# OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 14 July 2011 [1]

1. This reference for a preliminary ruling raises questions concerning the interpretation of a provision of the European Union ('EU') Customs Code [2] which the Court has already had occasion to interpret [3] and which defines the persons liable for a customs debt incurred through the unlawful introduction of goods into the customs territory of the European Union ('the EU customs territory'). However, the dispute before the referring court concerns a situation which has not arisen before and its resolution may have not insignificant repercussions. What sets it apart is the fact that the unlawful introduction was participated in over the internet and the unlawful act occurred in the course of postal traffic. For these two reasons, the ruling in the dispute has the potential to affect a large number of persons, given the unprecedented growth of the online mail-order business [4] and the internet's multiplier effect. [5]

## I – Legal context

2. 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 …

…

1 — Original language: French.

2 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17) ('the Customs Code').

3 — See, in particular, Joined Cases C-238/02 and C-246/02 *Viluckas and Jonusas* [2004] ECR I-2141; Case C-414/02 *Spedition Ulustrans* [2004] ECR I-8633; and Case C-195/03 *Papismedov and Others* [2005] ECR I-1667.

4 — As, for example, the European Economic and Social Committee noted in its opinion on the Proposal for a Regulation (EC) of the European Parliament and of the Council laying down the Community Customs Code (Modernised Customs Code) (COM(2005) 608 final) (OJ 2006 C 309, p. 22),'the amount of online and catalogue purchases of goods in countries outside the EU is growing exponentially'.

5 — More broadly, this case may have an impact on the development of business practices such as drop shipments, whereby the vendor sells goods which he acquires from a supplier who himself takes responsibility for delivery, thus avoiding problems connected with stock management, logistics and after-sales services, among other things.

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.' [6]

6 — At the material time, that is to say, between April 2004 and May 2006, the Customs Code was amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13 April 2005 amending Regulation No 2913/92 (OJ 2005 L 117, p. 13). However, the amendments made to the Customs Code by that regulation, in particular those relating to Article 40, have no direct bearing on the outcome of the dispute in the main proceedings.

## II – The dispute before the referring court

3. It appears from the order for reference and from the written observations submitted in accordance with Article 23 of the Statute of the Court of Justice that, between April 2004 and May 2006, Mr Jestel – the applicant in the main proceedings – used the eBay internet platform, through which he operated two shops under his own name, to auction a large number of goods originating in China. [7]

4. Mr Jestel acted as intermediary in the conclusion of contracts for the sale of the goods, in return for payment for the services, chiefly linguistic, which he provided through his eBay shops. It was the Chinese supplier who guaranteed the supply of the goods, set the prices for them and assumed responsibility for shipping them to the European Union, the purchasers, based in Germany, being supplied direct by post.

7 — It is worth pointing out at the outset that, even though Mr Jestel carried out his activities over the internet, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on eletronic commerce) (OJ 2000 L 178, p. 1) is not applicable. After all, while eBay's intermediary activities fall within the scope of that directive, Article 2(h) (ii) thereof provides that 'the supply of goods in respect of which a contract has been concluded by electronic means' does not, as the Court itself has held (see Case C-108/09 *Ker-Optika* [2010] ECR I-12213, paragraphs 29 and 30).

5. It would seem that the goods supplied in this way were delivered without being presented to customs and, therefore, without any import duties having been being paid, the reason for this, apparently, being that the information provided by the Chinese supplier concerning the contents and value of the packages was incorrect.

6. On the view that Mr Jestel had participated in the unlawful introduction of goods into the EU customs territory for the purposes of the second indent of Article 202(3) of the Customs Code, the Hauptzollamt Aachen (Principal Tax Office, Aachen, Germany) issued him with a tax assessment notice for sums of approximately EUR 10 000 by way of customs duties and EUR 21 000 by way of import turnover tax.

7. Mr Jestel raised an objection to the tax assessment notice, arguing that the conclusion of the sales contracts on eBay and the forwarding of the purchasers names and addresses to the Chinese supplier could not constitute participation in the unlawful introduction of goods for the purposes of the second indent of Article 202(3) of the Customs Code because those acts significantly pre-dated the shipping of the goods and related exclusively to the causal transaction.

8. Since the objection raised by Mr Jestel was dismissed, as was the action challenging that dismissal which he brought before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), Mr Jestel then brought an appeal on a point of law before the Bundesfinanzhof (Federal Finance Court).

