Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

4 March 2020*

(Reference for a preliminary ruling — Customs union — Regulation (EU) No 952/2013 — Removal from customs supervision — Theft of goods placed under a customs warehousing procedure — Article 242 — Person responsible for the removal — Holder of the authorisation for customs warehousing — Penalty for failure to comply with the customs legislation — Article 42 — Obligation to pay a sum corresponding to the value of the missing goods — Combination with a pecuniary penalty — Proportionality)

In Case C-655/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Varna (Administrative Court, Varna, Bulgaria), made by decision of 5 October 2018, received at the Court on 19 October 2018, in the proceedings

Teritorialna direktsiya 'Severna morska' kam Agentsiya Mitnitsi, successor in law to Mitnitsa Varna

v

Schenker EOOD,

intervener:

Okrazhna prokuratura — Varna,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský and F. Biltgen (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 14 November 2019,

after considering the observations submitted on behalf of:

– Teritorialna direktsiya 'Severna morska' kam Agentsiya Mitnitsi, successor in law to Mitnitsa Varna, by S.K. Kirilova, M.F. Bosilkova-Kolipatkova and B. Borisov, acting as Agents,

– Schenker EOOD, by G. Goranov, advokat,

* Language of the case: Bulgarian.

– the Bulgarian Government, by L. Zaharieva and E. Petranova, acting as Agents,

– the European Commission, by I. Zaloguin, V. Bottka and M. Kocjan, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1).

2 The request has been made in proceedings between Teritorialna direktsiya 'Severna morska' kam Agentsiya Mitnitsi ('North Coast' Regional Directorate, Customs Agency, Bulgaria; 'Varna Customs Office') and Schenker EOOD concerning the penalties imposed on that company in its capacity as holder of an authorisation for customs warehousing, following the theft of goods that it had been entrusted with storing for another party.

Legal context

EU law

3 Recital 45 of Regulation No 952/2013 states:

'It is appropriate to lay down at Union level the rules governing the destruction or disposal otherwise of goods by the customs authorities, since these are matters which previously required national legislation.'

4 Article 42(1) and (2) of that regulation provides:

'1. Each Member State shall provide for penalties for failure to comply with the customs legislation. Such penalties shall be effective, proportionate and dissuasive.

2. Where administrative penalties are applied, they may take, inter alia, one or both of the following forms:

(a) a pecuniary charge by the customs authorities, including, where appropriate, a settlement applied in place of and in lieu of a criminal penalty;

(b) the revocation, suspension or amendment of any authorisation held by the person concerned.'

5 Article 79 of that regulation, entitled ‘Customs debt incurred through non-compliance’, provides in paragraphs 1 and 3:

‘1. For goods liable to import duty, a customs debt on import shall be incurred through non-compliance with any of the following:

(a) one of the obligations laid down in the customs legislation concerning the introduction of non-Union goods into the customs territory of the Union, their removal from customs supervision, or the movement, processing, storage, temporary storage, temporary admission or disposal of such goods within that territory;

(b) one of the obligations laid down in the customs legislation concerning the end-use of goods within the customs territory of the Union;

…

3. In cases referred to under points (a) and (b) of paragraph 1, the debtor shall be any of the following:

(a) any person who was required to fulfil the obligations concerned;

(b) any person who was aware or should reasonably have been aware that an obligation under the customs legislation was not fulfilled and who acted on behalf of the person who was obliged to fulfil the obligation, or who participated in the act which led to the non-fulfilment of the obligation;

…’

6 Article 198 of that regulation is worded as follows:

‘1. The customs authorities shall take any necessary measures, including confiscation and sale, or destruction, to dispose of goods in the following cases:

(a) where one of the obligations laid down in the customs legislation concerning the introduction of non-Union goods into the customs territory of the Union has not been fulfilled, or the goods have been withheld from customs supervision;

…

3. The costs of the measures referred to in paragraph 1 shall be borne:

(a) in the case referred to in point (a) of paragraph 1, by any person who was required to fulfil the obligations concerned or who withheld the goods from customs supervision;

…’

7 Under Article 242(1) of Regulation No 952/2013:

‘The holder of the authorisation and the holder of the procedure shall be responsible for the following:

(a) ensuring that goods under the customs warehousing procedure are not removed from customs supervision; and

(b) fulfilling the obligations arising from the storage of goods covered by the customs warehousing procedure.’

Bulgarian law

8 Article 233(6) of the Zakon za mitnitsite (Law on customs, DV No 15 of 6 February 1998), in the version applicable to the main proceedings ('Law on customs'), provides:

'Smuggled goods shall be subject to confiscation for the benefit of the State, irrespective of who owns them; if they are not available or have been disposed of, the offender shall be ordered to pay the equivalent of their customs value, or, in the event of exportation, the value of the goods.'

