Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 26 October 2016[1]

Case C-679/15

Ultra-Brag AG
v
Hauptzollamt Lörrach

(Request for a preliminary ruling from the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany))

(Community Customs Code — Article 202(3) — Article 212a — Customs debt incurred through the unlawful introduction of goods — Concept of debtor — Employee of a legal person responsible for the unlawful introduction of the goods — Attribution of conduct and knowledge of an employee to the employer)

1. To what extent is an employer liable for a customs debt brought about as a result of one of its employees infringing customs obligations in the performance of the tasks entrusted to him? That is the issue on which the Court is called upon to rule in the present request for a preliminary ruling.

2. This request for a preliminary ruling from the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany) turns on the proper construction of the term 'debtor' as defined in the first and second indents of Article 202(3) of Regulation (EEC) No 2913/92,[2] and more precisely on the parameters for holding a legal person liable for the conduct of its employees. In the same vein, the referring court also seeks guidance as to whether 'obvious negligence' within the meaning of Article 212a of the Customs Code includes the possible negligence of an employee.

I – Legal framework

3. Article 38(1) of the Customs Code states:

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

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

…'

1 — Original language: English.

2 — Council Regulation of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended and in the version applicable at the material time, that is to say, May 2010 ('the Customs Code').

4. Article 40 of the Customs Code provides:

‘Goods entering the customs territory of the Community shall be presented to customs by the person who brings them into that territory or, if appropriate, by the person who assumes responsibility for carriage of the goods following such entry, with the exception of goods carried on means of transport only passing through the territorial waters or the airspace of the customs territory of the Community without a stop within this territory. The person presenting the goods shall make a reference to the summary declaration or customs declaration previously lodged in respect of the goods.’

5. According to Article 185(1) of the Customs Code:

‘Community goods which, having been exported from the customs territory of the Community, are returned to that territory and released for free circulation within a period of three years shall, at the request of the person concerned, be granted relief from import duties.

…’

6. 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 good liable to import duties, or

…

For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 …

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.’

7. Article 212a of the Customs Code provides:

‘Where customs legislation provides for favourable tariff treatment of goods by reason of their nature or end-use or for relief or total or partial exemption from import or export duties pursuant to Articles 21, 82, 145 or 184 to 187, such favourable tariff treatment, relief or exemption shall also apply in cases where a customs debt is incurred pursuant to Articles 202 to 205, 210 or 211, on condition that the behaviour of the person concerned involves neither fraudulent dealing nor obvious negligence and he produces evidence that the other conditions for the application of favourable treatment, relief or exemption have been satisfied.’

II – Facts, procedure and the questions referred

8. The applicant in the main proceedings, Ultra-Brag AG, is a logistics undertaking established in Switzerland, which, among other things, offers transport services on European internal waters.

9. On 25 May 2010, Ultra-Brag exported two transformers, each including two rollers, out of the EU customs territory and into Switzerland by inland waterways on a vessel named *MS Aargau*.

10. The same day, Ultra-Brag was informed that one of its other vessels, which was due to take on board a 301-tonne turbine at 11.00 the next day in Strasbourg (France), bound for Antwerp (Belgium), was experiencing technical difficulties and was therefore not available for that transport operation. L, being an expert in transporting heavy goods and employed by the applicant as 'key account manager', was responsible for both operations. While L was searching for a substitute vessel he also considered sailing *MS Aargau*, from which one of the transformers and its two rollers had not yet been unloaded, to Strasbourg and taking the turbine on board there. If L chose this course of action, both the turbine and the transformer would then have to be transported back to Switzerland, where the transformer and its rollers would be unloaded. Thereafter, *MS Aargau* would carry the turbine to Antwerp.

11. L contacted the competent Swiss authorities in order to enquire about the customs treatment of such interim transport. The Swiss authorities stated that a temporary export into the EU customs territory did not pose any difficulties from their point of view but that the competent German customs authorities (in this case the Zollamt Weil am Rhein-Schusterinsel, the Customs Office of Weil am Rhein-Schusterinsel) should be informed of the planned transport operation.[3] However, on his way there, L's car broke down and in consequence the competent German customs authorities were not informed.