## III – The questions referred for a preliminary ruling

9. On considering the question whether Mr Jestel's participation in the conclusion of contracts for the sale of goods through his online shops on eBay might be sufficient to confer on him the status of customs 'debtor' within the meaning of the second indent of Article 202(3) of the Customs Code, the Bundesfinanzhof decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a person become a debtor liable to pay customs duties because of "participation" in the unlawful introduction of goods into the [EU] customs territory … according to the second indent of Article 202(3) of Regulation (EEC) No 2913/92 establishing the Community Customs Code where that person, without being directly involved in the introduction of goods, arranges the conclusion of the contracts to purchase the goods concerned and therefore envisages

that the seller will possibly deliver the goods or part of the goods in such a way as to evade import duties?

(2) If appropriate, is it sufficient that he considers this to be conceivable, or does he only become a debtor if he fully expects that this will happen?'

10. The referring court states that the question whether Mr Jestel had assumed that the goods would be imported in compliance with the customs formalities, whether he had entertained any doubts in that regard or whether he expected from the outset that they would be imported in breach of those formalities has not yet been definitively resolved.

11. Written observations have been submitted by the Czech Government and the European Commission.

12. Since the parties which submitted written observations made no application for a hearing within the time allowed under Article 104(4) of the Court's Rules of Procedure, the Court decided to proceed without a hearing.

## IV – Analysis

### A – *The questions raised*

13. By its two questions, the referring court asks in essence whether the facts before it fall within the scope of the second indent of Article 202(3) of the Customs Code.

14. It must be pointed out that the referring court takes it as read that the goods at issue were introduced into the EU customs territory unlawfully for the purposes of Article 202(1) of the Customs Code. Its question is whether the circumstances in which Mr Jestel was involved in the transactions leading to the unlawful introduction at issue are such that he may, on the basis of the second indent of Article 202(3) of the Customs Code, be regarded as the debtor of the customs debt incurred through that introduction.

15. The referring court expressly states that it considers it doubtful that a person who, without being directly involved in the unlawful introduction of goods, acts as an intermediary in the conclusion of a contract of sale relating to those goods may be considered to have

participated in that introduction for the purposes of the second indent of Article 202(3) of the Customs Code.

16. It also asks whether a person in Mr Jestel's situation can be regarded as a 'debtor' within the meaning of the second indent of Article 202(3) of the Customs Code if he was able to 'envisage' ('in Betracht ziehen') that the goods, or some of them, might be delivered in such a way as to evade import duties. By its second question, the referring court asks, more specifically, whether it is sufficient that that person considered this to be 'conceivable' ('für denkbar halten') or whether, on the contrary, he must 'fully expect' ('fest rechnen') that that possibility will materialise.

B – *The structure of Article 202(3) of the Customs Code: the second indent*

17. Article 202(3) of the Customs Code defines three categories of person who may be regarded as debtors of the customs debt incurred through the unlawful introduction of goods into the EU customs territory: (i) the persons who introduced the goods unlawfully; (ii) the 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 (iii) the persons who acquired or held the goods introduced unlawfully and who were aware or should reasonably have been aware that they had been introduced unlawfully.

18. As the Court has held, it is clear from the very wording of Article 202(3) of the Customs Code that the EU legislature intended to lay down exhaustively the conditions for determining who are the debtors of the customs debt [8] and to give a broad definition of the persons capable of being regarded as debtors of the customs debt [9] in cases of unlawful introduction of goods into the EU customs territory.

19. It is common ground that Mr Jestel is not the person who physically introduced [10] the goods at issue into the EU customs territory and that he cannot therefore be regarded as the debtor of the customs debt on the basis of the first indent of Article 202(3) of the Customs Code. [11]

8 — *Spedition Ulustrans*, paragraph 39, and *Papismedov and Others*, paragraph 38. See also Case C-140/04 *United Antwerp Maritime Agencies and Seaport Terminals* [2005] ECR I-8245, paragraph 30.

9 — *Papismedov and Others*, paragraph 38.

10 — This would be true, for example, of a lorry driver who failed to report the goods he was carrying to the first customs post he encountered on entering the territory of the European Union, as in the case giving rise to the judgment in *Viluckas and Jonusas*.

11 — *Viluckas and Jonusas*, paragraph 29, and *Spedition Ulustrans*.

