well as the companies Transocean System Transport BVBA and United Logistic Partners BVBA, concerning the smuggling of goods by removing them from customs supervision.

### **Relevant provisions**

#### *Community legislation*

- 3 ‘Supervision by the customs authorities’ and ‘presentation of goods to customs’ are defined in Article 4(13) and (19) respectively of the Customs Code. The first means ‘action taken in general by those authorities with a view to ensuring that customs

rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed'. The second means 'the notification to the customs authorities, in the manner laid down, of the arrival of goods at the customs office or at any other place designated or approved by the customs authorities'.

- 4 Title III of the Customs Code is devoted to the provisions applicable to goods brought into the customs territory of the Community until they are assigned a customs-approved treatment or use. The entry, properly so called, of goods and their presentation to customs are provided for in Chapter 1, Articles 37 to 39, and in Chapter 2, Articles 40 to 42, respectively of that code. As for summary declaration and unloading of goods presented to customs, they are governed by Chapter 3, Articles 43 to 47, of that code.

- 5 Article 38 of the Customs Code provides:

'1. Goods brought into the customs territory of the Community shall be conveyed by the person bringing them into the Community without delay, by the route specified by the customs authorities and in accordance with their instructions, if any:

- (a) to the customs office designated by the customs authorities or to any other place designated or approved by those authorities; or,

(b) to a free zone, if the goods are to be brought into that free zone direct:

— by sea or air, or

— by land without passing through another part of the customs territory of the Community, where the free zone adjoins the land frontier between a Member State and a third country.

2. Any person who assumes responsibility for the carriage of goods after they have been brought into the customs territory of the Community, *inter alia* as a result of transshipment, shall become responsible for compliance with the obligation laid down in paragraph 1.

...'

6 Article 40 of the Customs Code provides:

'Goods which, pursuant to Article 38(1)(a), arrive at the customs office or other place designated or approved by the customs authorities shall be presented to customs by the person who brought the goods into the customs territory of the Community or, if appropriate, by the person who assumes responsibility for carriage of the goods following such entry.'

7 Article 43 of the Customs Code is worded as follows:

‘Subject to Article 45, goods presented to customs within the meaning of Article 40 shall be covered by a summary declaration.

The summary declaration shall be lodged once the goods have been presented to customs. The customs authorities may, however, allow a period for lodging the declaration which shall not extend beyond the first working day following the day on which the goods are presented to customs’.

8 Title VII, Chapter 2, of the Customs Code concerns the incurrence of a customs debt. It lays down, in particular, the point at which that customs debt is incurred and determines who is the debtor thereof. Where the importation was carried out according to the procedure leading to the release for free circulation of goods liable to import duties, or their placing under the temporary importation procedure with partial release from import duties, Article 201 of that code applies. Where, on the other hand, the imported goods were introduced unlawfully or unlawfully removed from customs supervision, Articles 202 and 203 of the same code respectively apply.

9 Article 202 of the Customs Code provides:

‘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’.

- 10 A customs debt on importation is also incurred, under Article 203 of the Customs Code, through the unlawful removal from customs supervision of goods liable to import duties and, under Article 204, through non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or further, by non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods, in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

### *National legislation*

- 11 Article 257(3) of the General Law on Customs and Excise of 18 July 1977 (*Belgisch Staatsblad*, 21 September 1977), confirmed by the Law of 6 July 1978 (*Belgisch Staatsblad*, 12 August 1978), provides:

‘Anyone who, without prior permission of the Customs and Excise Administration, assigns goods covered by customs documents mentioned in paragraph 1 to a destination other than that which is expressly stated shall be liable to the penalties provided for, according to the case, by Article 157, Articles 220 to 225, 227 and 277 or by Article 231.’

### **The main proceedings and the questions referred for a preliminary ruling**

- 12 The defendants in the main proceedings are charged, as principals, accessories, or direct or indirect parties, with smuggling, by removing from transit 709 cartons each containing 10 000 cigarettes, concealed behind 29 cases containing cooking utensils.



- 13 On 10 June 2001, the vessel MSC Rafaela docked at Antwerp (Belgium) laden with containers. Its cargo was cleared through customs by MSC Belgium NV. From it was unloaded a container which, according to the summary declaration provided to those authorities, contained 406 cases of 'cookware' from China, consigned to the company United Logistic Partners, established in Merksem (Belgium).
- 14 On 11 June 2001, during the container's inspection by the customs authorities, they established that behind two rows of packing cases containing cooking utensils, were identical cases containing cartons of cigarettes. The container was subsequently closed again, resealed and placed under observation. None of the documents lodged with the customs authorities mentioned the presence of a consignment of 7 090 000 cigarettes.
- 15 On the same day, a document for external Community customs transit serving as a customs declaration was validated for the consignment in question at the Antwerp customs services. In that document, Transocean System Transport BVBA was stated to be the party declaring the external Community transit and the store Eurolog, situated in Merksem, as the place of destination, such place being recognised as a type 'B' warehouse entitled to receive goods which were still under customs supervision.
- 16 On 12 June 2001, Mr Janssens presented himself as the driver of a lorry to take delivery of the container. Once loaded, the lorry was not driven to the Eurolog store but went to a store situated in Schoten (Belgium), a place which is not recognised as a customs warehouse. That lorry was unloaded in the presence of several of the

