Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 11 February 2021 [1]

Case C-39/20

Staatssecretaris van Financiën
v
Jumbocarry Trading GmbH

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling – Period for the notification of customs debts – Suspension of the notification period – Limitation of the customs debt – Temporal application of the provision governing the grounds for suspension – Principle of legal certainty – Principle of protection of legitimate expectations)

1. In 1992, the Community legislature decided to bring together within a single text the hitherto disparate provisions of customs law. The result was set out in Regulation (EEC) No 2913/92, which established the 'Community Customs Code' ('the CCC'). [2]

2. The CCC underwent subsequent amendments until it was repealed by Regulation (EU) No 952/2013 [3] establishing the 'Union Customs Code' ('the UCC').

3. In accordance with Article 288 of the UCC, some of the provisions of that code are to apply as from 30 October 2013, while others are to apply with effect only from 1 May 2016. [4] The latter include Articles 103 and 124 of the UCC, relating to the suspension of the period for notifying the customs debt and to the extinguishment of that debt, respectively.

4. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has submitted a request for a preliminary ruling to the Court of Justice with a view to obtaining an interpretation of Article 103(3)(b) and Article 124(1)(a) of the UCC.

1 Original language: Spanish.

2 Council Regulation of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

3 Regulation of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1; corrigendum OJ 2013 L 287, p. 90).

4 In accordance with Article 287, the UCC entered into force on 30 October 2013, that is to say on the twentieth day following that of its publication in the OJ of 10 October 2013. Article 288 specifies which articles are to apply as from 30 October 2013 and which as from 1 May 2016.

5. By its questions, the referring court wishes to ascertain, in essence, whether a provision of the UCC can suspend the limitation period applicable to a customs debt while that period is still running, thereby delaying beyond the date on which that debt was to become time-barred under the CCC the date on which the customs authorities may notify (and recover) that debt.

I. EU law

A. Community Customs Code (CCC)

6. Article 221(1), (3) and (4) provides:

'1. As soon as [the customs debt] has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

…

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the appeal proceedings.

4. Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3.'

B. Union Customs Code (UCC)

7. Article 22(6) states:

'6. Before taking a decision which would adversely affect the applicant, the customs authorities shall communicate the grounds on which they intend to base their decision to the applicant, who shall be given the opportunity to express his or her point of view within a period prescribed from the date on which he or she receives that communication or is deemed to have received it. Following the expiry of that period, the applicant shall be notified, in the appropriate form, of the decision.'

8. Article 29 provides:

'Except when a customs authority acts as a judicial authority, Article 22(4), (5), (6) and (7), Article 23(3) and Articles 26, 27 and 28 shall also apply to decisions taken by the customs authorities without prior application by the person concerned.'

9. Article 103(1) and Article 103(3)(b), provides:

'1. No customs debt shall be notified to the debtor after the expiry of a period of three years from the date on which the customs debt was incurred.

…

3. The periods laid down in paragraphs 1 and 2 shall be suspended where:

…

(b) the customs authorities communicate to the debtor, in accordance with Article 22(6), the grounds on which they intend to notify the customs debt; such suspension shall apply from the date of that communication until the end of the period within which the debtor is given the opportunity to express his or her point of view.'

10. In accordance with Article 124(1)(a):

'1. Without prejudice to the provisions in force relating to non-recovery of the amount of import or export duty corresponding to a customs debt in the event of the judicially established insolvency of the debtor, a customs debt on import or export shall be extinguished in any of the following ways:

(a) where the debtor can no longer be notified of the customs debt, in accordance with Article 103[.]'

