Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 8 March 2012 [1]

Case C-28/11

Eurogate Distribution GmbH
v
Hauptzollamt Hamburg-Stadt

(Reference for a preliminary rulingfrom the Finanzgericht Hamburg (Germany))

(Community Customs Code — Customs warehouse — Regulation (EEC) No 2913/92 — Article 204 — Incurrence of a customs debt by reason of failure to fulfil an obligation — Delayed entry in stock records)

I – Introduction

1. The customs warehousing procedure, provided for by the Customs Code,[2] allows non-Community goods to be stored in a customs warehouse without being subject to import duties.

2. The operation of a private customs warehouse, which is a customs procedure with economic impact, requires authorisation and is subject to certain conditions.[3] The person designated by the customs authorities must, among other things, keep stock records of all the goods placed under the customs warehousing procedure. Those stock records must at all times show the current stock of goods which are still under the customs warehousing arrangements.

3. In the main proceedings, Eurogate Distribution GmbH ('Eurogate Distribution') was authorised to operate a private customs warehouse. It is common ground that the goods stored in the customs warehouse in question were assigned a new customs-approved treatment or use, owing to their re-exportation, in such a way that the customs arrangement was properly discharged.[4]

4. However, it became apparent that Eurogate Distribution had not fulfilled its obligation to enter the departure of the goods in the stock records at the time when they were removed from the customs warehouse, but that it did so only much later.

1 — Original language: French.

2 — Council Regulation of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 13), ('the Customs Code'). The Customs Code was repealed by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1) ('the Modernised Customs Code'), certain provisions of which came into force on 24 June 2008. In view of the date of the facts in the main proceedings, these are still governed by the rules set out in the Customs Code.

3 — See Articles 84(1), 85 and 87 of the Customs Code.

4 — See Article 89(1) of the Customs Code.

5. On the basis of that finding, the Hauptzollamt Hamburg-Stadt (Principal Customs Office, City of Hamburg) ('the Hauptzollamt') imposed customs duties pursuant to Article 204 of the Customs Code in respect of the goods entered late in the stock records.

6. The Finanzgericht Hamburg (Finance Court, Hamburg, Germany), hearing an action brought by Eurogate Distribution against the notice of assessment, has referred a question to the Court of Justice for a preliminary ruling in order to ascertain whether infringement of the obligation to record the removal of goods from the customs warehouse in the computer program designated for that purpose, even though the goods acquired a new customs-approved treatment or use at the termination of the customs procedure, caused a customs debt to arise on the basis of Article 204(1)(a) of the Customs Code.

7. As in Case C-262/10 *Döhler Neuenkirchen*, pending before the Court, in which I shall also be delivering my Opinion today, which concerns the late supply of the bill of discharge relating to an inward processing procedure, the present case will enable the Court to specify the circumstances which give rise to a customs debt pursuant to Article 204 of the Customs Code. Although the facts and the failure liable to give rise to a debt under that article are different in these two cases, it must be stated that they relate to the interpretation of the same statutory provision and both concern suspensive customs procedures, namely, the inward processing procedure in Case C-262/10 and the customs warehousing procedure in Case C-28/11.

II – Legal framework

A – *The Customs Code*

8. It is apparent from Article 4 of the Customs Code that, for the purposes of that Code, 'customs debt on importation' means the obligation on a person to pay the amount of the import duties, which apply to specific goods under the Community provisions in force. Customs-approved treatment or use of goods covers, inter alia, the placing of goods under a customs procedure and their re-exportation from the customs territory of the European Community. As for a customs procedure, this covers, inter alia, customs warehousing.

9. The customs warehousing procedure is a suspensive procedure constituting a customs procedure with economic impact within the meaning of Article 84(1)(a) and (b) of the Customs Code.

10. It is apparent from Article 98(1) and (2) of the Customs Code that the customs warehousing procedure allows the storage in a customs warehouse of non-Community goods without those goods being subject to import duties. The term 'customs warehouse' designates any place approved by and under the supervision of the customs authorities where goods may be stored under the conditions laid down by that Code.

11. According to Article 99 of the Customs Code, 'private warehouse' means a customs warehouse reserved for the warehousing of goods by the warehousekeeper. The warehousekeeper is the person authorised to operate the customs warehouse. The depositer is the person bound by the declaration placing the goods under the customs warehousing procedure or to whom the rights and obligations of such a person have been transferred.