others accused. The evidence from the investigation led by the officials of the Special Inspectorate of the Antwerp Customs and Excise confirmed that that container was loaded with 29 cases of cooking utensils and 709 cartons each containing 10 000 cigarettes.

17 Those facts led to criminal proceedings. The Vacation Chamber of the Rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp), sitting in criminal proceedings on 30 July 2001, delivered a judgment against which an appeal has been brought before the referring court. The customs authorities maintain that the goods were lawfully introduced into the Community but that they were removed from customs supervision, since the dispatch for which an external Community transit document was validated was not presented at the place of destination stated on the customs document. Mr Papismedov submits that it is correct in this case to say that the cigarettes were smuggled and not that they were removed from customs supervision.

18 In those circumstances, the Hof van Beroep te Antwerpen (Court of Appeal, Antwerp) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Must goods in respect of which a summary declaration was submitted with an incorrect designation/commercial designation ('cookware' instead of cigarettes), or goods which were declared under an incorrect designation/commercial designation for the purposes of a customs procedure (such as the procedure for external Community customs transit), be regarded as having been lawfully introduced into the customs territory of the Community and, accordingly, as being under customs supervision (temporary storage or customs procedure), notwithstanding the fact that, intentionally or not, the goods bore an incorrect designation/commercial designation?

2. If the answer to the first question is affirmative must the view be taken, in the case of removal from customs supervision of goods which, intentionally or not, were declared under an incorrect designation/commercial designation, that the customs debt arises under Article 203 of the Community Customs Code and must the person liable to comply with the obligations arising out of temporary storage of the goods or from use of the customs procedure under which the goods (even if under an incorrect designation) were placed, also be regarded as a debtor in respect of the customs debt?
3. If the answer to the first question is affirmative, on establishment by the customs authorities that the goods under customs supervision were declared, intentionally or not, under an incorrect designation/commercial designation, whilst the goods had not (by then) been removed from customs supervision and the customs authorities still had access to the goods, must the customs debt in respect of the goods which were declared under an incorrect designation/commercial designation be regarded as arising under Article 204 of the Community Customs Code or must the view be taken that in respect of those goods no customs debt has yet arisen?
4. If the answer to the first question is negative must goods which, intentionally or not, were declared under an incorrect designation/commercial designation be regarded as having been introduced unlawfully into the customs territory of the Community (in other words imported in breach of the provisions of Articles 38 to 41 inclusive and of the second indent of the first paragraph of Article 177 of the Community Customs Code) as a result of which the customs debt in respect of those goods arises under Article 202 of the Community Customs Code and the person making the summary declaration or the declaration for a customs procedure, even if with an incorrect designation/commercial designation, may be deemed to be the customs debtor only if he may be regarded as a debtor within the meaning of Article 202(3) of the Community Customs Code?

## **The questions referred for a preliminary ruling**

### *The first question*

- 19 By its first question, the Hof van Beroep te Antwerpen is asking, in essence, whether goods presented to customs, for which a summary declaration was lodged and an external Community transit document validated, were lawfully introduced into the Community if, in the documents lodged with the customs authorities, the goods were wrongly designated, in this case as ‘cookware’ instead of cigarettes.
- 20 It is clear from the decision to refer that the Hof van Beroep te Antwerpen seems to consider that there is a connection between the submission to customs supervision of goods arriving in the customs territory of the Community and the lawfulness of their introduction into that territory. It is therefore appropriate to consider, at the outset, whether there is such a connection.
- 21 ‘Supervision by the customs authorities’ is defined in Article 4(13) of the Customs Code as meaning ‘action taken in general by those authorities with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed’. Under Article 37 of that code, goods brought into the customs territory of the Community are, from the time of

their entry, subject to customs supervision. In the course of such supervision they may be subject to control by those authorities in accordance with the provisions in force, and remain under such supervision for as long as necessary to determine their customs status, and, in the case of non-Community goods, until their customs status is changed, they enter a free zone or free warehouse or they are re-exported or destroyed in accordance with Article 182.

