Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 28 February 2013 [1]

Case C-542/11Staatssecretaris van Financiënv

Codirex Expeditie BV

(Request for a preliminary ruling from the HogeRaad der Nederlanden (Netherlands))

(Community Customs Code — Regulation (EEC) No 2913/92 — Article 50 — Goods in temporary storage — Non-Community goods — External Community transit procedure — Point in time at which a customs-approved treatment or use is assigned — Articles 63 and 67 — Acceptance of the customs declaration — Article 73 — Release of the goods — Article 203 — Customs debt)

I – Introduction

1. Two missing packages of meat: that is how this all began. The case before the referring court concerns a situation where a consignment of refrigerated beef was shipped in a container from Brazil to the Netherlands. When the seals affixed by the customs authorities in the Port of Rotterdam (Netherlands) were broken for the goods to be released, the recipient of the goods found only 1 667 packages of meat out of the 1 669 packages specified in the customs declaration.

2. This request for a preliminary ruling concerns the interpretation of Article 50 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the Customs Code'). [2] The request was made in proceedings between the Netherlands Staatssecretaris van Financiën (Secretary of State for Finance; 'the Staatssecretaris') and Codirex Expeditie BV ('Codirex'), concerning a tax assessment notice relating to customs duties and value added tax ('VAT').

3. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) would essentially like to know precisely when non-Community goods with the status of goods in temporary storage and declared with a view to their being placed under the external Community transit procedure are assigned a customs-approved treatment or use for the purposes of Article 50 of the Customs Code. In that regard, the referring court envisages two different possibilities: either when the declaration is accepted (in accordance with Article 63 of the Customs Code) or when, after the declaration has been accepted, the goods are released (in accordance with Article 73 of the Customs Code).

1 — Original language: French.

2 — OJ 1992 L 302, p. 1. Regulation as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1).

4. I recall that, in *D. Wandel*,[3] the Court had to address a similar question in relation to a situation in which non-Community goods had been declared with a view to their release for free circulation. In that case, the Court held that the decisive point in time was the moment at which the goods were released.[4]

II – Legal context

5. Under Article 4(15), (16) and (20) of the Customs Code:

'For the purposes of this Code, the following definitions shall apply:

…

(15) "Customs-approved treatment or use of goods" means:

(a) the placing of goods under a customs procedure;

…

(16) "Customs procedure" means:

(a) release for free circulation;

(b) transit;

…

(20) "Release of goods" means the act whereby the customs authorities make goods available for the purposes stipulated by the customs procedure under which they are placed.'

6. Under Article 37 of the Customs Code, goods brought into the customs territory of the European Community are to be subject, from the time of their entry, to customs supervision. They may be subject to customs controls and are to remain under customs supervision for as long as is necessary for their customs status to be determined.

7. Article 48 of the Customs Code provides that '[n]on-Community goods presented to customs shall be assigned a customs-approved treatment or use authorised for such non-Community goods'.

8. Article 50 of the Customs Code is worded as follows:

'Until such time as they are assign[ed] a customs-approved treatment or use, goods presented to customs shall, following such presentation, have the status of goods in temporary storage. Such goods shall hereinafter be described as "goods in temporary storage".'

3 — Case C-66/99 [2001] ECR I-873

4 — I would also point out that the recent judgments in Case C-262/10 *DöhlerNeuenkirchen* [2012] ECR and Case C-28/11 *Eurogate Distribution* [2012] ECR – cases in which I delivered my Opinions on 8 March 2012 – concern the next stage, that is to say, the stage at which the goods *have already been assigned* a customs-approved treatment or use and irregularities arise during that stage. In those circumstances, the debtor is the person required to fulfil the obligations arising from the use of the customs procedure in question (the inward processing procedure in *Döhler Neuenkirchen* and the customs warehousing procedure in *Eurogate Distribution*).

9. Article 59(1) of the Customs Code provides:

‘1. All goods intended to be placed under a customs procedure shall be covered by a declaration for that customs procedure.’

10. Under Article 63 of the Customs Code:

‘Declarations which comply with the conditions laid down in Article 62 shall be accepted by the customs authorities immediately, provided that the goods to which they refer are presented to customs.’