12. The first paragraph of Article 105 of the Customs Code provides:

'The person designated by the customs authorities shall keep stock records of all the goods placed under the customs warehousing procedure in a form approved by those authorities ...'

13. Article 107 of the Customs Code provides:

‘Goods placed under the customs warehousing procedure shall be entered in the stock records provided for in Article 105 as soon as they are brought into the customs warehouse.’

14. Title VII of the Customs Code, entitled ‘Customs debt’, contains, in Chapter 2, the provisions relating to the incurrence of the customs debt.

15. Article 201 of the Customs Code lays down the fundamental rule in the following terms:

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

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

(b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

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

…’

16. Article 204 of the Customs Code provides for a residual category in the following terms:

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

(a) 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

…,

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.

2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

…’

B – *The Implementing Regulation*

17. The Customs Code is supplemented by Implementing Regulation (EEC) No 2454/93.[5]

18. Articles 529 and 530 of the Implementing Regulation contain provisions relating to the keeping of stock records in the customs warehouse.

5 — Commission Regulation of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 993/2001 of 4 May 2001 (OJ 2001 L 141, p. 1) (‘the Implementing Regulation’).

19. Article 529(1) of that regulation provides:

‘The stock records shall at all times show the current stock of goods which are still under the customs warehousing arrangements. At the times laid down by the customs authorities, the warehousekeeper shall lodge a list of the said stock at the supervising office.’

20. Article 530(3) of the Implementing Regulation provides:

‘Entry in the stock records relating to discharge of the arrangements shall take place at the latest when the goods leave the customs warehouse or the holder’s storage facilities.’

21. Article 859 of the Implementing Regulation sets out the cases in which failure to fulfil an obligation under Article 204(1) of the Customs Code does not lead to the incurrence of a customs debt on the ground that the failures have no significant effect on the correct operation of the temporary storage or customs procedure in question. [6]

III – The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court of Justice

22. Eurogate Distribution has been authorised to operate a private customs warehouse since 2006. The stock records for that customs warehouse are kept, in accordance with the authorisation, with the aid of a computer program.

23. As warehousekeeper, Eurogate Distribution took into its private customs warehouse non-Community goods from its customers with a view to forwarding them outside the territory of the European Union. At the time of the removal of the goods from the customs warehouse, customs declarations for their re-exportation were drawn up and those goods were in fact exported from the customs territory.

24. However, when a customs inspection was carried out, it was established that the removals of the goods at issue had not been recorded until 11 to 126 days after the goods had actually been removed, and were thus recorded late for the purposes of the first paragraph of Article 105 of the Customs Code, read in conjunction with Articles 529(1) and 530(3) of the Implementing Regulation.

25. By notice of assessment of 1 July 2008, the Hauptzollamt imposed import duties together with the corresponding value added tax on the goods which had been recorded late. Eurogate Distribution challenged that notice.

26. Following remission of a portion of the duties, granted by notice of 11 August 2009, the Hauptzollamt, by a decision of 8 December 2009, dismissed the remainder of Eurogate Distribution’s challenge as unfounded, on the ground that the delayed entries in the stock records were to be regarded as constituting a failure on the part of Eurogate Distribution to meet its obligations under the customs warehousing procedure and that, consequently, that failure had given rise to a customs debt on the basis of Article 204(1)(a) of the Customs Code. In that regard, the referring court points out that the obvious negligence on the part of Eurogate Distribution precludes the conclusion that that infringement had no effect on the correct operation of the customs procedure, with the result that, in the present case, the requirements of Article 859 of the Implementing Regulation are not met.

6 — I would point out that, according to the referring court, the conditions for applying that provision are not met in the present case.

27. Eurogate Distribution subsequently brought an action before the Finanzgericht (Finance Court) Hamburg for annulment of the notice of assessment of 1 July 2008, as amended by the notice of 11 August 2009 and confirmed by the decision of 8 December 2009, claiming, inter alia, that the delayed entries of the removals from the customs warehouse in the stock records do not constitute a failure to fulfil its obligations within the meaning of Article 204(1)(a) of the Customs Code inasmuch as, in accordance with Article 105 of the Customs Code and Article 530(3) of the Implementing Regulation, the obligation to record removals in the stock records has to be fulfilled only after the conclusion of the customs warehousing procedure.

