Reports of Cases

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

Case C-262/10

Döhler Neuenkirchen GmbH
v
Hauptzollamt Oldenburg

(Reference for a preliminary ruling from the Bundesfinanzhof (Germany))

(Community Customs Code — Inward processing procedure — System of suspension — Regulation (EEC) No 2913/92 — Article 204 — Incurrence of a customs debt on importation as a result of non-fulfilment of an obligation — Failure to supply the bill of discharge within the time-limit)

I – Introduction

1. The inward processing procedure, set out in the Community Customs Code, [2] allows Community manufacturers to process, on European Community territory, non-Community goods intended to be re-exported from the customs territory of the Community in the form of compensating products, without being subject to import duties.

2. The use of this suspensive customs arrangement with economic impact requires authorisation, which is issued subject to conditions laid down in the Customs Code. [3] In particular, the customs authorities set the time-limit ('the period for discharge') within which the processed products ('the compensating products') must have been re-exported or assigned a new customs-approved treatment or use. The assignment of that new treatment or use equates with the discharge of the inward processing procedure. [4]

3. A number of indications concerning the progress of the inward processing procedure must be notified to the customs authorities within 30 days of the expiry of the period for discharge ('the bill of discharge').

4. In the main proceedings, Döhler Neuenkirchen GmbH ('Döhler Neuenkirchen') benefited from the inward processing procedure for the importation of non-Community goods.

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 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 The Customs Code was repealed by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (OJ 2008 L 145, p. 1) ('the Modernised Customs Code'), some provisions of which entered into force on 24 June 2008. Given the date of the facts of the main proceedings, they are governed by the rules laid down in the Customs Code. I shall come back subsequently to the question of whether the solution put forward in this Opinion would also apply under the rules of the Modernised Customs Code.

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

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

5. Upon expiry of the period for discharge, the compensating products were either re-exported or assigned a new customs-approved treatment or use, that is to say released for free circulation in accordance with the aforementioned conditions. Döhler Neuenkirchen did not, however, fulfil its obligation to supply the bill of discharge within 30 days of the expiry of the period for discharge.

6. The Bundesfinanzhof (Germany) seeks to ascertain whether such a violation gives rise to a customs debt under Article 204 of the Customs Code, particularly where most of the goods have been re-exported.

7. As in Case C-28/11 *Eurogate Distribution*, pending before the Court, in which I shall also be delivering my Opinion today, which concerns, by contrast, the non-fulfilment of obligations under the customs warehousing 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 the 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' refers, inter alia, to the placing of goods under a customs procedure or their re-exportation from the Community customs territory. Customs procedure covers, inter alia, release for free circulation or inward processing of goods.

9. As regards the inward processing procedure, Article 114 of the Customs Code provides as follows:

'1. Without prejudice to Article 115, the inward processing procedure shall allow the following goods to be used in the customs territory of the Community in one or more processing operations:

(a) non-Community goods intended for re-export from the customs territory of the Community in the form of compensating products, without such goods being subject to import duties or commercial policy measures;

…

2. The following expressions shall have the following meanings:

(a) suspension system: the inward processing relief arrangements as provided for in paragraph 1(a);

…

(c) processing operations:

— the working of goods, including erecting or assembling them or fitting them to other goods;

— the processing of goods;

…'

10. Article 118(1) and (2) of the Customs Code provides:

‘1. The customs authorities shall specify the period within which the compensating products must have been exported or re-exported or assigned another customs-approved treatment or use. ...

2. The period shall run from the date on which the non-Community goods are placed under the inward processing procedure. The customs authorities may grant an extension on submission of a duly substantiated request by the holder of the authorization.

For reasons of simplification, it may be decided that a period which commences in the course of a calendar month or quarter shall end on the last day of a subsequent calendar month or quarter respectively.’

11. Title VII of the Customs Code, headed ‘Customs Debt’, contains, in Chapter 2, the provisions concerning the incurrence of a customs debt.

12. Article 201 of the Customs Code lays down the general rule, as follows:

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

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

…

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

…’

13. Article 204 of the Code provides for a residual category, as follows:

‘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*

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

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’).

15. Article 496(m) of the Implementing Regulation provides that '"period for discharge" means the time by which the goods or products must have been assigned a new permitted customs-approved treatment or use …'.