11. Article 67 of the Code provides:

‘Save as otherwise expressly provided, the date to be used for the purposes of all the provisions governing the customs procedure for which the goods are declared shall be the date of acceptance of the declaration by the customs authorities.’

12. Under Article 73(1) of the Customs Code:

‘1. Without prejudice to Article 74, where the conditions for placing the goods under the procedure in question are fulfilled and provided the goods are not subject to any prohibitive or restrictive measures, the customs authorities shall release the goods as soon as the particulars in the declaration have been verified or accepted without verification. The same shall apply where such verification cannot be completed within a reasonable period of time and the goods are no longer required to be present for verification purposes.’

13. Article 74 of the Customs Code provides:

‘1. Where acceptance of a customs declaration gives rise to a customs debt, the goods covered by the declaration shall not be released unless the customs debt has been paid or secured. However, without prejudice to paragraph 2, this provision shall not apply to the temporary importation procedure with partial relief from import duties.

2. Where, pursuant to the provisions governing the customs procedure for which the goods are declared, the customs authorities require the provision of a security, the said goods shall not be released for the customs procedure in question until such security is provided.’

14. Under Article 203 of the Customs Code:

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

— the unlawful removal from customs supervision of goods liable to import duties.

(2) The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

(3) The debtors shall be:

— the person who removed the goods from customs supervision,

— any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

— 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 removed from customs supervision, and

— where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed.'

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

15. A consignment of chilled beef shipped in a container from Brazil to the Netherlands was unloaded at the Port of Rotterdam by Seaport International. While waiting for the goods to be assigned a customs-approved treatment or use, the company stored the consignment of beef on its premises.

16. On 6 November 2007, while the container was on the premises of Seaport International, Codirex – acting as the declarant – submitted a customs declaration in electronic form with a view to having the consignment placed under the external Community transit procedure. The Rotterdam Seaport customs office accepted that declaration immediately. At the time, the container mentioned in the declaration was sitting in Seaport International's container terminal. At the time of the transit declaration referred to above, the goods had the status of 'goods in temporary storage' within the meaning of Article 50 of the Customs Code.

17. The next morning, on 7 November 2007, the customs authorities granted release of the goods immediately after affixing seals to the container. On the same day, the container was transported by road to Eurofrigo BV ('Eurofrigo') – the recipient of the beef, whose place of business is on the industrial estate at Maasvlakte (Netherlands) – which held an authorisation as approved recipient.[5] Upon the container's arrival, Eurofrigo found that the seals were still intact. On breaking the seals, it noticed that two packages of beef were missing from the consignment as compared with the contents as quoted on the customs declaration. According to Eurofrigo, the container showed no sign of having been tampered with.

18. As the authorities at the Rotterdam Seaport customs office had received no confirmation that the goods had arrived at Eurofrigo, they carried out an investigation, following which they sent Codirex a tax assessment notice on 3 July 2008, seeking payment of the customs duties and VAT.

19. Codirex challenged the tax notice before the Rechtbank te Haarlem (District Court, Haarlem).

20. The case before the Rechtbank te Haarlem turned on whether Codirex, in its capacity as declarant for the purposes of the placing of the goods under the external Community transit procedure, could be regarded as liable for a loss[6] which had to be presumed to have occurred between the acceptance of the customs declaration and the affixing of the seals to the container just before the goods were released for transit. It was not argued in the course of the main proceedings that the missing packages had been lost while the sealed container was en route from Seaport International to Eurofrigo's premises.

5 — See Article 406 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).

6 — The use of those words ('a loss') in no way prejudges the actual fate of those two packages, which is not known according to the information provided by the national court.

21. The Rechtbank te Haarlem found that non-Community goods brought into the customs territory, presented to customs and declared with a view to their being placed under the external Community transit procedure retain the status of goods in temporary storage until such time as the customs authorities release them.

22. The Rechtbank te Haarlem went on to rule that, between the period of temporary storage and the time when the customs authorities released the goods for transit, Codirex could not be regarded as the debtor within the meaning of the fourth indent of Article 203(3) of the Customs Code. The Rechtbank te Haarlem based that conclusion on the judgment of the Court in *United Antwerp Maritime Agencies and Seaport Terminals*,[7] and held that, over that period, Codirex had no power of physical disposal over the goods and was too far removed from the goods to be able to move them or put them into storage.