20. It is also common ground that he did not acquire or hold the goods at issue and that he cannot be regarded as the debtor of the customs debt on the basis of the third indent of Article 202(3) of the Customs Code either.

21. The referring court is therefore right to ask whether the second indent of Article 202(3) of the Customs Code is applicable to the facts.

C – *Who is the 'debtor' within the meaning of the second indent of Article 202(3) of the Customs Code?*

22. Treatment as a 'debtor' within the meaning of the second indent of Article 202(3) of the Customs Code is subject to conditions resting on matters of assessment that are in principle objective (participation in the introduction of the goods at issue) and subjective (knowledge that the introduction was unlawful). As the Court has had occasion to point out, in terms which provide a perfect synthesis of the provision in question, the debtor, be it a natural or a legal person, must have participated knowingly [12] in the unlawful introduction of the goods into the EU customs territory, it being understood that the matters of subjective assessment are such as to exclude, in certain cases, treatment as a debtor. [13]

23. Before we look in detail at the conditions governing the application of the second indent of Article 202(3) of the Customs Code, it is important to point out that the referring court starts from the principle that the goods were introduced unlawfully into the EU customs territory and that they were therefore introduced in breach of the formalities laid down in Articles 38 to 41 of the Customs Code. However, the referring court provides hardly any further information in this regard, even though the goods were introduced by post. Postal traffic is the subject of specific provisions, some of which form part of international law, that may have a bearing on the outcome of the dispute. The main provisions applicable to postal traffic must therefore be briefly reviewed before we examine the two conditions for the application of the second indent of Article 202(3) of the Customs Code.

1. Preliminary observations on the specific nature of postal traffic

24. In accordance with Article 38(1)(a) of the Customs Code, goods which are brought into the EU customs territory are to be conveyed

12 — *Papismedov and Others*, paragraph 40.

13 — *Spedition Ulustrans*, paragraphs 27 and 28, and *Papismedov and Others*, paragraph 40.

by the person bringing them into that territory, without delay, to the customs office designated by the customs authorities or to any other place designated or approved by those authorities. However, Article 38(4) of the Customs Code exempts postal traffic from that rule, on condition that the possibility of customs supervision and customs control is not thereby jeopardised. [14]

25. The Court has never yet been called upon to interpret that provision of the Customs Code or, more broadly, to consider the customs rules applicable to postal traffic.

26. It is Articles 237 and 238 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, [15] which make up Section 4, entitled 'Postal Traffic', of Title VII, containing the provisions applicable to the normal customs declaration procedure, which lay down the principal specific rules applicable in EU law [16] to postal traffic. [17]

27. Moreover, Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty [18] provided relief from import duties for

14 — See also Article 45 of the Customs Code.

15 — OJ 1993 L 253, p. 1. Council Regulation (EEC) No 4151/88 of 21 December 1988 laying down the provisions applicable to goods brought into the customs territory of the Community (OJ 1988 L 367, p. 1), which was repealed by the Customs Code, already included specific provisions governing postal traffic (see, in particular, the fifth recital in the preamble to and Articles 3(4) and 10 of that regulation).

16 — It must be pointed out, however, that, in accordance with Article 8 of Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42), which was applicable at the material time, the European Communities' own resources referred to in Article 2(1)(a) and (b) of that decision, including customs duties, '[were to] be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action, which [were], where appropriate, [to] be adapted to meet the requirements of Community rules'.

17 — Thus, Article 237(1)(A) of Regulation No 2454/93 states that postal consignments and, in particular, parcels are to be 'considered' to have been declared to customs for release for free circulation either [situation (a)] at the time when they are introduced into the customs territory, provided that they are exempt from the obligation to be conveyed to customs in accordance with the provisions adopted pursuant to Article 38(4) of the Customs Code, or, failing that, [situation (b)] at the time when they are presented to customs, provided that they are accompanied by a CN22 and/or a CN23 declaration. Originally it was a C1 and/or C2/CP3 declaration. The provision was amended by Article 1(6) of Commission Regulation (EC) No 1602/2000 of 24 July 2000 amending Regulation No 2454/93 (OJ 2000 L 188, p. 1) to take account of the fact that the forms provided for by the Universal Postal Union for the declaration of consignments sent by letter or parcel post had been replaced (see recital 9 in the preamble to that regulation).