16. Article 521 of that regulation concerns, inter alia, the bill of discharge and provides as follows:

'1. At the latest upon expiry of the period for discharge, irrespective of whether aggregation in accordance with Article 118(2), second subparagraph, of the Code is used or not:

— in the case of inward processing (suspension system) …, the bill of discharge shall be supplied to the supervising office within 30 days;

…

Where special circumstances so warrant, the customs authorities may extend the period even if it has expired.

2. The bill or the claim shall contain the following particulars, unless otherwise determined by the supervising office:

…

3. The supervising office may make out the bill of discharge.'

17. Article 546 of the implementing regulation provides:

'The authorisation shall specify whether compensating products or goods in the unaltered state may be released for free circulation without customs declaration, without prejudice to prohibitive or restrictive measures. In this case they shall be considered to have been released for free circulation, if they have not been assigned a customs-approved treatment or use on expiry of the period for discharge.

For the purposes of the first subparagraph of Article 218(1) of the Code, the declaration for release for free circulation shall be considered to have been lodged and accepted and release granted at the time of presentation of the bill of discharge.

…'

18. Article 859 of the implementing regulation provides for the cases in which the non-fulfilment of an obligation set out in Article 204(1) of the Customs Code does not result in a customs debt being incurred, on the ground that the failures have no significant effect on the correct operation of the customs procedure in question.

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

19. During the first quarter of 2006, Döhler Neuenkirchen imported concentrated fruit juice which it processed under the inward processing procedure, as permitted by the authorisation issued to it. According to that authorisation, the period for discharge of the inward processing procedure expired in the following fourth calendar quarter, that is to say on 31 March 2007.

20. Under the inward processing procedure, the bill of discharge must be supplied within 30 days of the expiry of the period for discharge. In the case at issue, the bill of discharge was therefore to be supplied no later than 30 April 2007, which Döhler Neuenkirchen failed to do, despite a warning from the Hauptzollamt Oldenburg ('the Hauptzollamt') requiring the bill to be supplied by 20 June 2007.

21. In the absence of the bill of discharge, the Hauptzollamt imposed import duty on all the imported goods in respect of which the period for discharge had expired on 31 March 2007, for the full amount (EUR 1 403 188.49).

22. On 10 July 2007, Döhler Neuenkirchen finally supplied the bill of discharge, which showed a lesser amount of import duty, namely EUR 217 338.39, since a significantly lower quantity of the imported goods had not been re-exported within the time-limit, that is to say by 31 March 2007.

23. Döhler Neuenkirchen challenged the difference between the amount of the import duty determined by the Hauptzollamt and that resulting from the bill of discharge, before bringing the case before the Finanzgericht Hamburg.

24. The Finanzgericht Hamburg dismissed the action, ruling that, by exceeding the period allowed for submission of the bill of discharge, Döhler Neuenkirchen had not fulfilled its obligations and had thus incurred a customs debt pursuant to Article 204(1)(a) of the Customs Code. That court also held that the late submission of the bill of discharge could not be considered a failure having no significant effect on the correct operation of the customs procedure within the meaning of Article 859(9) of the implementing regulation. [6]

25. The Finanzgericht Hamburg pointed out, firstly, that the time-limit for submission of the bill of discharge could not have been extended, inasmuch as there were no special circumstances which warranted an extension of the period within the meaning of the second subparagraph of Article 521(1) of the implementing regulation. Secondly, it found that Döhler Neuenkirchen had been obviously negligent inasmuch as it was aware, as an experienced operator under the inward processing procedure, of the obligation to submit bills of discharge within a specified period and, in addition, had had its attention drawn to that requirement by the Hauptzollamt.

26. Döhler Neuenkirchen then lodged an appeal before the Bundesfinanzhof, claiming that the customs procedure had been discharged on 31 March 2007 and that any non-fulfilment of obligations after that date, such as the late submission of the bill of discharge, could not have an impact on the procedure or, still less, give rise to a customs debt at a later stage.