23. The Staatssecretaris brought an appeal on a point of law before the Hoge Raad der Nederlanden against the decision of the Rechtbank te Haarlem.

24. Against that background, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'At what point in time are non-Community goods assigned a customs-approved treatment or use, for the purposes of Article 50 of the [Customs Code], where goods with the status of goods "in temporary storage" are declared for placing under the external Community transit procedure?'

25. Written observations have been submitted by the Netherlands and Greek Governments and by the European Commission, all of whom presented oral argument at the hearing on 12 December 2012.

IV – Analysis

A – *Preliminary remarks*

26. Under Article 50 of the Customs Code, goods presented to customs are to retain the status of goods in temporary storage until such time as they are assigned a customs-approved treatment or use. 'Customs-approved treatment or use' of goods is to be understood, inter alia, as the placing of the goods under a customs procedure, such as – in the case before the referring court – the external Community transit procedure. Under Article 59(1) of the Customs Code, all goods intended to be placed under a particular customs procedure are to be covered by a declaration for that customs procedure.

27. According to the Hoge Raad der Nederlanden, it is necessary to determine with precision the point, referred to in Article 50 of the Customs Code, at which goods in temporary storage are assigned a customs-approved treatment or use and thereby lose the status of goods in temporary storage.

28. A point to note at the outset is that it is impossible to tell from the documents before the Court whether the two packages in question were actually in the container when it arrived at the Port of Rotterdam. Yet much of practical importance depends on whether that was so, which is a matter for the national court to determine.

29. Those goods could not have been removed from customs supervision unless the declaration made by Codirex was accurate.

7 — Case C-140/04 [2005] ECR I-8245, paragraphs 35 to 39.

30. If the two packages were in the container at the time of the declaration and that declaration was therefore accurate, they must have disappeared when the goods were under customs supervision. If that were so, the goods in question would be liable to customs duties under Article 203 of the Customs Code and the debtor could be Codirex or a third party.

31. If, on the other hand, the two missing packages never arrived in Rotterdam, that would mean that the declaration was substantively inaccurate.[8] It would follow that the goods had never existed and could not have been removed from customs supervision, with the result that no customs debt could have arisen in relation to those goods.[9]

32. That said, the order for reference is based on the assumption that the first of those two possible situations obtained. The Hoge Raad der Nederlanden is essentially seeking to identify the debtor in relation to the customs debt at issue. In order to answer that question, the referring court must be able to determine whether the lost goods were removed from customs supervision while they had the status of goods in temporary storage or while they were under the external Community transit procedure. Consequently, that court raises the question as to precisely when temporary storage ends and the transit procedure begins.

33. It is clear from Article 203(1) of the Customs Code that, where goods liable to import duties are removed from customs supervision, a customs debt on importation is incurred as from the moment of that removal (see, in particular, *United Antwerp Maritime Agencies and Seaport Terminals*, paragraph 28). According to the case-law of the Court, 'unlawful removal from customs supervision' covers any act or omission the result of which is to prevent, even if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring provided for under Article 37(1) of the Customs Code (see, in particular, *United Antwerp Maritime Agencies and Seaport Terminals*, paragraph 28).

34. If the goods were lost while they *had the status of goods in temporary storage*, Codirex would not be the debtor in relation to the customs debt, because Codirex was not the person who – in a situation where the first three indents of Article 203(3) of the Customs Code did not apply – had to perform the obligations arising from temporary storage of the goods, in accordance with the fourth indent of that provision.[10]

35. If, on the other hand, the goods were lost while they *were already under the external Community transit procedure*, Codirex – as the principal liable – would be the debtor in relation to the customs debt because Codirex would be the person who had to perform the obligations arising from the customs procedure under which the goods had been placed, in accordance with the fourth indent of Article 203(3) of the Customs Code.