18 — OJ 1983 L 105, p. 1, and corrigendum OJ 1986 L 271, p. 31. That regulation was amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and the adaptations to the Treaties on which the European Union is based – Protocol No 3 on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus (OJ 2003 L 236, p. 940). That regulation has since been repealed by Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty (OJ 2009 L 324, p. 23).

consignments of negligible value – that is to say, not exceeding EUR 22 [19] – and for consignments from one private person to another, more specifically from a private person in a third country to another private person in the EU customs territory, provided that they were imports of a non-commercial nature. [20]

28. However, the order for reference makes no mention either of those specific reliefs or even of Regulation No 918/83. Indeed, the Czech Government infers from the factual circumstances set out in the order for reference that the goods at issue must have been entered by the sender of the parcels, in other words the supplier, in the documentation attached to those parcels – that is to say, forms CN21 or CN22 – as goods of negligible value exempt from import duty under Article 27 of Regulation No 918/83. It can also be inferred from the order for reference that, in the light of their frequency, the imports at issue do not in any event qualify for relief as business between private persons.

29. It is for the referring court, however, to make the findings of fact that will allow it to draw any conclusions in that regard.

30. The point that must be borne in mind is that postal consignments are covered by special rules, most of which are laid down not by the acts of EU secondary legislation referred to above but by the Universal Postal Union Convention adopted by the United Nations Organisation on 10 July 1964 [21] and by the International Convention on the Simplification and Harmonisation of Customs Procedures, [22] signed in Kyoto on 18 May 1973, [23] in particular Annex F.4 thereto concerning customs formalities in respect of postal traffic,

19 — See Articles 27 and 28 of that regulation. That exemption concerned goods sent directly from a third country to an addressee in the territory of the European Union, with the exception of alcoholic beverages, perfumes, toilet waters, tobacco and tobacco products.

20 — See Articles 29 to 31 of that regulation.

21 — That convention, to which all the Member States of the European Union have acceded, lays down the general legal framework governing international postal activities.

22 — Council Decision 75/199/EEC of 18 March 1975 concluding an international convention on the simplification and harmonisation of customs procedures and accepting the Annex thereto concerning customs warehouses (OJ 1975 L 100, p. 1).

23 — By Council Decision 2003/231/EC of 17 March 2003 concerning the accession of the European Community to the Protocol of Amendment to the International Convention on the simplification and harmonisation of customs procedures (Kyoto Convention) (OJ 2003 L 86, p. 21), the European Union acceded to the Protocol of Amendment to the International Convention on the simplification and harmonisation of customs procedures adopted by the Customs Cooperation Council on 26 June 1999. See also Council Decision 2004/485/EC of 26 April 2004 amending Decision 2003/231/EC concerning the accession of the European Community to the Protocol of Amendment to the International Convention on the simplification and harmonisation of customs procedures (Kyoto Convention) (OJ 2004 L 162, p. 113). The accession covers the text of that protocol of amendment, including Appendices I and II, but not Appendix III.

approved by Council Decision 94/798/EC of 8 December 1994,[24] as implemented in the various national legal orders.[25]

31. It is clear, in particular, from the provisions of the International Convention on the Simplification and Harmonisation of Customs Procedures and, inter alia, from Annex F.4 thereto concerning customs formalities in respect of postal traffic, that, in the case of international postal consignments, responsibility for completing customs formalities lies principally with the sender, who must supply the documents required, namely the customs declaration form (initially forms C2/CP3 in Annex F.4 and now customs declaration CN22 or CN23 in the Customs Code), the requisite commercial or pro forma invoices and any other document that may be required (certificate of origin, plant health certificate, export licence, for example).

2. Participation in the introduction of the goods into the EU customs territory

32. As the referring court has pointed out, 'participation' for the purposes of the second indent of Article 202(3) of the Customs Code is not defined by the Code. Moreover, the Code does not make any reference to the law of the Member States for the purposes of determining the meaning and the scope of those provisions. It therefore has an autonomous meaning in EU law which the Court of Justice must define. The Court has repeatedly held that the need for the uniform application of EU law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purposes of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; and that interpretation must take into account the context of the provision and the purpose of the legislation in question.[26]

33. It must be made clear at the outset that the purpose of the provisions of Article 202(3) of the Customs Code is not to determine who is 'responsible' for the unlawful introduction of goods into the territory of the European Union but, more broadly, which persons are liable for the debt incurred through that unlawful introduction, in the more general interest of safeguarding the financial interests of the European Union.