12. L's search for a substitute vessel was unsuccessful and the same evening, after the closure of the Customs Office of Weil am Rhein-Schusterinsel, in order to make the loading slot in Strasbourg, L instructed the captain of *MS Aargau*, also an employee of Ultra-Brag, to sail to Strasbourg and collect the turbine, with the transformer and rollers on board. The transformer and the rollers were not presented to the customs authorities upon crossing the border from Switzerland to Germany.

13. On the following day, 26 May 2010, L contacted the competent German customs authorities and informed them of the re-importation of the transformer and its rollers.

14. On 27 May 2010 *MS Aargau* returned to the Rhine port of Basel (Switzerland) in order to unload the transformer and the two rollers. At this point, the German customs authorities identified those goods aboard the vessel in the course of an inspection.

15. By import duty notice dated 9 August 2010, the defendant in the main proceedings, the Hauptzollamt Lörrach (Principal Customs Office of Lörrach, Germany), assessed Ultra-Brag alone as liable for payment of EUR 122470.07 customs duty in respect of the transformer and its two rollers.

16. Following an unsuccessful objection to that assessment, Ultra-Brag began legal proceedings before the referring court and argued that the customs duty assessment was unlawful as the conditions for exemption set out in Article 212a of the Customs Code were met. Ultra-Brag argued that it was not guilty of any obvious negligence in having entrusted its employee L with the transport of the goods concerned. Nor could L be accused of obvious negligence.

3 — In Basel, there is, as explained by the referring court, a tri-national customs office, established with a view to facilitating the customs clearance procedures for waterway transportation on the Rhine. However, that establishment does not transfer the exercise of sovereign powers of one national customs authority to the authority of another State.

17. Entertaining doubts as to whether an employer can be considered the debtor of a customs debt within the meaning of Article 202(3), first or second indent, and whether 'obvious negligence' within the meaning of Article 212a of the Customs Code includes the possible negligence of an employee, the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg) decided to stay the proceedings and to refer the following three questions to the Court for a preliminary ruling:

'(1) Is the first indent of Article 202(3) of the [Customs Code] to be interpreted as meaning that a legal person becomes a customs debtor under the first indent of Article 202(3) of the [Customs Code] as the person who introduced goods if one of its employees, who is not its statutory representative, brought about the unlawful introduction while acting within the scope of his responsibility?

(2) If the answer to the first question is in the negative:

Is the second indent of Article 202(3) of the [Customs Code] to be interpreted as meaning that:

(a) a legal person participates in an unlawful introduction (even) if one of its employees, who is not a statutory representative, was involved in that introduction while acting within the scope of his responsibility, and

(b) in the case of legal persons who participate in an unlawful introduction, the subjective element that they "were aware or should reasonably have been aware" is to be determined by reference to the natural person in the legal person's undertaking to whom the matter is entrusted, even if he is not the statutory representative of the legal person?

(3) If the answer to the first or second question is in the affirmative:

Is Article 212a of the Customs Code to be interpreted as meaning that whether the conduct of a participant involves fraudulent dealing or obvious negligence is to be determined, in the case of a legal person, solely by reference to the conduct of the legal person or its organs, or is the conduct of a natural person employed by it and entrusted with the task within the scope of his responsibility to be attributed to it?'

18. Written observations have been submitted by the Commission. Pursuant to Article 76(2) of the Rules of Procedure of the Court of Justice, no hearing has been held.

III – Analysis

A – *Introductory remarks on the incurrence of a customs debt*

19. A customs debt on importation is under normal circumstances incurred upon 'customs clearance' or, put in terms of Article 201(1)(a) of the Customs Code, when goods liable to import duties are released for free circulation. According to Article 201(2) and (3) of the Customs Code, the incurrence of the debt is linked to the acceptance of the customs declaration in question and the debtor is held to be the declarant [4] and, in the case of indirect representation, [5] the person on whose behalf a customs declaration is made.