27. Having analysed the argument put forward by Döhler Neuenkirchen, according to which a failure committed after the discharge of the customs procedure in question could not cause a customs debt to be incurred, the Bundesfinanzhof noted that, if that approach were to be taken, it would therefore have to be admitted that the European Commission had, in Article 859(9) of the implementing regulation, created a ground for exclusion from the incurrence of customs debt with no useful consequences. With regard to the viewpoint put forward by the Hauptzollamt, that it follows from the first indent of the first subparagraph of Article 521(1) of the implementing regulation that the inward processing procedure is – as set out in Article 89(1) of the Customs Code – 'discharged' not when a new customs-approved treatment or use is assigned to the imported goods but only when the bill of discharge is supplied, the national court questions whether, by that provision, the Commission exceeded its power to adopt measures implementing the Customs Code and stresses the risk of a double customs debt being incurred in cases in which there is a shortfall of goods.

28. Considering that the dispute before it called for an interpretation of Community law, the Bundesfinanzhof decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 204(1)(a) of [the Customs Code] to be interpreted as meaning that it also applies to non-fulfilment of those obligations which are to be fulfilled only after discharge of the relevant customs procedure which has been used, so that where goods imported under an inward processing

6 — Point 9 relates, in the framework of inward processing and processing under customs control, to exceeding the time-limit allowed for submission of the bill of discharge, provided the limit would have been extended had an extension been applied for in time.

procedure in the form of a system of suspension have been partly re-exported within the time-limit the failure to fulfil the obligation to supply the bill of discharge to the supervising office within 30 days of the expiry of the time-limit for discharging the procedure gives rise to a customs debt in respect of the entire quantity of the imported goods covered by the bill of discharge if the requirements of Article 859(9) of [the implementing regulations] are not fulfilled?'

29. Written observations were submitted to the Court by Döhler Neuenkirchen, the Hauptzollamt Oldenburg, the Czech Government and the Commission.

30. The Court assigned the case to the Seventh Chamber, which held a hearing on 13 April 2011. However, on 22 September 2011, the Seventh Chamber decided, pursuant to Article 44(4) of the Rules of Procedure of the Court, to refer the case back to the Court for reassignment to a formation composed of a greater number of judges. The Court decided to reassign Case C-262/10 to the Third Chamber and to hear the Opinion of the Advocate General before ruling.

31. The Third Chamber of the Court, by order of 25 October 2011, ordered the re-opening of the oral proceedings and summoned the parties to a new hearing. On 1 December 2011, Döhler Neuenkirchen, the Italian Government and the Commission attended this second, joint hearing with Case C-28/11.

IV – Analysis

A – *Introduction*

32. In the present case, the Court is requested to give its assessment of the issue of what factors can cause a customs debt to be incurred and, more specifically, to what extent the failure to fulfil conditions laid down in an inward processing procedure causes a customs debt to be incurred.

33. In the main proceedings, what is at issue is not a complete failure to comply with the provisions, still less a refusal to cooperate with the customs authorities. The inward processing procedure in question in the main proceedings took place correctly, with the notable exception of the date of submission of the bill of discharge.

34. To analyse the situation, I propose to proceed as follows. First of all, I shall recall the legislative background to Article 204 of the Customs Code as regards the incurrence of a customs debt and the issue of cumulative customs debts. Next, I shall analyse the 'obligations' set out in Article 204 of the Customs Code in the framework of a suspension system such as inward processing in this case. Lastly, I shall address the question of whether a customs debt can be classed as a penalty, or even a disproportionate penalty, as maintained by Döhler Neuenkirchen, and the question of the impact of the Modernised Customs Code.

B – *Incurrence of a customs debt*

35. Under 'normal' circumstances, such as those listed in Article 201 of the Customs Code, a customs debt on importation is incurred at the time of acceptance of the customs declaration in question or the release for free circulation of the goods in question. The chargeable event giving rise to the debt consists of the lawful release for circulation, and therefore a lawful change of status, of the goods in question.[7]

36. Where, by contrast, the subsequent articles of the Customs Code apply, Advocate General Kokott rightly points out that, 'when certain failures to comply with customs rules are committed, incurrence of the customs debt on importation is governed by Articles 202 to 205 of the Customs Code.

7 — See, to that effect, Case C-66/99 *D. Wandel* [2001] ECR I-873, paragraphs 41 and 42.

Depending on the situation, those articles provide, in paragraphs 2 and 3 in each case, for incurrence of the customs debt at different points in time and for different debtors'. [8]

37. Thus a customs debt under Article 202 of the Customs Code is incurred when goods liable to import duties are introduced unlawfully into the customs territory of the Community. Moreover, a customs debt under Article 203 of the Code is incurred when customs supervision is compromised. Lastly, a customs debt under Article 204 of the Code is incurred through 'non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed'.