24 — Decision accepting, on behalf of the Community, Annexes E.7 and F.4 to the International Convention on the Simplification and Harmonisation of Customs Procedures (OJ 1994 L 331, p. 11). It should be noted, however, that this annex was approved subject to a general reservation and reservations with respect to Standards 19 and 26 and Recommended Practices 23, 24 and 25.

25 — See, in this regard, my observations in footnote 16.

26 — See, in particular, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; and Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 35.

34. After all, Article 202(3) of the Customs Code must be read first of all in the light of the paragraphs that precede it, in particular paragraph 1(a), which defines unlawful introduction by reference inter alia to Articles 38 to 41 of the Customs Code. Pursuant to the final sentence of Article 202(1) of the Customs Code, goods are to be considered to have been introduced into the territory of the European Union unlawfully if they have not been presented to customs in accordance with Articles 38 to 41 of the Customs Code.

35. That provision thus confirms the central role played by the customs declaration, and, by extension, the person making it, in the Customs Code. As the Court has held, the person liable for the customs debt is determined exclusively on the basis of the formality of declaration and results from the legal effects associated with the formality of declaration. [27] The debtor of the customs debt is normally the declarant or, where appropriate, the person on whose behalf the declaration is made [28] or the person on whom the obligation to declare the goods is placed. [29] From this point of view, the very purpose of Article 202 of the Customs Code is to extend [30] the meaning of debtor of the customs debt to persons who have failed to comply with the provisions of EU customs legislation relating to the customs declaration, thus confirming, by converse implication, the central role played by that declaration. [31]

36. That said, it must be pointed out that, to some extent, the three indents of Article 202(3) of the Customs Code establish an order of gradation in the 'involvement' of the person deemed to be the debtor by virtue of his participation in the unlawful introduction of goods. Thus, the first indent refers to – as the principal or first-ranking debtor, as it were – the person who introduced the goods unlawfully, that is to say, the person who ought normally to have cleared the goods through customs and performed the declarant's obligations. The second and third indents refer to persons who, although not 'responsible' for customs clearance under the

27 — Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraphs 32, 33 and 65.

28 — For example, the employer of the person who carried out the unlawful introduction at issue in the performance of the tasks entrusted to him by that employer (see *Spedition Ulustrans*).

29 — *Viluckas and Jonusas*, paragraphs 23 and 24.

30 — See, in particular, Case C-459/07 *Elshani* [2009] ECR I-2759, paragraphs 26 to 28.

31 — Like Articles 203 to 205, 210, 211 and 220 of the Customs Code, which all concern situations in which the operator concerned has failed to comply with the EU customs legislation (see Case C-546/09 *Aurubus Balgaria* [2011] ECR I-2531, paragraphs 32 to 34.

Customs Code, are none the less involved, either before or immediately after the unlawful introduction.

37. In so doing, Article 202(3) of the Customs Code makes it possible to define several categories of debtor and, where appropriate, joint and several co-debtors [32] of the customs debt incurred through the unlawful introduction of goods, determined according to their involvement in the transaction at issue. It is important to emphasise in this regard that the Customs Code does not establish any order of precedence of one category of debtor over another. The customs authorities may without distinction approach the debtor they consider best placed to enable the objective pursued by that provision to be attained, that is to say, payment of customs duties evaded through non-completion of customs formalities.

38. In this context, the objective condition laid down by the second indent of Article 202(3) of the Customs Code is couched in very general terms which are manifestly intended to encompass all kinds of situations. What is required is not actual 'participation' in an 'unlawful introduction' of goods into the customs territory and, accordingly, a more or less direct involvement in the unlawful act, but, more simply, 'participation' in the introduction per se of those goods, that is to say, involvement in all the transactions which led to the goods being physically present in the EU customs territory.

39. As Advocate General Tizzano pointed out in his Opinion in *Spedition Ulustrans*, [33] 'that requirement is obviously satisfied each time a person makes a practical or moral contribution to introduction of the goods into the Community'. This underscores the fact that the scope potentially [34] covered by that provision is very extensive and may embrace both a direct contribution to the physical introduction of the goods into the EU customs territory, that is to say, active complicity in the fraudulent crossing of the external borders of the European Union, [35] and an indirect contribution such as participation in the financing of the import transactions leading to the unlawful introduction or, as in the case under consideration, simply acting as an intermediary in the conclusion of the contract

32 — As was the case in *Spedition Ulustrans*.