4 — 'Declarant' is defined in Article 4(18) of the Customs Code as the person making the customs declaration in his own name or the person in whose name a customs declaration is made.

5 — 'Indirect representation' is defined in Article 5(2) of the Customs Code and refers to a representative who acts in his own name but on behalf of another person.

20. Where the rules governing the customs procedures are not complied with, the incurrence of a customs debt is instead linked to the breach of the customs obligations and is governed by Articles 202 to 205 of the Customs Code. In the case before the referring court, a transformer and two rollers were introduced into the EU customs territory but were never conveyed or presented to the competent customs authorities, in this case the Customs Office of Weil am Rhein-Schusterinsel, as required by Articles 38 and 40 of the Customs Code. As a result, a customs debt on importation was incurred for 'the unlawful introduction' of the goods into the EU customs territory pursuant to Article 202(1)(a) of the Customs Code.

21. When goods liable for customs duty are unlawfully introduced into the EU customs territory the first, second and third indents of Article 202(3) of the Customs Code identify three potential categories of debtors liable for the customs debt,[6] namely (i) the person who introduced such goods unlawfully, (ii) 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 (iii) 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.

22. The three indents of Article 202(3) of the Customs Code could, to some extent, be said to set out an order of gradation in the involvement of the person held to be the debtor by virtue of his participation in the unlawful introduction of goods into the EU customs territory. While the first indent refers to 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 performing the customs clearance under the Customs Code, are nonetheless involved, either before or immediately after the unlawful introduction.[7] While the liability for debtors under the first indent is strict, a subjective element appears in the second and third indents, so that only persons who were aware or should reasonably have been aware that such introduction was unlawful become debtors.

B – *The first question referred*

23. By its first question, the referring court seeks guidance as to when a legal person becomes liable for a customs debt under the first indent of Article 202(3) of the Customs Code, that is to say, as the person who introduced the goods unlawfully into the EU customs territory. More specifically, the referring court asks if such liability arises when one of the company's employees, who is not its statutory representative,[8] brought about the unlawful introduction while acting within the scope of his responsibility. In what follows, I shall explain why that question, in principle, ought to be answered in the affirmative.

24. As a preliminary point, I note that the first indent of Article 202(3) of the Customs Code refers to the 'person' who introduced the goods, without specifying whether that means a natural or a legal person. Nevertheless, it follows from Article 4(1) of the Customs Code that the term 'person' includes both legal and natural persons. Moreover, the Court has confirmed that an employer can become a debtor of a customs debt under the first indent (either solely or jointly with its employee) if that

6 — When several debtors are liable for payment of a customs debt, they are, according to Article 213 of the Customs Code, jointly and severally liable for such debt.

7 — Opinion of Advocate General Cruz Villalón in *Jestel*, C-454/10, EU:C:2011:488, point 36.

8 — The referring court refers to the organs of the company, in German '*Organe*'.

employer can be regarded as 'having been by its actions responsible for the unlawful introduction of the goods', [9] or, put differently, as 'having itself unlawfully introduced the goods'. [10] From this I draw the conclusion that Ultra-Brag, being a legal person, could in principle become a debtor under the first indent of Article 202(3) of the Customs Code. [11]

25. Yet the question still remains: under what circumstances will such liability arise?

26. The referring court suggests that a legal person may become a customs debtor under the first indent of Article 202(3) of the Customs Code either if it is carrying the goods itself (through its statutory representatives) or if the unlawful introduction 'is the direct consequence of the employer's actions'. Since, in the view of the referring court, Ultra-Brag cannot be regarded as having carried the goods itself, [12] its liability under the first indent of Article 202(3) of the Customs Code depends on whether it is sufficient that the unlawful introduction of the goods into the EU customs territory was the direct consequence of the conduct of one of its employees, in this case L, who was responsible for the transport operation and instructed the boat's captain to sail to Strasbourg, or if it is only the conduct of its statutory representatives that may be taken into account to establish liability.