11. Article 288 states:

'1. Articles 2, 7, 8, 10, 11, 17, 20, 21, 24, 25, 31, 32, 36, 37, 40, 41, 50, 52, 54, 58, 62, 63, 65, 66, 68, 75, 76, 88, 99, 100, 106, 107, 115, 122, 123, 126, 131, 132, 138, 142, 143, 151, 152, 156, 157, 160, 161, 164, 165, 168, 169, 175, 176, 178, 180, 181, 183, 184, 186, 187, 193, 196, 200, 206, 207, 209, 212, 213, 216, 217, 221, 222, 224, 225, 231, 232, 235, 236, 239, 253, 265, 266, 268, 273, 276, 279, 280, 281, 283, 284, 285 and 286 shall apply as from 30 October 2013.

2. Articles other than those referred to in paragraph 1 shall apply as from 1 May 2016.'

C. Delegated Regulation (EU) No 2015/2446 [5]

12. Article 8(1) provides:

'1. The period for the applicant to express his point of view before a decision which would adversely affect him is taken shall be 30 days.'

II. Facts, dispute and questions referred for a preliminary ruling

13. Jumbocarry Trading GmbH ('Jumbocarry') is a company established in Germany. On 4 July 2013, it submitted, in the Netherlands, declarations for release for free circulation of a consignment of porcelain goods. In those declarations, it indicated Bangladesh as the country of origin of the goods, as a result of which a preferential rate of customs duty of 0% was applied.

[5] Commission Delegated Regulation of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ 2015 L 343, p. 1; 'Delegated Regulation on the UCC').

14. On 1 June 2016, the Inspecteur van de Belastingdienst (Tax Inspector; 'the Inspecteur'), finding that the certificate of origin for the goods in question was false, informed Jumbocarry in writing of his intention to proceed with post-clearance recovery of customs duties at the standard rate of 12%. In the same letter, he gave Jumbocarry the opportunity to express its point of view within a period of 30 days.

15. On 18 July 2016, the tax authority notified a request for payment of the customs debt to Jumbocarry.

16. Jumbocarry brought an action against that decision before the Rechtbank Noord-Holland (District Court, North Holland, Netherlands), which ordered in its favour on the ground that the customs debt had already become time-barred, inasmuch as three years had elapsed since its incurrence (on 4 July 2013).

17. The Inspecteur lodged an appeal against the judgment at first instance with the Gerechtshof Amsterdam (Court of Appeal, Amsterdam, Netherlands), which dismissed his appeal by judgment of 27 February 2018.

18. The Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) lodged an appeal on a point of law with the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which, being uncertain as to the temporal effects of certain provisions of the UCC, has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 103(3)(b) and 124(1)(a) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code applicable to a customs debt that was incurred before 1 May 2016 and whose period of limitation had not yet expired as of that date?

(2) If the answer to the first question is in the affirmative, does the principle of legal certainty or the principle of legitimate expectations preclude that applicability?'

III. Procedure before the Court

19. The reference for a preliminary ruling was received at the Court on 27 January 2020.

20. Written observations have been submitted by Jumbocarry, the Netherlands Government, the Commission, the Council, and the Parliament.

21. The Court put to the parties and the interveners in the preliminary ruling proceedings a number of questions to be answered in writing [6] concerning:

– the bearing, if any, on the present dispute of the findings in the judgment of the Court of Justice of 5 December 2017, *M.A.S. and M.B.*, in particular paragraph 42 thereof; [7]

[6] Replies were submitted by the Netherlands Government, the Commission and the Parliament (but not by Jumbocarry).

[7] Case C-42/17, EU:C:2017:936; 'the judgment in *Taricco II*'. In so far as paragraph 42 of that judgment contains a specific reference to 'the *Taricco* judgment, paragraph 57, and the case-law of the European Court of Human Rights cited in that paragraph', the Court's question implicitly extended to the impact of the judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555; 'the judgment in *Taricco I*'), on the present case.

– classification of the customs debt at issue as being incurred as a result of an act which, at the time when it was committed, was liable to give rise to criminal court proceedings, in reference to the judgment of 19 October 2017, *A* [8] (paragraphs 54 to 62);

– the analogy of the communication provided for in Article 22(6) of the UCC, in conjunction with Article 29 thereof, with that provided for in Article 221(3) of the CCC, which interrupts the three-year limitation period, according to the judgment of 10 July 2019, *CEVA Freight Holland* [9] (paragraphs 43, 45, 46 and 48).