33 — Point 40 of that Opinion.

34 — That is to say, provided that the second, subjective, condition is satisfied.

35 — This is true of the liability shared by the driver of the lorry in which the goods crossed the external borders of the European Union, in breach of the customs formalities, and his employer, as in *Spedition Ulustrans*.

for the sale of the goods subsequently introduced into the EU customs territory unlawfully.

40. The order for reference does show that the goods were introduced into the EU customs territory in the course of postal traffic and that Mr Jestel was neither the sender nor the addressee of the postal consignments constituting that introduction. However, those circumstances do not allow me to conclude that Mr Jestel did not 'participate' in the introduction at issue, since the basis for a customs debt arising from goods not declared to customs or declared under an incorrect designation [36] is Article 202 of the Customs Code.

41. On the other hand, the specific nature of postal traffic must certainly be taken into consideration when examining the subjective condition imposed by the second and third indents of Article 202(3) of the Customs Code, which I shall examine below and the very purpose of which is to mitigate the severity of the objective condition when applied to persons not normally bound by the obligations incumbent on the customs declarant.

36 — *Papismedov and Others*, paragraph 36.

42. It can therefore be concluded that a person who has acted as an intermediary in the conclusion of contracts of sale relating to goods introduced into the EU customs territory 'participated' in that introduction for the purposes of the second indent of Article 202(3) of the Customs Code.

3. 'Who were aware or should reasonably have been aware that such introduction was unlawful'

43. In accordance with the second indent of Article 202(3) of the Customs Code, however, the person who 'participated' in the introduction of goods into the EU customs territory, within the meaning set out above, cannot be classified as the debtor of the customs debt unless it is established that he was aware or, alternatively, should reasonably have been aware that such introduction was unlawful. The referring court states that it has not yet made a finding in that regard.

44. As the Court has held on many occasions, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national

court. [37] It is not therefore for the Court itself to find that the subjective condition to the effect that the person must have been aware, or 'should reasonably have been aware', that the introduction of the goods at issue was unlawful was satisfied in this case. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with the national court, provide it with all the guidance that it deems necessary. [38] It must therefore provide the referring court with the guidance it needs to be able to make that finding, and with information on both the method to be followed and the criteria to be applied.

45. The main difficulty raised by the second indent of Article 202(3) of the Customs Code – and, incidentally, by the third indent – is indisputably the meaning to be ascribed to the phrase 'should reasonably have been aware' [39] that the goods were introduced unlawfully. [40]

46. By the second of its two questions, the referring court offers us two possible answers. On the one hand, the view might be taken that a person who participated in the unlawful introduction at issue is the debtor of the customs debt if he was in a position to envisage or imagine that such unlawful introduction might arise. On the other hand, the view might be taken that he is a debtor only if he is almost certain that it will arise.

37 — See, in particular, Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4; Case 36/79 *Denkavit Futtermittel* [1979] ECR 3439, paragraph 12; and Joined Cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I-305, paragraph 41.

38 — See, in particular, Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 30; Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273, paragraph 41; Case C-433/05 *Sandström* [2010] ECR I-2885, paragraph 35; and Case C-12/10 *Lecson Elektromobile* [2010] ECR I-14173, paragraph 15.

39 — In French 'devant raisonnablement savoir'; in German 'vernünftigerweise hätten wissen müssen'; and in Spanish 'debiendo saber razonablemente'.

40 — It must be noted that the Customs Code contains other provisions formulated in a similar or identical way. The first indent of Article 8(1) concerns the annulment of a favourable decision adopted on the basis of incorrect or incomplete information. The second subparagraph of Article 201(3) concerns customs declarations based on false information. The second and third indents of Article 203(3) concern the removal of goods from customs supervision. Article 205(3) concerns the consumption, in a free zone or free warehouse, of goods liable to import duties. The second indent of Article 210(3) concerns the removal from the EU customs territory of goods liable to export duties without a customs declaration. The Court has itself used identical forms of words in its own judgments (judgment of 17 March 2011 in Case C-23/10 *Commission* v *Portugal*). The use of similar forms of words is also very widespread in acts imposing sanctions on third States or on particular persons or entities ('smart sanctions'), since a natural or legal person cannot be held liable for the infringement of a prohibition if he cannot 'reasonably have been aware' that his action would have such a consequence (see, for example, Article 10(2) of Council Regulation (EU) No 442/2011 of 9 May 2011 concerning restrictive measures in view of the situation in Syria (OJ 2011 L 121, p. 1)).