9 Under Article 234a(1) and (3) of the Law on customs:

'1. Any person who removes temporarily stored goods or goods declared under a customs procedure or for re-exportation without complying with the requirements laid down by law or by the customs authorities shall be subject to a fine in the case of natural persons, or by a financial penalty in the case of legal persons and sole traders, equal to between 100 and 200 per cent of the customs value of the goods or, in the case of goods intended for export, equal to the value of the goods that were the subject of the offence.

…

3. In the situations referred to in paragraphs 1 and 2, the provisions of Article 233(6), (7) and (8) shall apply accordingly.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 On 16 March 2017, Teld Consulting OOD made a customs declaration for 13 containers containing plywood to be placed under a customs warehousing procedure. That declaration was submitted for and on behalf of Balkantrade Properties EOOD.

11 Following completion of the customs formalities for that procedure, those containers had to be transported to a customs warehouse operated and managed by Schenker, in accordance with the customs warehousing authorisation held by that company.

12 Schenker instructed Fortis Trade OOD to provide that transport. However, one of those containers was stolen en route, together with the vehicle belonging to Fortis Trade which was transporting that container. Consequently, the goods in that container were not delivered to Schenker's warehouse.

13 Following the customs control of that warehouse carried out by the customs inspectorate of Varna (Bulgaria), it was established that not all of the goods subject to the customs warehousing procedure were in that warehouse. As a result, a notice to the effect that Schenker had committed an administrative offence under Article 234a(1) of the Law on customs was issued, on the ground that that company had removed part of the goods declared under the customs warehousing procedure from customs supervision. On the basis of that finding, the director of the Varna Customs Office issued a decision, which, in accordance with Article 233(6) and Article 234a(1) and (3) of the Law on customs, imposed a pecuniary penalty on Schenker of 23 826.06 Bulgarian leva (BGN) (approximately EUR 12 225) and ordered that company to pay the same sum a second time, corresponding to the value of the missing goods.

14 In an action brought by Schenker against that decision, the Varnenski rayonen sad (District Court, Varna, Bulgaria) annulled that decision. It found, inter alia, that the theft was a case of *force majeure* and there was no causal link between an unlawful act or omission on the part of that company and the consequence of the theft, that is to say the impossibility for the customs authorities to access goods placed under customs supervision and carry out customs controls.

15 The Varna Customs Office lodged an appeal on a point of law before the referring court, the Administrativen sad Varna (Administrative Court, Varna, Bulgaria). That office submits that the application of the customs warehousing procedure gives rise to an obligation not to remove the goods from customs supervision and that the theft in question is not a case of *force majeure* which can exempt the warehouse keeper from liability.

16 The referring court observes that two administrative penalties were imposed on Schenker. According to that court, the penalty consisting in the obligation to pay the value of the stolen goods does not fall under any of the forms of penalty provided for by Article 42(2) of Regulation No 952/2013, and nor is it a form of seizure, as provided for under national law. The referring court is therefore unsure as to whether that obligation to pay the value of the goods is compatible with that provision and with the principles of effectiveness and proportionality, bearing in mind the fact that it is imposed in addition to a pecuniary penalty.

17 In those circumstances, the Administrativen sad Varna (Administrative Court, Varna) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Should Article 242(1)(a) and (b) of Regulation [No 952/2013] be interpreted as meaning that, under the specific circumstances of the main proceedings, the theft of goods placed under a customs warehousing procedure constitutes a removal from the customs warehousing procedure that justifies the imposition of a financial penalty on the holder of the authorisation for failure to comply with the customs legislation?

(2) Is the imposition of a charge equivalent to the value of the goods that were the subject of the customs offence (in this case removal from the customs warehousing procedure) an administrative penalty within the meaning of Article 42(1) and (2) of Regulation [No 952/2013], and is a national provision imposing such a penalty, together with a financial penalty, permissible? Does such a rule meet the requirement that penalties must be effective, proportionate and dissuasive, laid down in the second sentence of Article 42(1) of the regulation, in respect of failure to comply with the EU customs legislation?’

Consideration of the questions referred

The first question

Admissibility

18 In its written observations, Schenker contends that the first question is inadmissible, in so far as it relates exclusively to the application of provisions of national law, and concerns in particular the question of whether a particular action or omission constitutes an infringement as defined by national law.