27. The Commission considers that for an employer — a legal person — to become liable under the first indent of Article 202(3) of the Customs Code, it is sufficient that the employee who has in practical terms introduced the goods into the EU customs territory — in this case the captain of the boat — has done so within the scope of the tasks entrusted to him and/or within the scope of his responsibilities and by using a means of transport owned by the employer.

28. I shall in the following give my view on this issue.

29. At the outset, it is necessary to recall the distinction between the different categories of customs debtors identified in Article 202(3) of the Customs Code (see above at points 21 and 22). Under the first indent, the debtor is the person *introducing the goods unlawfully* into the EU customs territory, that is to say, the person who in practical terms introduced the goods and should have presented them to the competent customs authorities. [13] It is common ground that that person in the main proceedings is the captain of the boat. The relevant question is therefore whether *his* conduct is to be attributed to Ultra-Brag.

30. I would rule out the possibility that only conduct of statutory representatives may be taken into account to establish liability under the first indent of Article 202(3) of the Customs Code. As the Commission points out, such an interpretation would run counter to the purpose of that provision, namely to give a broad definition of the persons capable of being customs debtors. [14] What is more, it would result in any company exceeding a certain size avoiding liability under this first indent, since it is most unlikely that any large companies would have statutory representatives — typically directors or

9 — Judgments of 23 September 2004, *Spedition Ulustrans*, C-414/02, EU:C:2004:551, paragraph 26, and of 3 March 2005, *Papismedov and Others*, C-195/03, EU:C:2005:131, paragraph 39.

10 — Judgment of 23 September 2004, *Spedition Ulustrans*, C-414/02, EU:C:2004:551, paragraph 29.

11 — See also Gormley, L., *EU Law of Free Movement of Goods and Customs Union*, Oxford University Press, Oxford, 2009, p. 335 at footnote 40.

12 — The referring court does recognise that the goods were conveyed on *MS Aargau* on Ultra-Brag's behalf, but, given that the captain of *MS Aargau* was merely an employee of Ultra-Brag (and not a statutory representative), the referring court draws the conclusion that Ultra-Brag cannot be regarded as having carried the goods itself.

13 — Judgment of 4 March 2004, *Viluckas and Jonusas*, C-238/02 and C-246/02, EU:C:2004:126, paragraph 29, and opinion of Advocate General Cruz Villalón in *Jestel*, C-454/10, EU:C:2011:488, point 36. See also judgments of 23 September 2004, *Spedition Ulustrans*, C-414/02, EU:C:2004:551, paragraph 26, and of 3 March 2005, *Papismedov and Others*, C-195/03, EU:C:2005:131, paragraph 39.

14 — Judgments of 23 September 2004, *Spedition Ulustrans*, C-414/02, EU:C:2004:551, paragraph 25, and of 3 March 2005, *Papismedov and Others*, C-195/03, EU:C:2005:131, paragraph 38.

other members of the management bodies — sailing their ships or driving their vehicles. Lastly, such an interpretation is not supported by the Court's case-law, which clearly states that an employer can be a debtor, either solely or jointly with its *employee*, under the first indent of Article 202(3) of the Customs Code. [15]

31. In the same vein, it is not decisive for determining Ultra-Brag's liability whether the instructions to the captain, causing the unlawful introduction of the transformer and its two rollers into the EU customs territory, were given by a statutory representative of Ultra-Brag. It is in my view sufficient that the employee, L, was competent to give such an instruction and that the boat's captain was to follow it. In that respect the order for reference indicates that L was a manager in the export department of the company responsible for the transport operation at issue and that the captain always received specific directions as to what to do in relation to an impending transport operation, either from a customs agent or from someone in L's department. Hence, although it is for the referring court to verify the facts, there is nothing in the information provided to the Court that indicates that L was acting outside the scope of his responsibilities when he gave the order to the captain of *MS Aargau* to perform the specific transport operation or, for that matter, that the captain was wrong to follow L's order.