47. I am not at all convinced that the EU legislature intended to allow a person who has 'participated' in the introduction of goods into the EU customs territory, in the very broad sense of 'participation' that I have proposed above, to be regarded as the 'debtor of the customs debt' within the meaning of the second indent of Article 202(3) of the Customs Code if he was not in a position to rule out the possibility that such unlawful introduction might arise, which is to say, in the words of the referring court, if he considered such unlawful introduction to be 'conceivable' ('denkbar'). Nor am I certain, however, that classification as the 'debtor of the customs debt' within the meaning of that provision requires the level of certainty suggested by the idea that the person in question must fully expect ('fest rechnen') that such unlawful introduction will arise.

48. I therefore incline to the view that we must leave behind the referring court's proposed alternative and try to arrive at an independent interpretation of the expression used in the second and third indents of Article 202(3) of the Customs Code. [41]

49. The adverb 'reasonably' is a reference to the situation of a reasonably circumspect economic agent [42] and describes matters of which everyone should have been aware in normal circumstances. What the subjective condition requires is, ultimately, an *in concreto* evaluation of the information to which the person in question had or could have had access under normal circumstances in order to gauge the likelihood that he knowingly acted in such a way as to evade the customs rules.

50. The subjective condition laid down in the second indent of Article 202(3) of the Customs Code therefore requires the customs authority to establish, under the supervision of the competent courts, that the person who participated in the unlawful introduction of the goods at issue had, must have had or could have had access to information enabling him to identify the unlawful introduction, foresee it and, where appropriate, prevent it from happening.

41 — See, in this regard, my observations in point 32 above.

42 — The criterion of the 'reasonably circumspect economic agent' does of course call to mind the criterion of the average consumer, or internet user, who is reasonably well informed and reasonably observant and circumspect, by reference to which, inter alia, the distinctive character of a trade mark is assessed (Case C-299/99 *Philips* [2002] ECR I-5475 and Case C-37/03 P *BioID* v *OHIM* [2005] ECR I-7975). The 'average consumer, who is reasonably well informed and reasonably observant and circumspect' is also used in contexts other than trade mark law (see Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657), See also, in relation to consumer protection, Case C-457/05 *Schutzverband der Spirituosen-Industrie* [2007] ECR I-8075 and, in relation to misleading advertising, Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095).

51. In making that evaluation, the competent national authorities and competent national courts may take all kinds of factors into account. These include, by way of example (the following list is not exhaustive), the status of the person in question (private individual, commercial or semi-commercial operator) and the capacity in which he acted in the transaction at issue; the nature of the activities regarded as 'participation' in the unlawful introduction at issue and the stage in the import transaction at which those activities took place (financing of the import transactions, organisation of the forms of transport for the goods, conclusion of the contracts of sale); any contractual obligations incumbent on that person; or, more simply, the information of which he is deemed to have been aware or which was available and easily accessible.

52. It is for the competent national authorities and courts to evaluate and weigh the various relevant factors at their disposal which may enable them to establish that there is a sufficient degree of probability that the person in question acted knowingly. While they must be allowed a measure of discretion in this regard, they none the less have a duty to make that evaluation in compliance with the rules governing the taking of evidence in similar situations and consistently with the principles of equivalence and effectiveness. [43]

53. That said, I should like, solely in order to give the referring court a helpful answer to its questions and by way of conclusion, to give a more specific illustration of the factors that may be taken into consideration in the situation under consideration.

54. It is clear from the details provided by the referring court that Mr Jestel participated in the unlawful introduction of the goods at issue through his eBay shops.

55. The Commission points out in this regard that, on the one hand, Mr Jestel cannot deny that, through his eBay shops, he engaged, on a reasonably regularly basis and with a view to securing a profit, in the activity of marketing goods over the internet by arranging and facilitating the conclusion of contracts of sale relating to supplies of goods from China to the European Union and that, on the other hand, he could not have been unaware that supplies of that kind gave rise to an obligation to pay import duties. The Commission refers in this connection to the information sheet on ordering goods over the internet (electronic

43 — In this regard, see, in particular, Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 80; Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529. paragraph 51; Case C-55/06 *Arcor* [2008] ECR I-2931, paragraph 192; and Case C-264/08 *Direct Parcel Distribution Belgium* [2010] ECR I-731, paragraphs 32 to 36 and 42 to 47.

commerce) prepared by the German customs authorities. The Commission infers from this that it was reasonable to expect Mr Jestel to draw the attention of the supplier or his customers to the existence of the provisions in force and to insist that they be complied with, if he had any doubts about the lawfulness of the introduction of the goods at issue into the territory of the European Union.