36. In that regard, it should be noted that the Customs Code does not define precisely the point at which temporary storage ends and the external Community transit procedure begins.[11]

37. Two theories have been put forward in that connection in the context of this dispute.

8 — I note that the Advocate General before the Hoge Raad der Nederlanden suggested in his submissions of 30 September 2010 that the case should be referred back to the court of first instance so that the facts could be more clearly established. I would add that it does not seem to me to be fair to say that liability for the customs debt arising out of errors in the declaration should be attributed solely to the port authorities which unloaded the goods under the 'temporary storage' procedure.

9 — See, to that effect, Case C-234/09 *DSV Road* [2010] ECR I-7333, paragraph 23.

10 — See Case C-140/04 *United Antwerp Maritime Agencies* [2005] ECR I-8245, paragraphs 38 and 39.

11 — On the other hand, it should be noted that the circumstances in which the external Community transit procedure ends are set out in Article 92 of the Customs Code.

38. According to the first theory, put forward by the Staatssecretaris before the national court and by the Netherlands and Greek Governments before the Court of Justice, temporary storage ends when *the customs declaration*, made with a view to the goods being placed under a customs procedure for the purposes of Article 59 of the Customs Code, *is accepted*. They base this view on Article 67 of the Customs Code, which provides that the date to be used for the purposes of all the provisions governing the customs procedure for which the goods are declared is the date of acceptance of the declaration by the customs authorities.

39. According to the second theory, which seems to be favoured by the national court and which was defended before that court by Codirex and before the Court of Justice by the Commission, temporary storage ends when the customs authorities release the goods. In support of that position, those parties refer to Articles 73 and 74(2) of the Customs Code and argue that release cannot take place until the conditions for the placing of the goods under the relevant procedure are met. In their view, the acceptance of the declaration cannot be taken to end temporary storage where the requisite conditions for the goods being placed under the relevant customs procedure are not yet met. In particular, in the case of the external Community transit procedure, for which a guarantee is required, the goods cannot be released until that guarantee has been lodged. Until such time as the customs authorities release the goods, the provisions and rules on liability applicable under the earlier temporary storage of the goods continue to apply.

40. Those two theories should therefore be examined in turn.

B – *Acceptance of the customs declaration*

41. I agree with the interpretation suggested by the Commission to the effect that acceptance of the customs declaration does not have the effect of placing the goods under the desired customs procedure. The goods remain in temporary storage after the declaration has been accepted.

42. The Court has recently referred to the fact that, in accordance with Article 4(17) of the Customs Code, the customs declaration is the act whereby the declarant indicates, in the prescribed form and manner, a wish to place goods under a given customs procedure. [12]

43. Under Article 63 of the Customs Code, the customs authorities are required to accept immediately customs declarations which comply with the requisite conditions and, under Article 67 of the Customs Code, the date to be used for the purposes of all the provisions governing the customs procedure for which the goods are declared is to be the date of acceptance of the declaration by the customs authorities.

44. The Commission correctly states that, after accepting a declaration, the customs authorities may, under Article 68 of the Customs Code, check the declarations accepted. [13]

45. The fact that that possibility exists means that the formal acceptance of a declaration may be followed by the adoption of measures such as those provided for under Articles 71 and 72 of the Customs Code to ensure that the customs procedure under which the goods are to be placed is correctly applied.

46. In the present case, the time that elapsed between acceptance of the declaration and release of the goods was used to seal the container in order to ensure the correct application of Article 72 of the Customs Code for the purposes of the external Community transit procedure.

12 — See Case C-138/10 *DP Grup* [2011] ECR I-8369, paragraph 35.

13 — Ibid. (paragraphs 36 and 39).

47. Given that, under Article 68 of the Customs Code, the declaration may be verified *even after it has been accepted*, the goods must remain under customs supervision. As long as the goods remain in temporary storage, such supervision is ensured, irrespective of the customs procedure subsequently applied.

48. It should be borne in mind that, in *D. Wandel*,[14] the Court stated that goods intended for free circulation are to remain in temporary storage until they are released. Accordingly, a customs debt arises under Article 203 of the Customs Code if the goods disappear between the time at which the customs declaration is accepted and the time at which the goods are released.

49. There is no call for a different approach in the context of other customs procedures, even though those procedures differ from release for putting the goods into free circulation in so far as they provide for the goods to remain under customs supervision after release, as in the case of the external Community transit procedure.