- 22 It is clear from the combined effect of those articles that goods arriving in the Community are subject to customs supervision from the time of their introduction therein, whether it is lawful or in breach of Articles 38 to 41 or the second indent of the first paragraph of Article 177 of the Customs Code, which is what the supervising authorities must, by their controls, establish. It follows that the submission of goods to such supervision is not connected to the lawfulness of their introduction into that territory.
- 23 The Belgian Government submits, in the light of Article 202 of the Customs Code which defines unlawful introduction of goods as any introduction in violation of the provisions of Articles 38 to 41 and the second indent of the first paragraph of Article 177 of that code, that introduction into the customs territory of the Community is lawful where those provisions are complied with, that is to say where the goods have crossed one of the external borders and been declared to the customs services. Since the obligation to lodge a summary declaration, as imposed by Article 43 et seq. of that code, is not included among the provisions breach of which may result in illegal introduction of goods into that territory, the statement of an erroneous commercial designation of the goods on such a document does not at all affect the lawfulness of their introduction into that territory. Unlawful introduction therefore equates to smuggling by unrecognised routes or frontier crossings.
- 24 That argument would have the effect of unreasonably restricting the scope of Article 202 of the Customs Code.

25 Several provisions of the Customs Code may limit the meaning of unlawful introduction. That is the case, as the Belgian Government correctly observed, of Article 202 of that code, which defines it as any introduction in violation of the provisions of Articles 38 to 41 and the second indent of the first paragraph of Article 177 of that code, of goods liable to import duties, either into the customs territory of the Community, or into another part of that territory, if they are located in a free zone or free warehouse.

26 Thus, an importation of goods constitutes an unlawful introduction if it does not comply with the following stages laid down by the Customs Code. First, under Article 38(1) of that code, goods brought into the customs territory of the Community must be conveyed without delay to the designated customs office or to a free zone. Secondly, under Article 40, when the goods arrive at the customs office they must be presented to customs. 'Presentation of goods to customs' is defined in Article 4(19) of that code as the notification to the customs authorities, in the manner laid down, of the arrival of goods at that customs office or at any other place designated or approved.

27 It is clear from the wording of those provisions as a whole that, for goods to be regarded as having been lawfully introduced into the customs territory of the Community, they must, on their arrival, be taken to a customs office or to a free zone and be presented to customs. The aim of the latter obligation, which falls on the person responsible for the introduction or on the person who assumes responsibility for the transport, is to ensure that the customs authorities are informed not only of the fact that the goods have arrived, but also of all relevant information about the type of article or product concerned and the quantity of those goods. It is that information which will enable the goods to be correctly identified, for the purposes of their tariff classification and, if appropriate, for the calculation of import duties.

28 In a case concerning the introduction, into the customs territory of the Community, of cigarettes concealed in a vehicle and discovered by the customs authorities of a Member State during an inspection, the Court has held that, since the true nature of the goods presented to customs did not appear on the documents provided and the customs authorities had not been informed of that nature by the persons concerned, those goods had to be regarded as not having been presented to customs in accordance with Article 40 of the Customs Code (see Joined Cases C-238/02 and C-246/02 *Viluckas and Jonusas* [2004] ECR I-2141, paragraph 28).

29 It is true that, as the Belgian Government observes, 'unlawful introduction' covers, specifically, only the violation of Articles 38 to 41 and the second indent of the first paragraph of Article 177 of the Customs Code, although the obligation to lodge a summary declaration with the customs authorities is laid down by Article 43 et seq. of that code. That Government maintains that, consequently, the introduction of goods into the Community must be regarded as lawful if they have been put in a place designated or approved by those authorities or in a free zone and if their arrival has been notified, unless there is an obligation to declare them under a certain general or commercial designation.

30 The latter point of view cannot be accepted. The presentation of goods to customs, required by Article 40 of the Customs Code, comprises in effect, taking account of Articles 43 and 45 of that code, a collateral obligation to lodge without delay a summary declaration or to comply without delay with the formalities to assign the goods concerned a customs destination, that is to say, if it is requested that they be placed under a customs regime, to complete a customs declaration. It is clear from the wording of the second paragraph of Article 43 of that code that both operations are carried out, as a general rule, simultaneously, because the period which the

customs authorities can allow for that lodgement is not to extend beyond the first working day following the day on which the goods are presented to customs. In addition, under Article 44(1) of that code, the summary declaration must contain the particulars necessary for identification of the goods.

31 Consequently, when the presentation of goods to customs required by Article 40 of the Customs Code is accompanied by the lodging of a summary declaration or of a customs declaration which gives a description of the type of goods which bears no relation to reality, the notification to the customs authorities of the arrival of the goods, within the meaning of Article 4(19) of that code, is lacking. It cannot, in those circumstances, be considered that the information necessary for identification of the goods has been provided to those authorities by the mere production of certain documents. It is also necessary that the statements contained in the documents which accompanied the presentation to customs are correct. Where those statements make no mention of the presence of a significant part of the goods presented to customs, those goods must be regarded as having been introduced unlawfully.