38. Each article therefore has its own sphere of application, with no overlap. In the judgment in *Hamann International*, [9] the Court specifically emphasised that Articles 203 and 204 of the Customs Code have different spheres of application, noting that, '[w]hilst the first provision covers conduct leading to the goods being removed from customs supervision, the second covers failure to fulfil obligations and non-compliance with the conditions of the various customs schemes which have no effect on customs supervision'.

39. Nevertheless, while there is no question that a situation such as that at issue in the main proceedings is governed by the rules of the Customs Code, the fact remains that Article 859 of the implementing regulation, read in conjunction with Article 860, lays down an exhaustive set of rules governing, according to the case-law, ten failures within the meaning of Article 204(1)(a) of the Customs Code which 'have no significant effect on the operation of temporary storage or of the customs procedure in question'. [10]

40. According to the referring court, it is common ground that the circumstances of the main proceedings do not come under any of those ten failures listed in Article 859 of the implementing regulation. [11]

41. The importation of goods under a customs arrangement with economic impact, giving rise to the suspension of customs duties, is an exceptional case, and for that reason is subject to conditions. As already stated, in principle, a customs debt is incurred under Article 201 of the Customs Code when the goods arrive in the Community and a customs declaration is drawn up and accepted. That being the case, in such circumstances, subsequent re-exportation does not affect the earlier incurrence of a customs debt in respect of the imported goods. In the case of a suspensive arrangement, however, a customs debt is not incurred if the goods remain under customs supervision while fulfilling the conditions of the applicable procedure until it is discharged.

42. However, if part of the goods is released for free circulation, in accordance with the inward processing authorisation and in compliance with the rules provided for in the Customs Code, a customs debt is incurred for that part, pursuant to the principle set out in Article 201 of the Code.

C – *Customs debt: multiple debts, temporal aspect and double taxation*

43. In the main proceedings, it is possible that more than one customs debt was incurred at different times, thereby raising the question of double taxation.

44. It is should be remembered from the outset that the very concept of a customs union precludes the double taxation of goods in connection with their entry into Community customs territory. [12] European Union law therefore prohibits in principle the levying of a double customs debt in respect of the same goods. [13]

8 — See point 23 of the Opinion of Advocate General Kokott in Case C-195/03 *Papismedov and Others* [2005] ECR I-1667.

9 — Case C-337/01 [2004] ECR I-1791, paragraph 28.

10 — See Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 43.

11 — It is also possible that, highly exceptionally, Article 204 of the Customs Code does not apply at all, as was found in Case C-234/09 *DSV Road* [2010] ECR I-7333, paragraphs 32 and 37. The same does not apply, however, to the present case.

12 — See, to that effect, Case 252/87 *Kiwall* [1988] ECR 4753, paragraph 11.

13 — See, to that effect, the first paragraph of Article 208 of the Customs Code.

45. For that reason, a distinction should be made between three notions, namely the notion of a 'good', that of a 'case' and that of a 'chargeable event'. A single 'good' cannot be subject to multiple taxation. A 'case', understood to be a particular factual situation,[14] cannot be linked to more than one provision concerning liability to a customs debt. An overall customs debt, therefore concerning all of the goods, can result from different, concurrent 'chargeable events'.[15]

46. Where there is more than one chargeable event, it is important to determine which one triggers the liability to the customs debt. This may be the first chargeable event or the most serious. From a chronological point of view, it would seem to me that the determining criterion in this respect is that underlying, for example, Article 215 of the Customs Code, according to which it is the first chargeable event which causes a customs debt to be incurred.[16] On this point, I would therefore agree with the Czech Government's analysis and would move away from the criterion of the 'most serious chargeable event' put forward by the Commission, which referred to the Opinion of Advocate General Kokott.[17]

47. According to the case file for the present proceedings, in the case in question most of the compensating products were re-exported by Döhler Neuenkirchen, while some of the goods were released for free circulation. Under normal circumstances, it would be appropriate to accept, as Döhler Neuenkirchen rightly suggests, that the part of the goods released for free circulation is subject to Article 201 of the Customs Code, while the goods that were re-exported are not subject to any customs duties. However, in the present case, although the inward processing procedure was lawfully discharged, the bill of discharge was not submitted within the time-limit laid down. The Hauptzollamt therefore imposed import duties on all the goods pursuant to Article 204 of the Customs Code.