C – *Release of the goods*

50. The goods may not be released until the customs declaration has been accepted.

51. Article 73 of the Customs Code authorises the customs authorities to release goods as soon as the conditions for placing them under the procedure requested are met. The same idea is reflected in the definition of 'release of goods' in Article 4(20) of the Customs Code, according to which that term refers to the act by which the customs authorities make goods available for the purposes stipulated by the customs procedure under which they are placed. Both those provisions apply to all customs procedures alike.

52. That analysis is consistent with the powers of the customs authorities with regard to acceptance of the declaration and release of the goods. Although the customs authorities can refuse to accept the declaration only on grounds of *failure to comply with the formal conditions* laid down in Article 62 of the Customs Code,[15] they may refuse to release the goods whenever the substantive conditions for the placing of those goods under a customs procedure are not yet met.

53. An example of how use can be made of the time elapsing between the acceptance of the declaration and the release is for the customs authorities to request a guarantee or, if need be, an increase in a guarantee already arranged. If those conditions are not met, the release may be refused.

54. Evidence of the essential role played by the release of the goods as a starting point for the customs procedure is also to be found, in the case of transit, in the fact that the guarantor's liability commences at the time when the goods are released for the purposes of the transit covered by the guarantee.

55. Accordingly, I share the Commission's view that the goods in question in the main proceedings did not come under the external Community transit procedure until their release on 7 November 2007.

56. Before concluding, I would like to turn once more to the *D. Wandel* case.

14 — Paragraph 45.

15 — See also Article 77 of the Customs Code as regards customs declarations made electronically.

57. *D. Wandel* concerned the declaration of non-Community goods for the purposes of their release into free circulation. In its judgment in that case,[16] the Court found that the goods do not obtain the status of Community goods until commercial policy measures have been applied, all the other formalities laid down in respect of the importation of goods have been completed and any import duties legally due have been not only charged but paid or secured.

58. The Court went on to say[17] that, whilst those formalities undeniably include the lodging and immediate acceptance of a customs declaration under Articles 59(1) and 63 of the Customs Code, they must also be taken to include application of the measures referred to in Article 68 of that code, which entitles the customs authorities, when verifying the declarations which they have accepted, to carry out, inter alia, an examination of the goods (which may involve the taking of samples for analysis or a detailed examination).

59. The Court therefore concluded[18] that, given that, under the first paragraph of Article 79 of the Customs Code, the purpose of release for free circulation is to confer the status of Community goods on non-Community goods, the release of the goods (defined in Article 4(20) of the Customs Code) must be regarded as one of the formalities which must be completed if imported goods are to be properly released for free circulation.

60. I take the view that the Court's reasoning can be transposed *mutatis mutandis* to the case currently under consideration, which concerns the external Community transit procedure: the lodging of a customs declaration and its immediate acceptance, in accordance with Articles 59(1) and 63 of the Customs Code, are unquestionably among the formalities required for the purposes of placing goods under the external Community transit procedure, inasmuch as the application of that procedure is conditional upon completion of those formalities. None the less, that customs procedure does not apply solely by dint of the acceptance of the declaration: the goods must also be released by the competent authorities.

61. Goods which are presented to customs and intended for placing under a particular customs procedure must be covered by a customs declaration for that procedure; this comes about as a result of two distinct but connected acts.[19]

62. The first is the acceptance of the declaration. This is automatic because the declaration – which is normally made electronically – is accepted as soon as it is complete and contains all the information required.

63. The second, once acceptance is complete, is the release of the goods. This is an act for the purposes of which the customs authorities have a wider margin of discretion. Acceptance means that the customs authorities are thenceforth in possession of the basic information necessary for undertaking the required checks and determining, if need be, the specific conditions for release.

16 — Paragraph 36.

17 — Ibid. (paragraph 37).

18 — Ibid. (paragraph 38).

19 — See Articles 50 and 59 of the Customs Code.

V – Conclusion

64. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Hoge Raad der Nederlanden:

Non-Community goods with the status of goods in 'temporary storage' and declared with a view to their being placed under the external Community transit procedure are assigned a customs-approved treatment or use for the purposes of Article 50 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006, upon acceptance of the declaration and release of the goods.