28. The Hauptzollamt disputes that analysis on the ground that the keeping of the stock records is not an obligation that can be fulfilled after the conclusion of the procedure. On the contrary, it argues, entries in the stock records must be made during the customs warehousing procedure or at the same time as the conclusion of the procedure. According to the Hauptzollamt, the customs warehousing procedure was not terminated, in the present case, until after the removal of the non-Community goods with the customs release for the transit procedure as a new customs-approved treatment or use.

29. The referring court considers that the view that breach of the obligation to enter the removal of goods in the stock records immediately gives rise to a customs debt raises doubts.

30. In that regard, the referring court points out that, according to the analysis proposed by a section of German academic opinion on the basis of the wording of Article 204(1)(a) of the Customs Code, it may be argued that, in the present case, it is an obligation arising 'during' the use of the customs procedure that is infringed, and not an obligation 'arising' from such use, with the result that no customs debt arose. Moreover, inasmuch as the goods had already been assigned a new customs-approved treatment or use when they left the customs warehouse and the status of the goods is therefore no longer affected by the breach of obligation, the referring court is unsure whether a customs debt can in fact arise at all and whether it might not be possible to penalise certain breaches of the procedure in some other way.

31. Taking the view that the resolution of the dispute before it depends on the interpretation of European Union law, the Finanzgericht Hamburg decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'On a proper interpretation of Article 204(1)(a) of [the Customs Code], does infringement of the obligation, in the case of non-Community goods which were in the customs warehousing procedure and have been assigned a new customs-approved treatment or use upon discharge of that procedure, to record the removal of the goods from the customs warehouse in the appropriate computer program forthwith upon discharge of the customs warehousing procedure – rather than considerably later – cause a customs debt to arise in respect of the goods?'

32. Written observations were submitted by Eurogate Distribution, the Czech Government and the European Commission.

33. Eurogate Distribution, the Italian Government and the Commission were represented at the joint hearing with Case C-262/10, which was held on 1 December 2011.

IV – Analysis

34. By the question which it has referred for a preliminary ruling, the referring court wishes to know, in essence, whether Article 204(1)(a) of the Customs Code is to be interpreted as meaning that failure to fulfil the obligation to enter the removal of non-Community goods from the customs warehouse in the appropriate stock records, at the latest when those goods are removed, gives rise to a customs debt in respect of the goods concerned.

35. The Court is thus called upon to specify the conditions which must be satisfied in the course of the customs warehousing procedure, and infringement of which gives rise to a customs debt.

36. The present case does not involve complete failure to comply with the applicable provisions, and even less a refusal to cooperate with the customs authorities. The customs warehousing procedure was carried out correctly in the main proceedings, except with regard to the obligation to make entries in the stock records as soon as possible.

37. In view of the connection between this case and Case C-262/10, cited above, I think it is appropriate, in order to avoid repetitions, to refer to my Opinion in the latter case.

38. For the reasons set out in *Döhler Neuenkirchen* (points 35 to 37), I find that the incurrence of a customs debt is the objective consequence of the occurrence of the operative events specified by the Customs Code and consisting in either a lawful release for free circulation or a failure to fulfil obligations.

39. With more particular regard to the stock records, the obligation to keep stock records of the goods placed under the private customs warehousing procedure, laid down in Article 105 of the Customs Code, must be regarded as an essential obligation. Article 529(1) of the Implementing Regulation states that 'the stock records shall at all times show the current stock of goods which are still under the customs warehousing procedure'.

40. It follows that, where the particulars necessary for the proper application of the customs supervision procedure, within the meaning of Article 529 of the Implementing Regulation, are lacking, the obligation to keep stock records cannot be regarded as fulfilled. The result is a failure to fulfil an obligation essential to the customs supervision procedure. [7]

41. The Court has recently had the opportunity, in the judgment in *Groupe Limagrain Holding*, cited above, to rule on the function of the stock records in the context of entitlement to advance payment of an export refund. In that judgment, that entitlement was subject to, inter alia, proof that the products in respect of which a payment declaration had been submitted had been placed, and remained, under the customs warehousing procedure until they were exported. The Court noted that the placing of those products under the customs warehousing procedure was intended to guarantee that the products referred to in the payment declaration and the goods actually exported were identical. Where the products are not correctly placed under the customs warehousing procedure, proof that the products covered by the advance payment declaration have in fact been exported cannot be satisfactorily provided. The Court likened to a withdrawal from customs control the situation in which there has been a failure to comply with the obligation to maintain, in accordance with the European Union customs legislation, stock records in respect of products placed under that control. In both cases, the customs authorities are deprived of their ability to check the route taken by the products concerned and, consequently, to ensure that there has been compliance with the conditions governing the system of advance payment of export refunds. [8]