IV. Analysis

A. Preliminary clarifications

22. Before addressing the answer to be given to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), I shall make a number of clarifications with respect to the questions which the Court put to the parties and the interveners in the course of the preliminary ruling proceedings.

23. The Court's questions do not call into question the facts described in the order for reference. [10] On the contrary, taking those facts as read, they serve to offer the referring court a view of EU law that does not fully coincide with that which the latter posits.

24. There is nothing to prevent the Court of Justice from providing the national court with guidance, based on the documents before it and the observations submitted to it, on matters not addressed in the reference for a preliminary ruling, if it considers this appropriate for the purpose of improving its cooperation with the referring court.

1. Classification of the act as a result of which the customs debt was incurred and its consequences for the limitation period

25. Article 221(4) of the CCC provides that, 'where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period [following the incurrence of the debt]'.

26. Even though that provision and other paragraphs of Article 221 of the CCC did not use the term *limitation*, the Court took the view that the three-year period to which they referred was, strictly speaking, a limitation period applicable to the customs debt. [11]

[8] C-522/16, EU:C:2017:778; 'the judgment in *A*'.

[9] C-249/18, EU:C:2019:587; 'the judgment in *CEVA*'.

[10] As the Court recalled in the judgment of 2 April 2020, *Coty Germany* (C-567/18, EU:C:2020:267, paragraph 22), 'since the national court alone has jurisdiction to find and assess the facts in the case before it, the Court must in principle confine its examination to the matters which the court or tribunal making the reference has decided to submit to it and thus proceed on the basis of the situation which that court or tribunal considers to be established'.

[11] In actual fact, 'an action for recovery of a customs debt is time-barred …, which amounts to the debt itself being time-barred', in accordance with the judgment of 23 February 2006, *Molenbergnatie* (C-201/04: EU:C:2006:136; 'the judgment in *Molenbergnatie*'; paragraph 42).

27. It thus held: 'it is settled case-law that the first sentence of Article 221(3) of the [CCC] lays down *a limitation rule* whereby the communication of the amount of import or export duty due is not to take place after the expiry of a period of three years from the date on which the customs debt was incurred'. [12]

28. In accordance with the abovementioned Article 221(4) of the CCC, the *limitation period* for customs debts that was introduced by that code was not confined to three years in the case where the debt 'is the result of an act which … was liable to give rise to criminal court proceedings'.

29. This was the Court's finding in a case in which the goods had been unlawfully released for free circulation following a customs declaration based on false information. [13]

30. In the view of the Court, although the release for free circulation constitutes one of the events giving rise to the customs debt on importation listed in Article 201 of the CCC, 'that consideration is not to mean that such a debt is not the "result", within the meaning of Article 221(4) of the Customs Code, of acts such as those at issue in the main proceedings'. [14]

31. Consequently, the period provided for in Article 221(3) of the CCC could exceed three years where the facts as a result of which the customs debt was incurred were liable to give rise to criminal court proceedings. [15]

32. That same rule, with slight variations, is found in Article 103(2) of the UCC. [16] Pursuant to that article, if the customs debt is incurred as the result of an act liable to give rise to criminal court proceedings, the period for notifying that debt may be extended to a minimum of five years and a maximum of ten years.

33. The referring court could therefore, in so far as its rules of procedure allow it, [17] determine whether the situation in the present case is analogous to that examined in the judgment in *A*.

34. Everything seems to indicate that it is, inasmuch as the order for reference states that, in the communication sent to Jumbocarry on 1 June 2016, the Inspecteur expressed doubts as to the true provenance of the goods declared and stated that the certificate of origin was false. [18]

[12] Judgments of 17 June 2010, *Agra* (C-75/09, EU:C:2010:352, paragraph 30), which cites the judgment in *Molenbergnatie*, paragraph 39, and of 16 July 2009, *Snauwaert and Others* (C-124/08 and C-125/08, EU:C:2009:469, paragraph 28). No emphasis in the original.