D – *Conditions whose non-fulfilment leads to the application of Article 204 of the Customs Code*

48. It is important to pose the question as to what conditions, if not fulfilled, lead to the application of Article 204 of the Customs Code. In my view, the answer is any condition laid down in that article and provided for in the arrangement in question, except the circumstances provided for in Article 859 of the implementing regulation. I note in passing that, on this point, European Union customs law does not, in my opinion, make any distinction, as proposed by some of the German legal literature, between substantive obligations and procedural obligations.

49. As indicated by the Court, Article 859 of the implementing regulation contains a validly constituted and exhaustive set of rules on failures, within the meaning of Article 204(1)(a) of the Customs Code, which 'have no significant effect on the correct operation of the temporary storage or customs procedure in question'.[18] Any circumstance not covered by this exception consequently falls within the sphere of application of Article 204 of the Code.

50. In my view, there is no doubt whatsoever that the failure to submit the bill of discharge within the time-limit leads to the application of Article 204 of the Customs Code. It is through the discharge of the inward processing procedure based on the corresponding bill of discharge that the final fate of the imported goods is established, by way of derogation from the general arrangement. By means of the bill of

14 — Like Advocate General Kokott, I am of the view that such a 'case' should not be extended as a general reference to the import operation as a whole. See point 91 of the Opinion of Advocate General Kokott in *Papismedov and Others*.

15 — Articles 201 to 205 of the Customs Code provide for 'chargeable events' causing a customs debt on importation to be incurred. See Case C-91/02 *Hannl Hofstetter* [2003] ECR I-12077, paragraph 3.

16 — On the principle of 'temporal priority' in European Union customs law, see, for example, Case C-230/06 *Militzer & Münch* [2008] ECR I-1895, paragraph 28, according to which, '[w]here a number of offences or irregularities have occurred in various Member States, the Member State having jurisdiction to recover the customs duties is the State in which the first offence or irregularity was committed …'.

17 — In support of its proposal, the Commission refers to point 95 and footnote 44 of the Opinion of Advocate General Kokott in *Papismedov and Others*.

18 — *Söhl & Söhlke*, paragraph 43.

discharge, the importer declares to the customs authorities the destination of the goods imported subject to conditions. The bill of discharge is therefore a central document, as shown also by the detailed wording which must appear on it in accordance with Article 521(2) of the implementing regulation. [19]

51. The Court has already had occasion to point out that 'the inward processing procedure, which involves the suspension of customs duties, is an exceptional measure intended to facilitate the carrying-out of certain economic activities. Since that procedure involves obvious risks to the correct application of the customs legislation and the collection of duties, the beneficiaries of that regime are required to comply strictly with the obligations resulting therefrom. Similarly, the consequences of non-compliance with their obligations must be strictly interpreted.' [20]

52. Lastly, it must be remembered that, since double taxation is excluded, the customs debt incurred under Article 204 of the Customs Code cannot include goods for which a customs debt has already been incurred under Article 201 of that Code, due to their release for free circulation. For the other goods, including those re-exported after processing, the customs debt is incurred under Article 204 of the Customs Code.

E – *The incurrence of a customs debt is not a penalty*

53. Döhler Neuenkirchen maintains that the imposition of customs duties has, in the case in question, the nature of a penalty.

54. I do not agree with that argument for the following reasons.

55. The Court has laid down the principle that Member States are empowered to adopt appropriate measures to ensure respect for the Community customs legislation. In this situation, the measures to be adopted must comply with the principle of proportionality. [21]

56. The nature of those penalties may be administrative (including fiscal) or criminal. The *non bis in idem* principle enshrined in particular in Article 4(1) of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, limits the cumulative application of these two types of penalty to a single infringement. [22]

57. However, it seems to me that the case-law confirms that the incurrence of a customs debt does not have the nature of a sanction. [23] According to the case-law, once a customs debt is incurred, its existence is not affected by a subsequent amendment to the provisions concerning chargeable events, even in the case where the interested party has lodged an appeal against the imposition of that debt. Logically, if it were a sanction, such an interpretation could not have been given. [24] Consequently, it is not a sanction and the *non bis in idem* principle is not applicable in the case in question.

19 — In this regard, I would add that it matters little what information has been requested by the customs authorities. The practical procedures may indeed vary, but this does not affect the obligation to submit a bill of discharge.