19 In that regard, it must be recalled that, in accordance with the Court’s settled case-law, in the context of the procedure provided for in Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, the latter does not have jurisdiction to interpret national law and only the national courts may establish and assess the facts of the dispute in the main proceedings and determine the exact scope of national laws, regulations or administrative provisions (judgment of 3 October 2019, *Fonds du Logement de la Région de Bruxelles-Capitale*, C-632/18, EU:C:2019:833, paragraph 48 and the case-law cited).

20 In the present case, however, it is apparent from the very wording of the first question that, by that question, the referring court seeks the Court's guidance as to the interpretation of Article 242(1) of Regulation No 952/2013, in particular the concept of 'removal from customs supervision' in relation to that provision, and as to whether EU law allows such removal to be subject to a pecuniary penalty.

21 Schenker also maintains that the outcome of the dispute in the main proceedings depends not on the interpretation of provisions of EU law but on matters of fact, that is to say the establishment of the identity of the actual offender, his or her capacity at the time the offence was committed, and the acts or omissions which constitute an offence attributable to that offender.

22 In that regard, it must be recalled that, in the context of cooperation between the Court and the national courts, established by Article 267 TFEU, it is for the national courts alone to assess, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give judgment and the relevance of the questions which they put to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling (judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 19 and the case-law cited). That is clearly the case here.

23 Accordingly, the first question is admissible.

Substance

24 As a preliminary point, it is important to note that Article 242(1)(a) and (b) of Regulation No 952/2013, mentioned in the first question, concerns the liability of the holder of the authorisation and of the holder of the procedure in cases where the goods are removed from customs warehousing supervision, whereas that question also concerns whether a pecuniary penalty provided by national law can be imposed on those responsible for such removal, a matter which relates to other provisions of that regulation.

25 However, the fact that, formally, the referring court has limited one of its questions to the interpretation of a particular provision of EU law does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 50 and the case-law cited).

26 Consequently, by its first question, the referring court must be regarded as asking, in essence, whether Regulation No 952/2013 must be interpreted as precluding national legislation under which, in the event of theft of goods placed under a customs warehousing procedure, a pecuniary penalty is imposed on the holder of the customs warehousing authorisation for failure to comply with the customs legislation.

27 It is apparent from the Court's case-law that the concept of 'removal from customs supervision' in Regulation No 952/2013 must be understood as encompassing any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from monitoring them as provided for by the customs legislation (see, to that effect, judgment of 22 November 2017, *Aebtri*, C-224/16, EU:C:2017:880, paragraph 93 and the case-law cited).

28 As the Court has previously had occasion to rule, 'removal from customs supervision', within the meaning of that regulation, exists in particular where, as in the present case, goods placed under a suspensive procedure have been stolen (see, to that effect, judgment of 11 July 2013, *Harry Winston*, C-273/12, EU:C:2013:466, paragraph 30 and the case-law cited).

29 As regards the person responsible for such removal from customs supervision, Article 242(1)(a) of Regulation No 952/2013 provides that the holder of the authorisation is to be responsible for ensuring that the goods under the customs warehousing procedure are not removed from customs supervision.

30 In that regard, it follows from the Court's settled case-law that removal of goods from customs supervision requires only that certain objective conditions be met, such as the fact that the goods are not physically present at the approved place of storage at the time when the customs authorities intend to carry out an examination of them (judgment of 12 June 2014, *SEK Zollagentur*, C-75/13, EU:C:2014:1759, paragraph 31 and the case-law cited).

31 It follows that the liability of the holder of the customs warehousing authorisation in the event of removal from customs supervision of goods placed under a customs warehousing procedure is strict in nature and is therefore independent of the conduct of that holder and that of any third parties.

32 As regards the consequences of such removal from customs supervision for such a holder, it follows from the Court's case-law that non-compliance with an obligation laid down in the customs legislation applicable to the removal of goods from customs supervision is a customs offence, and that such non-compliance gives rise, in accordance with Article 79(1)(a) of Regulation No 952/2013, to a customs debt on import. In the absence of harmonisation of EU legislation in the field of such customs offences, the Member States are empowered to adopt appropriate measures to ensure that EU customs legislation is complied with (see, to that effect, judgment of 16 October 2003, *Hannl-Hofstetter*, C-91/02, EU:C:2003:556, paragraphs 18 to 20).

33 In the light of the foregoing considerations, the answer to the first question is that Regulation No 952/2013 must be interpreted as not precluding national legislation under which, in the event of theft of goods placed under a customs warehousing procedure, a pecuniary penalty is imposed on the holder of the customs warehousing authorisation for failure to comply with the customs legislation.

The second question

34 By its second question, the referring court asks, in essence, whether Article 42(1) of Regulation No 952/2013 must be interpreted as precluding national legislation under which, in the event of removal from customs supervision of goods placed under a customs warehousing procedure, the holder of the customs warehousing authorisation is required to pay, in addition to a pecuniary penalty, a sum corresponding to the value of those goods.