[13] Judgment in *A*. In that case, a company whose registered office was located in Germany had made several declarations for the release for free circulation in the Netherlands of goods originating in Brazil and Argentina. The Netherlands customs authorities took the view that several operators had set up a chain of transactions whereby 'the initial price of the products …, purchased from South American independent suppliers, was artificially increased in subsequent transactions, so that the cif import price of the products in question was higher than the trigger price, in order to avoid payment of the additional duties referred to in [the] Regulations …' (paragraph 24). The Court held that, 'in so far as the fact of having supplied false information is the reason for the absence of collecting all or part of such additional duties, it must be considered that such a customs debt "is the result", within the meaning of Article 221(4) of the Customs Code, of the supply of such information' (paragraph 57).

[14] *Ibidem*, paragraph 58.

[15] *Ibidem*, paragraph 61.

[16] Article 103(2): 'Where the customs debt is incurred as the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the three-year period laid down in paragraph 1 shall be extended to a period of a minimum of five years and a maximum of 10 years in accordance with national law.'

[17] According to the Netherlands Government, in answer to the Court's questions, the existence of conduct liable to give rise to criminal court proceedings may not be assessed in the context of an appeal on a point of law if the courts of first instance and appeal have not found such conduct to be present.

[18] Paragraph 2.3 of the order for reference. In the judgment in *A*, paragraph 45, the Court stated, in reference to Article 201 of the CCC, that 'it follows [from that provision] that the information having served as the basis for drawing up a customs declaration must be regarded as being "false" … where it has led to all or part of the import duties legally owed not being collected'.

35. Should the referring court confirm that the act as a result of which Jumbocarry's customs debt was incurred was liable to give rise to criminal court proceedings, that debt, which was incurred on 4 July 2013, would not have been extinguished by limitation either on 1 June 2016 (the date of the Inspecteur's communication) or on 18 July 2016 (the date of the request for payment).

36. On that basis, there would be no need to turn to an analysis of the impact under the CCC or the UCC of the acts which, in 2016, suspended the three-year limitation period applicable to the customs debt. That three-year period, I would recall, would not be applicable to the present case.

2. Communication to the debtor under the CCC

37. Communication to the debtor of the amount of customs duty, which was calculated by the customs authorities as soon as they had the necessary particulars,[19] was to be effected in accordance with 'appropriate procedures' and within a maximum period of three years from when that debt was incurred, pursuant to Article 221(1) and (3) of the CCC.

38. The Court ruled on that *communication*, stating, with respect to its form and content, that '… it is the responsibility of the competent State authorities to guarantee a form of communication which allows persons liable for customs debts to have full knowledge of their rights'.[20] However, there was no requirement to adhere to specific procedural rules.[21]

39. As regards its effects, the Court has held that 'communication to the debtor … [interrupts] the limitation period' on the expiry of which the customs debt is extinguished, 'in accordance with Article 221(3) of the [CCC]'.[22]

40. The 'communications' referred to in Article 221(1) and (3) of the CCC, on the one hand, and Articles 22(6) and 103(3)(b) of the UCC, on the other, exhibit notable commonalties. It is not that they are the same in all respects,[23] but, in certain circumstances, they may be regarded as administrative acts of equivalent content, if one takes the approach which the Court employed when interpreting the first of those articles.

41. The CCC did not expressly provide that administrative decisions unfavourable to a debtor's interests should be disclosed to the debtor before being adopted. As I have already explained, it confined itself to stating that the administration was to inform the debtor of the amount of duty payable, in accordance with appropriate procedures, prior to expiry of the period of three years from when the customs debt was incurred.