32. The Court has until now defined only in negative terms the liability of an employer under the first indent of Article 202(3) of the Customs Code. In this respect, the Court has emphasised that such liability cannot be automatic, since that would deprive the second and third indents of Article 202(3) of purpose. [16] It has further held that the fact that 'the employee acts in the conduct of his employer's affairs' is not sufficient for such liability to be established. [17]

33. In this specific case, the captain of *MS Aargau*, an employee of Ultra-Brag, transported the transformer and its two rollers on behalf of Ultra-Brag on a vessel operated by Ultra-Brag and on instructions from another employee of Ultra-Brag responsible for the transport of those goods. In my view that is sufficient to hold an employer, such as Ultra-Brag, liable for the customs debt under the first indent of Article 202(3) of the Customs Code.

34. I shall now explain how my conclusion is consistent with the statements of the Court set out in point 32 above.

35. First of all, it requires no further explanation that an outer limit to an employer's liability for its employee's actions must exist. The precise limit to that liability is not a matter which is necessary to establish in the present case. Suffice it to say that if an employee acts outside the scope of the tasks entrusted to him by, for example, not following orders or instructions, it is conceivable that an employer might escape liability under the first indent of Article 202(3) of the Customs Code. In the case before the referring court, it would appear, however, that the captain of the boat did follow instructions given by the employee entrusted with the transport operation at issue.

36. Furthermore, in cases in which an employee is involved in the smuggling of goods, an employer would normally not become a debtor under the first indent of Article 202(3) of the Customs Code, unless it can be established that the goods were smuggled on behalf of the employer. [18]

15 — Judgment of 23 September 2004, *Spedition Ulustrans*, C-414/02, EU:C:2004:551, paragraph 29.

16 — Judgment of 23 September 2004, *Spedition Ulustrans*, C-414/02, EU:C:2004:551, paragraph 40.

17 — Judgment of 23 September 2004, *Spedition Ulustrans*, C-414/02, EU:C:2004:551, paragraph 42.

18 — Cf. judgments of 4 March 2004, *Viluckas and Jonusas*, C-238/02 and C-246/02, EU:C:2004:126, and of 3 March 2005, *Papismedov and Others*, C-195/03, EU:C:2005:131.

37. Lastly, holding Ultra-Brag liable for the customs debt in the main proceedings on the grounds set out in point 33 above would not, in my view, amount to making an employer automatically a debtor under the first indent of Article 202(3) of the Customs Code for any situation in which an employee acts in the conduct of his employer's affairs. As the Commission points out, had the captain of *MS Aargau* transported, on the same journey, equipment or other goods of his own, alongside the transformers and rollers, he would still be seen as having acted in the conduct of Ultra-Brag's affairs, but Ultra-Brag would escape liability under the first indent of Article 202(3) of the Customs Code for any customs debt incurred on such extra goods since the captain would, in relation to those goods, have acted outside the scope of the tasks entrusted to him and, hence, not on Ultra-Brag's behalf.

38. In the light of the foregoing considerations, I propose that the Court answer the first question referred by the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg) as follows: The first indent of Article 202(3) of the Customs Code is to be interpreted as meaning that a legal person becomes a customs debtor under that indent if one of its employees, who is not a statutory representative, has introduced goods unlawfully into the EU customs territory, while acting within the scope of the tasks entrusted to him and/or within the scope of his responsibilities.

39. Having regard to the answer to the first question, it is not necessary to answer the second question, which arises only if Ultra-Brag cannot be held liable for the customs debt under the first indent of Article 202(3) of the Customs Code. For the sake of completeness, I shall nevertheless give my view on the issues raised by that second question.

C – *The second question referred*

40. The second question turns on the interpretation of the term 'debtor' under the second indent of Article 202(3) of the Customs Code. Treatment as a 'debtor' under that provision is subject to two cumulative conditions. The first condition, which is objective, regards participation in the unlawful introduction. The second is subjective and requires that the persons who participated did so with a certain degree of knowledge of the unlawful introduction.[19] The referring court essentially seeks to ascertain whether an employee's 'participation' in the unlawful introduction of goods can be attributed to the employer and whether the subjective condition included in the second indent can be determined by reference to that employee.