35 In that regard, it is apparent from the order for reference that, while Article 234a(1) of the Law on customs provides, in the event of removal from customs supervision, for a pecuniary penalty of between 100% and 200% of the value of the removed goods, Article 234a(3) of that law, read in conjunction with Article 233(6) thereof, provides that the person responsible for that removal must pay a sum corresponding to the value of those goods.

36 In their written observations and at the hearing before the Court, the Varna Customs Office and the Bulgarian Government maintained that the latter obligation does not constitute a penalty within the meaning of Article 42(1) of Regulation No 952/2013 but a measure under Article 198(1)(a) of that regulation, which provides that the customs authorities are to take any necessary measures, including confiscation and sale, or destruction, to 'dispose of goods' removed from customs supervision. According to those interested parties, since the list of measures referred to in that provision is not

exhaustive, where the competent authorities cannot establish that the goods in question are physically present, the payment of the value of those goods constitutes a 'means of dispos[ing] of [those] goods' within the meaning of that provision, similar to seizure of those goods for the benefit of the State.

37 That interpretation cannot, however, be accepted.

38 Article 198 of Regulation No 952/2013 is in Chapter 4, entitled 'Disposal of goods', under Title V of that regulation. It follows that the provisions in that chapter relate solely to measures to be taken to 'dispose of goods' which the competent authorities were able to establish were physically present. That interpretation is corroborated by recital 45 of that regulation, which states that the regulation seeks, inter alia, to lay down at Union level the rules governing the destruction or disposal otherwise of goods by the customs authorities.

39 The payment of the value of the goods concerned cannot be considered to be a means of disposing of those goods and thus one that could attain that objective.

40 Consequently, the referring court is right to classify as a penalty the obligation, for the person responsible for the offence, to pay, in addition to the pecuniary penalty, a sum corresponding to the value of the goods removed from customs supervision.

41 In accordance with Article 42(1) of Regulation No 952/2013, the penalties provided by the Member States for failure to comply with the customs legislation are to be effective, proportionate and dissuasive.

42 In that regard, it should be noted that, in the absence of harmonisation of EU legislation in the field of penalties applicable where conditions laid down by the rules imposed by such legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principle of proportionality (judgment of 16 July 2015, *Chmielewski*, C-255/14, EU:C:2015:475, paragraph 21 and the case-law cited).

43 In particular, the administrative measures or the measures imposing penalties permitted under the national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation, and furthermore, they must not be disproportionate to those objectives (see, to that effect, judgment of 22 March 2017, *Euro-Team and Spirál-Gép*, C-497/15 and C-498/15, EU:C:2017:229, paragraphs 40 and 58 and the case-law cited).

44 In the present case, a penalty consisting in the obligation to pay a sum corresponding to the value of the goods removed from customs supervision does not appear to be proportionate, irrespective of the fact that that penalty is in addition to that referred to in Article 234a(1) of the Law on customs. A penalty of such an amount goes beyond what is necessary in order to guarantee, in particular, that the goods placed under a customs warehousing procedure are not removed from customs supervision.

45 In that context, it must be noted that the penalties provided for in Article 42 of Regulation No 952/2013 do not seek to penalise possible fraudulent or unlawful activities but any failure to comply with the customs legislation (see, by analogy, judgment of 16 July 2015, *Chmielewski*, C-255/14, EU:C:2015:475, paragraph 31).

46 Furthermore, as the Commission stated in its written observations, a penalty such as that referred to in Article 234a(3) of the Law on customs, read in conjunction with Article 233(6) of that law, appears disproportionate to the customs debt which is incurred as a result of the removal from customs supervision of goods placed under a customs warehousing procedure.

47 In the light of the foregoing considerations, the answer to the second question is that Article 42(1) of Regulation No 952/2013 must be interpreted as precluding national legislation under which, in the event of removal from customs supervision of goods placed under a customs warehousing procedure, the holder of the customs warehousing authorisation is required to pay, in addition to a pecuniary penalty, a sum corresponding to the value of those goods.

Costs

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

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

1. **Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code must be interpreted as not precluding national legislation under which, in the event of theft of goods placed under a customs warehousing procedure, a pecuniary penalty is imposed on the holder of the customs warehousing authorisation for failure to comply with the customs legislation.**

2. **Article 42(1) of Regulation No 952/2013 must be interpreted as precluding national legislation under which, in the event of removal from customs supervision of goods placed under a customs warehousing procedure, the holder of the customs warehousing authorisation is required to pay, in addition to a pecuniary penalty, a sum corresponding to the value of those goods.**

[Signatures]