20 — See Joined Cases C-430/08 and C-431/08 *Terex Equipment* [2010] ECR I-321, paragraph 42.

21 — See Case C-91/02 *Hannl Hofstetter* [2003] ECR I-12077, paragraphs 19 and 20.

22 — See in particular the ECtHR judgments in *Zolotukhin* v *Russia*, 10 February 2009, no 14939/03, and *Ruotsalainen* v *Finland*, 16 June 2009, no 13079/03. See also Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 59; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 338; and Case C-617/10 *Åkerberg Fransson*, currently pending before the Court.

23 — See *Hamann International*, paragraph 33, according to which '[t]hat finding is not altered by the fact that Article 512 of the implementing regulation, as amended by Regulation No 993/2001, no longer provides for an obligation to place goods such as those at issue in the main proceedings under the external transit procedure when they are transferred to the customs office at the point of exit, since that provision entered into force only after the facts at issue in the main proceedings occurred and does not apply retroactively'. If that provision were a sanction, the more favourable provisions would have to be applied upon their entry into force (by virtue of the *lex mitius* principle).

24 — See, *mutatis mutandis*, Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 67 to 69, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 59. According to these judgments, the principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States.

58. The suspensive inward processing procedure implies the granting of a conditional advantage. The lawful imposition of customs duties is suspended for the duration of the processing operation, on condition that the operation is completed lawfully. If, and only if, the operation is completed in due and proper form, no customs duty is payable.

59. On the other hand, if the conditions are not fulfilled, that conditional advantage cannot be granted. The obligation to pay customs duties in such circumstances is not a penalty, therefore, but is simply the consequence of finding that the conditions required to obtain the advantage derived from the application of the inward processing procedure have not been fulfilled, thereby making the suspension inapplicable and consequently justifying the imposition of customs duties. [25]

F – *The objective character of the incurrence of a customs debt*

60. According to the Customs Code and the related case-law, the incurrence of a customs debt arises as a function of objective elements constituting a specific chargeable event, irrespective of whether the underlying tax purpose of that system has or has not been fulfilled. It seems to me that, for the purposes of the Customs Code, a customs debt does not correspond to the notion of an 'economic' customs debt, whereby a customs debt is incurred solely in respect of goods released for free circulation. It follows that customs duties can also be levied on goods that have actually left the territory of the European Union. [26]

61. The Commission observed at the hearing that this situation will change under the Modernised Customs Code. Pursuant to that Code, a customs debt is extinguished where goods have actually left the customs territory of the European Union, in accordance with an economic analysis of the customs operations. [27]

62. However, the provisions of the Modernised Customs Code should not be applied in advance in the present case.

V – Conclusion

63. In the light of the foregoing considerations, I propose that the Court should reply to the question referred for a preliminary ruling by the Bundesfinanzhof as follows:

Article 204(1)(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 it applies to the non-fulfilment of any obligation linked to the applicable customs procedure, including those which are to be fulfilled after discharge of that procedure.

Therefore, where goods imported under an inward processing procedure in the form of a system of suspension have been partly re-exported within the time-limit, the failure to fulfil the obligation to supply the bill of discharge to the supervising office within 30 days of expiry of the time-limit for discharging the procedure gives rise to a customs debt pursuant to that article in respect of the entire

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

26 — Although the purpose of customs duties is, inter alia, to protect domestic production against foreign competition ('der Wirtschaftszollgedanke' in German), the fact is that the application of rules on the matter is mechanical and formal, which can lead to situations in which customs duties are imposed where no protection is required, the goods in question not having been released for free circulation. See Willemoes Jørgensen, C., *Toldskuldens opståen og ophør*, Copenhagen, Jurist- og Økonomforbundets Forlag, 2009, p. 148 and p. 280, and Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 55.

27 — On the extinguishment of the customs debt under the Modernised Customs Code, see Article 86(1)(k) thereof.

quantity of the imported goods covered by the bill of discharge, including the re-exported goods, unless the requirements of Article 859(9) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, as amended by Commission Regulation (EC) No 993/2001 of 4 May 2001, are fulfilled.

However, the application of Article 204 of Regulation No 2913/92 to such a situation does not lead to a second customs debt being incurred for the goods in respect of which a customs debt has already been incurred on the basis of an earlier chargeable event, such as their release for free circulation.