41. The objective element of 'participation' in the second indent of Article 202(3) of the Customs Code is to be construed broadly. It is sufficient that a person has taken some part, even indirectly, in the unlawful act.[20] An employer may, for example, become a debtor of the customs debt if the unlawful introduction was made using his resources or staff.[21] As regards the attribution of an employee's 'participation' to the employer, the same line of reasoning applies as in relation to the first question. Hence, if the employee acts within the scope of the tasks entrusted to him and/or within the scope of his responsibilities, the conduct of an employee should be attributed to the employer.

42. As regards the subjective element, namely that the 'participant' was aware or should reasonably have been aware that the introduction of the goods was unlawful, I would note the following.

19 — Judgment of 17 November 2011, *Jestel*, C-454/10, EU:C:2011:752, paragraph 15 and the case-law cited.

20 — Judgment of 17 November 2011, *Jestel*, C-454/10, EU:C:2011:752, paragraphs 16 and 17.

21 — Judgment of 23 September 2004, *Spedition Ulustrans*, C-414/02, EU:C:2004:551, paragraph 30.

43. First, limiting the attribution of knowledge to a company's statutory representatives would in my view, as stated in my answer to the first question, place an unwelcome limit on the number of possible debtors (see above at point 30). Companies of a certain size would avoid liability by delegating responsibility for the performance of shipment and customs procedures to its employees. Furthermore, as the Commission points out, it is only rarely that the statutory representatives of a larger company are informed of a specific conveyance.

44. In this specific case, the order for reference states that L was responsible for the transport operation (see above at point 31). Accordingly, it is his knowledge that should be taken into account for the purpose of establishing whether the subjective condition is fulfilled.

45. It follows from the order for reference that L was the person instructing the captain to sail the boat, knowing that, if that instruction were followed, the transformer and its rollers would be brought into the EU customs territory without being presented to the competent German customs authorities. It is also apparent from the order for reference that L had been instructed by the Swiss customs authorities to inform the competent German customs authorities of the planned transport operation. It is for the referring court to verify if this is sufficient for the second condition to be fulfilled in the case before it. In that regard, it should however be noted, as the Commission points out, that the phrase 'should reasonably have been aware' relates to the conduct of a reasonably circumspect and diligent trader,[22] meaning, for example, that an employer could not escape liability merely because the employee in charge did not have sufficient legal knowledge in relation to the customs procedure to be followed.

46. Having regard to the above, I propose that the Court answer the second question referred by the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg) as follows: The second indent of Article 202(3) of the Customs Code is to be interpreted as meaning that a legal person becomes a customs debtor under that indent when one of its employees, who is not a statutory representative, has participated in the unlawful introduction of goods into the EU customs territory, while acting within the scope of the tasks entrusted to him and/or within the scope of his responsibilities, provided that the employer knew or should reasonably have known that the introduction was unlawful, which is to be determined by reference to the employee to whom the matter is entrusted.

D – *The third question referred*

47. The third question of the referring court arises only in the event that the first or the second questions are answered, as I propose, in the affirmative. The referring court seeks guidance as to the interpretation of Article 212a of the Customs Code, which, subject to certain conditions, allows for exemption from a customs duty incurred, inter alia, pursuant to Article 202 of the Customs Code. While the referring court considers that the requirements for an exemption from customs duty in respect of goods returned to the EU customs territory, as provided for under Article 185(1) of the Customs Code (to which Article 212a of the Customs Code refers) are met in the present case, it is uncertain whether the second condition, namely, that 'the behaviour of the person concerned involves neither fraudulent dealing nor obvious negligence' should be assessed solely in relation to the conduct of the debtor's statutory representatives, or whether conduct of its employees should also be taken into account.

22 — Judgment of 17 November 2011, *Jestel*, C-454/10, EU:C:2011:752, paragraph 22.

48. First of all, as the Commission points out, the term 'person concerned' (in German '*Beteiligten*') is not to be confused with 'persons who participated' as referred to in the second indent of Article 202(3) of the Customs Code. While the German term used in Article 212a of the Customs Code may give rise to such confusion, many other language versions refer instead to an expression which is closer to the German phrase '*betroffene Person*', such as '*the person concerned*' in English, '*l'intéressé*' in French, '*el interesado*' in Spanish, '*l'interessato*' in Italian and '*den berörda parten*' in Swedish.