19 Article 217 of the CCC. Where the amount of the duty payable tallied with that recorded in the customs declaration, communication was no longer necessary, and the goods were instead released by the customs authorities (see Article 221(2) of the CCC).

20 Judgment in *Molenbergnatie*, paragraph 53. That case was concerned with ascertaining whether a document which '… does not in any way refer to Article 221 of the [CCC] or indicate that it relates to notification to the debtor of the amount of duties owed', in accordance with the wording of the fourth question referred to the Court of Justice by the referring court, reproduced in paragraph 24 of that judgment, was a permissible form of communication.

21 *Ibidem*, paragraphs 53 and 54, and fourth paragraph of the operative part.

22 Judgment in *CEVA*, paragraph 47. No emphasis in the original.

23 They are not, therefore, automatically or generally to be treated in the same way: I concur in this regard with the Commission's reply to the Court's questions (paragraph 15 et seq.). What I propose is an analysis of their equivalence *in the particular case*, in the light of the circumstances specific to it.

42. The Court maintained, however, that prior communication was compulsory under the CCC, [24] since it gave the debtor an opportunity to be heard and, at the same time, enabled 'the competent authority effectively to take into account all relevant information'. [25] That communication, as I have recalled, 'interrupted' the limitation period applicable to the customs debt. [26]

43. Since the CCC did not expressly lay down an obligation of prior communication to the debtor, it made no provision for other matters relating to such communication either, such as the means by which the point of view was to be expressed or the period within which this was to be done. Those matters fell to be determined by national law, subject to observance of the principles of effectiveness and equivalence.

44. The UCC now explicitly governs communication to the debtor to enable him or her to express his or her point of view in defence of his or her interests. [27] In keeping with the Court's case-law on the CCC (and, to some extent, in counterpoint to recognition of the rights of the defence), [28] Article 103(3)(b) of the UCC confers on that administrative act the potential capacity to suspend the three-year period for notifying the debt, which starts to run on the date on which the debt is incurred. The suspension lasts until the end of the period during which the debtor has the opportunity to express his or her point of view, [29] from which point the three-year period starts to run again.

45. In other words, the suspension provided for in Article 103(3)(b) of the UCC adds thirty days to the three years which, calculated from the date when the customs debt was incurred, mark the time limit for notifying that debt. In effect, therefore, that provision creates an extension (very limited in time) of the limitation period extinguishing the right of the administration to recover the customs debt. [30]

46. In the present case, in accordance with the information provided by the referring court, the Inspecteur sent the communication to Jumbocarry on 1 June 2016 in order to inform it of his intention to effect post-clearance recovery of the customs debt, at a rate of 12%, and gave it thirty days to express its point of view.

[24] Judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 28 et seq.).

[25] *Ibidem*, paragraph 38: 'In order to ensure that the person or undertaking concerned is in fact protected, the purpose of that rule is, inter alia, to enable them to correct an error or submit such information relating to their personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content'.

[26] Judgment in *CEVA*, paragraph 47. The judgment refers to the 'interruption' of the limitation period but, depending on the context, the communication might constitute not an interruption in the strict sense of that term (meaning that that period would have to start to run again) but, rather, a 'suspension'. Article 221(3) of the CCC specifically referred to the period being 'suspended' by the lodging of an appeal.

[27] As a general rule, 'before taking decision which would adversely affect the applicant, the customs authorities shall communicate the grounds on which they intend to base their decision to the applicant, who shall be given the opportunity to express his or her point of view within a period prescribed from the date on which he or she receives that communication or is deemed to have received it' (Article 22(6) of the UCC). See also Article 29, in the case where the decision of the customs authority has not been adopted at the request of the person concerned.

[28] Suspension served to ensure that the customs debt would not be extinguished in the case where the communication took place almost at the end of the period. See amendment 62 to Article 91 of the Commission proposal, Report on the proposal for a Regulation of the European Parliament and of the Council laying down the Union Customs Code, document A7-0006/2013, p. 47.