42. In contrast to the case which gave rise to the judgment in *Groupe Limagrain Holding*, cited above, in which no stock records had been kept, the position in the present case is that stock records had indeed been kept, although with a delay of between 10 days and more than 100 days. It appears, moreover, that the customs authorities nevertheless received declarations relating to the new customs-approved treatment or use of the goods, with a view to discharging the customs warehousing procedure. None the less, it is not apparent from the applicable legislation that, in a situation such as that at issue in the main proceedings, a customs declaration can replace the proper fulfilment of the obligation to maintain stock records under the customs warehousing procedure.

7 — See, to that effect, Case C-402/10 *Groupe Limagrain Holding* [2011] ECR I-10827, paragraphs 33 to 37.

8 — *Groupe Limagrain Holding*, paragraphs 43 to 46.

43. Moreover, I note that the referring court has classified the facts which gave rise to the main proceedings, not as an 'unlawful removal from customs supervision' under Article 203 of the Customs Code, but as 'non-fulfilment of [an obligation]' within the meaning of Article 204 of that Code. In the absence of any question relating to the respective scopes of application of those articles, it is appropriate to start from the basic premiss that it is Article 204 of the Customs Code which should be applied. [9]

44. Moreover, it should be pointed out that late entry in the stock records does not feature among the events capable of being considered as having 'no significant effect' on the correct operation of the temporary storage or customs procedure in question because such an event is not included in the exhaustive list in Article 859 of the Implementing Regulation. [10]

45. Eurogate Distribution also pleads the manifestly excessive nature of the consequence attached to a simple irregularity committed through negligence, inasmuch as the German legislation links the incurrence of the customs debt and the levying of value added tax on importation. I, for my part, note that the question of the link allegedly made by the German legislation between the levying of customs duties and the imposition of value added tax on importation does not form the subject-matter of the reference for a preliminary ruling. Therefore, I do not need to address that matter further, even though I do not consider the questions raised by the Commission regarding the conformity of that link with European Union law on value added tax to be irrelevant.

46. It is necessary, in any event, to restate two observations contained in the Opinion in Case C-262/10.

47. In the first place, the obligation to pay customs duties in such a case is not an administrative, fiscal or criminal sanction, but simply the consequence of a finding that the conditions required for the purpose of obtaining the advantage derived from application of the customs warehousing procedure have not been satisfied, which renders the suspension inapplicable and, as a consequence, justifies the imposition of customs duties. [11] In that regard, I refer to points 55 to 59 of my Opinion in Case C-262/10.

48. In the second place, I note that, for the purposes of the Customs Code, a customs debt does not correspond to the concept of 'economic' customs debt, according to which a customs debt arises only in regard to goods released for free circulation. Therefore, the question of whether or not the goods concerned were ultimately released for free circulation is irrelevant. It follows that customs duties may also be levied on goods which have actually left the territory of the European Union. [12]

V – Conclusion

49. In the light of the foregoing, I propose that the Court should reply in the following terms to the question referred for a preliminary ruling by the Finanzgericht Hamburg:

Article 204(l)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13 April 2005, must be interpreted as meaning that, in the case of

9 — As regards the respective scopes of Articles 203 and 204 of the Customs Code, see Case C-337/01 *Hamann International* [2004] ECR I-1791, paragraph 28.

10 — The exhaustive nature of the list contained in that provision was confirmed by the Court in Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 43.

11 — See, to that effect, Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 56, and Case C-158/08 *Pometon* [2009] ECR I-4695, paragraph 28.

12 — Even though the purpose of customs duties is, inter alia, to protect domestic production against foreign competition ('Wirtschaftszollgedanke' in German), the fact remains that the application of the relevant rules is mechanical and formal, which may give rise to situations in which customs duties are imposed even though no protection is needed, where the goods concerned are not released for free circulation. See Willemoes Jørgensen, C., *Toldskuldens opståen og ophør*, Copenhagen, Jurist- og Økonomforbundets Forlag, 2009, p. 148, and Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 55.

non-Community goods, failure to fulfil the obligation to enter the removal of the goods from the customs warehouse in the appropriate stock records, at the latest when the goods leave the customs warehouse, gives rise to a customs debt in respect of those goods, even if they have been re-exported.