56. In so doing, the Commission cites two factors: (i) the nature of the activities pursued by Mr Jestel, *in casu* the quasi-commercial nature, in terms of its duration and volume, of his internet activity and (ii) the public nature of the relevant information concerning the customs rules applicable to those activities. These factors call for the following comments.

57. The first factor – it is important to point out – is concerned less with Mr Jestel's status than with the nature of his activities or the manner in which he engages in them. There is no need to determine whether he is to be regarded as a commercial operator, a semi-commercial operator or a mere amateur, since such a distinction has no basis in the Customs Code. While it is true that the fact that a natural person engages in an activity on a commercial basis means that he must be assumed to be familiar with all the rules applicable to that activity,[44] conversely, the fact that a natural person engages in an activity as an amateur does not in itself release him from the obligation to comply with the customs rules applicable or exempt him from all liability for any infringement of those rules.

58. On the other hand, the ongoing nature of the activity in question, the volume of the goods in question, the number and frequency of postal consignments dispatched and the fact that they were dispatched by one and the same supplier or a very small number of suppliers are certainly factors to be taken into consideration when making that evaluation. Likewise, the fact that the person in question changed the manner in which he engaged in his activity specifically in order to avoid having to complete customs formalities is likely to be of decisive importance from this point of view.

59. The second factor, that is to say, the public nature of relevant information, is certainly the main factor to be taken into account when assessing whether a person can reasonably be considered to have knowingly acted in such

44 — On the other hand, the commercial nature of the activity pursued can obviously be taken into account in assessing the information available to the person in question.

a way as to evade the customs rules. In this regard, the referring court can most definitely take account of easily identifiable and readily accessible information intended for the public at large such as the information sheet on ordering goods over the internet, to which the Commission refers. It must also be able to rely, and with greater certainty, on information with which Mr Jestel was contractually obliged to make himself familiar, that is to say, the user conditions [45] and the specific rules of eBay.

60. This category of 'mandatory' information includes the 'seller rules' [46] which all eBay members are required to read and understand and which are intended to enforce local laws and regulations'. Sellers are therefore contractually obliged to know and comply with the rules for putting goods up for international sale, [47] which state that buyers and sellers must comply with the various schemes of legislation applicable. The information thus posted online by eBay in the 'Help' section of the website includes a document entitled 'Customs and documentation', [48] which can be accessed via the 'Payment and postage', 'Packaging and posting items' and 'Posting internationally' links, and which provides a summary of the customs obligations incumbent on sellers.

61. As I indicated above, however, it is for the referring court to determine whether, in the light of the nature of the activities engaged in by Mr Jestel, the information with which he was required to make himself familiar and the factual and legal context in which those activities took place – in particular, the fact that the goods at issue were introduced in the course of postal traffic – he can be regarded as the 'debtor of the customs debt incurred through the unlawful introduction of goods into the EU customs territory' for the purposes of the second indent of Article 202(3) of the Customs Code.

45 — http://pages.ebay.co.uk/help/policies/user-agreement.html.

46 — http://pages.ebay.co.uk/help/policies/seller-rules-overview.html.

47 — http://pages.ebay.co.uk/help/policies/seller-international.html.

48 — http://pages.ebay.co.uk/help/pay/customs.html.

## V – Conclusion

62. I therefore propose that the Court's answer to the questions referred by the Bundesfinanzhof should be as follows:

'The second indent of Article 202(3) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000, must be interpreted as meaning that a customs debt arising from participation in the unlawful introduction of goods into the customs territory of the European Union is payable by a person who, without being directly involved in the introduction of the goods, participated in that introduction by acting as intermediary in the conclusion of the contracts of sale relating to those goods, where it is established that, in the light of the information to which that person had or could have had access under normal circumstances, there is a sufficient degree of probability that he acted knowingly.

To that end, it is for the competent national authorities and competent national courts to evaluate and weigh the various relevant factors at their disposal in compliance with the rules governing the taking of evidence in comparable situations and consistently with the principles of equivalence and effectiveness.'