32 In those circumstances, the answer to the first question must be that goods presented to customs, for which a summary declaration was lodged and an external Community transit document validated, were not lawfully introduced into the customs territory of the Community if, in the documents lodged with the customs authorities, the goods were wrongly designated.

33 Since the second and third questions were referred only in case the Court gave an affirmative reply to the first question, there is no need to consider them.



*The fourth question*

- 34 The fourth question is divided into two parts. By the first part of that question, the Hof van Beroep te Antwerpen is asking, in essence, whether the customs debt in respect of goods presented to customs and declared under an incorrect designation, in this case 'cookware' instead of cigarettes, is based on Article 202 of the Customs Code. By the second part of that question, it is asking, in essence, whether the person making the summary declaration or the customs declaration stating the incorrect designation, who does not appear as such on the list in Article 202(3), may none the less be regarded as a debtor of the customs debt if that person satisfies the definition of that term given by that provision.

## The first part of the fourth question

- 35 According to the analysis made in connection with the reply to the first question, goods presented to customs under an incorrect designation in the documents submitted to the custom authorities, in this case 'cookware' instead of cigarettes, were not lawfully introduced into the Community. If those goods were unlawfully introduced, Article 202 of the Customs Code applies, which lays down the detailed rules on incurrance of the customs debt. It follows that the customs debt in respect of that operation is necessarily based on that Article 202.
- 36 The answer to the first part of the fourth question must therefore be that the customs debt in respect of goods presented to customs and declared under an incorrect designation is based on Article 202 of the Customs Code.

The second part of the fourth question

- 37 Under the terms of Article 202(3) of the Customs Code, the customs debt in the case of unlawful introduction of goods into the Community is imposed on three categories of persons, namely the perpetrators of that introduction, those who participated in it and were aware or should reasonably have been aware that it was unlawful and those who acquired or held the goods in question and were aware or should reasonably have been aware that they had been introduced unlawfully.
- 38 According to the Court's case-law, it is clear from the wording of that provision that the Community legislature intended to give a broad definition of the persons capable of being regarded as debtors of the customs debt, in cases of unlawful introduction of goods subject to import duties (Case C-414/02 *Spedition Ullustrans*, not yet published in the ECR, paragraph 25). The legislature also intended to lay down exhaustively the conditions for determining who are the debtors of the customs debt (*Spedition Ullustrans*, cited above, paragraph 39).
- 39 The Court has, in addition, already noted that the first indent of Article 202(3) of the Customs Code refers to the 'person' who introduced the goods, without specifying whether that means a natural person or a legal person. Any 'person' may, therefore, be regarded as the debtor of the customs debt for the purposes of that provision, that is to say if he can be regarded as having been by his actions responsible for the unlawful introduction of the goods (*Spedition Ullustrans*, paragraph 26). As regards the interpretation of that provision, the Court has also held that, even if other

persons can be declared debtors in respect of the same goods on the basis of the other provisions of Article 202(3), the person who in practical terms introduced the goods without declaring them remains the debtor by virtue of the provisions of the first indent of Article 202(3) (*Viluckas and Jonusas*, cited above, paragraph 29).

40 On the other hand, the meaning of debtor for the purposes of the second and third indents of Article 202(3) of the Customs Code is subject to conditions which rest on matters of subjective assessment, namely that the natural or legal persons participated knowingly in the unlawful introduction of goods or in acquiring or holding unlawfully introduced goods. Such factors are likely to exclude, in certain cases, treatment as a debtor (*Spedition Ullustrans*, paragraphs 27 and 28).

41 Having regard to the foregoing considerations, the answer to the second part of the fourth question must be that it is for the national court to establish, in the light of the circumstances of the main proceedings, whether the person who lodged the summary declaration or the customs declaration was, because he stated an incorrect designation, responsible for the unlawful introduction of the goods. If such is not the case, it is for that court to consider whether, by that action, the person participated in the introduction of the goods whilst he was or should reasonably have been aware that it was unlawful.

## Costs

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

On those grounds, the Court (Sixth Chamber) rules as follows:

- 1. Goods presented to customs, for which a summary declaration was lodged and an external Community transit document validated, were not lawfully introduced into the customs territory of the Community if, in the documents lodged with the customs authorities, the goods were wrongly designated.**
- 2. The customs debt in respect of goods presented to customs and declared under an incorrect designation is based on Article 202 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.**
- 3. It is for the national court to establish, in the light of the circumstances of the main proceedings, whether the person who lodged the summary declaration or the customs declaration was, because he stated an incorrect designation, responsible for the unlawful introduction of the goods. If such is not the case, it is for that court to consider whether, by that action, the person participated in the introduction of the goods whilst he was or should reasonably have been aware that it was unlawful.**

[Signatures]