49. Given that Article 212a of the Customs Code allows for exemptions from customs duties, the conditions for those exemptions are to be interpreted strictly.[23] Accordingly the term 'person concerned' is to be understood broadly and comprises not only the conduct of persons who are directly involved in the unlawful introduction of the goods in question, but also any person who can be said to be behind such unlawful introduction, provided however that the conduct in question can be attributed to the debtor.[24]

50. In that context it should be noted that Ultra-Brag may itself be considered to have acted negligently due to an organisational failure, that is to say, for not having acted diligently in delegating the tasks or supervising its employees. It is for the referring court to verify whether, in the present case, such negligence exists.

51. However, returning to the question of the referring court, namely whether the conduct of Ultra-Brag's employees may be attributed to Ultra-Brag for the purpose of determining obvious negligence,[25] the principles for determining whether the conduct and/or knowledge of an employee can be attributed to its employer, as I have discussed in relation to the first and second questions, are valid here as well. Accordingly, provided that L has acted within the scope of the tasks entrusted to him and/or within the scope of his responsibilities, his conduct is to be taken into account when assessing the presence of obvious negligence.[26]

52. It is for the referring court to assess whether L's conduct involves obvious negligence. In that respect the Court has held that account should be taken, in particular, of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader.[27]

53. Having regard to the above, I consider that the third question referred to the Court ought to be answered as follows: Article 212a of the Customs Code is to be interpreted as meaning that whether the conduct of a (legal) 'person concerned' involves fraudulent dealing or obvious negligence should be determined not only in relation to the company itself or its statutory representatives but also in relation to any employee acting within the scope of the tasks entrusted to him and/or within the scope of his responsibilities.

23 — Cf. judgment of 11 November 1999, *Söhl & Söhlke*, C-48/98, EU:C:1999:548, paragraph 52.

24 — The term 'person concerned' is used in other parts of the Customs Code, namely in Article 239(1) relating to repayment or remission of import duties. In relation to that provision, the person concerned has been held to mean 'the person or persons [who has paid or is liable to pay those duties] or their representatives, and any other person who was involved with the completion of the customs formalities relating to the goods concerned or gave the instructions necessary for the completion of these formalities'. See Article 899(3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1).

25 — I note that the order for reference contains no indication of the presence of fraudulent dealing in the case before the referring court.

26 — The same applies to the captain of *MS Aargau*, although there is nothing in the order for reference indicating that he acted negligently.

27 — Judgments of 11 November 1999, *Söhl & Söhlke*, C-48/98, EU:C:1999:548, paragraph 56, and of 25 June 2015, *DSV Road*, C-187/14, EU:C:2015:421, paragraph 46.

IV – Conclusion

54. In the light of the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany) as follows:

— The first indent of Article 202(3) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended, is to be interpreted as meaning that a legal person becomes a customs debtor under that indent if one of its employees, who is not a statutory representative, has introduced goods unlawfully into the EU customs territory, while acting within the scope of the tasks entrusted to him and/or within the scope of his responsibilities.

— The second indent of Article 202(3) of Regulation No 2913/92 is to be interpreted as meaning that a legal person becomes a customs debtor under that indent when one of its employees, who is not a statutory representative, has participated in the unlawful introduction of goods into the EU customs territory, while acting within the scope of the tasks entrusted to him and/or within the scope of his responsibilities, provided that the employer knew or should reasonably have known that the introduction was unlawful, which is to be determined by reference to the employee to whom the matter is entrusted.

— Article 212a of Regulation No 2913/92, is to be interpreted as meaning that whether the conduct of a (legal) 'person concerned' involves fraudulent dealing or obvious negligence should be determined not only in relation to the company itself or its statutory representatives but also in relation to any employee acting within the scope of the tasks entrusted to him and/or within the scope of his responsibilities.