[29] Article 24(f) of the UCC empowered the Commission to adopt delegated acts in order to determine the duration of the period referred to in the first subparagraph of Article 22(6). Article 8(1) of the Delegated Regulation on the UCC fixed that period at thirty days.

[30] See footnote 11 to this Opinion.

47. If that was the sequence of events, applying the abovementioned case-law might lead the referring court to weigh two factors relevant to the dispute:

– the first is that a communication to that effect might have been appropriate in providing the debtor with adequate information and enabling it to defend its rights in full knowledge of the facts, in keeping with the interpretation of Article 221(3) of the CCC adopted by the judgment in *Molenbergnatie*; [31]

– the second is that that communication would have triggered, in accordance once again with Article 221(3) of the CCC as interpreted by the Court, [32] the *interruption* (or suspension) of the limitation period of three years, counted from the date on which the customs debt had been incurred.

48. The three-year limitation period would thus have been suspended (or, as the case may be, interrupted), irrespective of which customs code was applicable (the CCC or the UCC), on account of the communication from the Inspecteur to Jumbocarry on 1 June 2016, that is to say prior to the expiry of three years from 4 July 2013, the date on which that debt was incurred.

49. By the same token, as the suspension of that period remained in place until the end of the period of time granted to the debtor to express its point of view, it is conceivable [33] that, at the date (18 July 2016) on which the request for payment was notified to Jumbocarry, the three years (plus the suspension time) making up the limitation period at the end of which the customs debt is extinguished had not elapsed, even under the CCC.

B. In the alternative, on the questions referred

50. I shall in any event suggest a reply to the questions referred in the event that, after analysing the two criteria for adjudication set out above, [34] the national court takes the view that it still needs an interpretation of the provisions of EU law with which those questions are concerned.

1. The first question referred

51. The referring court expresses its uncertainty as to the effect *ratione temporis* of two rules of the UCC which, in accordance with Article 288(2) thereof, are to apply as from 1 May 2016:

– the first concerns the limitation of the customs debt (Article 103(3)(b) of the UCC);

– the second relates to the extinguishment of that customs debt (Article 124(1)(a) of the UCC) where the debtor can no longer be notified in accordance with Article 103 of the UCC.

[31] Point 38 of this Opinion. In answer to the Court's questions, the Council confirms that this might be the case in certain specific situations (and, therefore, is not the case as a rule).

[32] Point 39 of this Opinion.

[33] As I stated in point 43 of this Opinion, under the CCC, the fixing of the time available for expressing a point of view was a matter for the national legislature to determine, subject to the principles of equivalence and effectiveness.

[34] In the view of the Parliament, the request for a preliminary ruling would be rendered hypothetical if either of those two criteria for adjudication were found to be present (paragraph 12 of its reply to the Court's questions).

52. The reasoning applied by the referring court and the arguments put forward by the parties and the interveners in the preliminary ruling proceedings have revolved around whether the provisions at issue are to be classified as procedural or substantive. I have no objection to starting my analysis from this angle.

(a) Procedural or substantive nature of the rules applicable and their effects on the present dispute

53. The parties and interveners in the present dispute rely on the *traditional* case-law of the Court, which, when ruling on the temporal impact of new rules, whether on situations which are in progress or ones which have become definitive, draws a distinction based on whether those rules are procedural or substantive (or material) rules.

54. In accordance with that case-law, 'procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force'. [35]

55. The Court provided details on the temporal application of substantive rules as follows: 'a new legal rule applies from the entry into force of the act introducing it, and …, while it does not apply to legal situations that arose and became definitive prior to that entry into force, it does apply immediately to the future effects of a situation which arose under the old law, and to new legal situations. The position is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application.' [36]

56. That case-law [37] is amenable to certain refinements, depending on the circumstances. Thus:

– procedural rules are generally applicable as from the date on which they enter into force;

– substantive rules, on the other hand, do not affect legal positions which became definitive prior to their entry into force, unless it follows from their terms, objectives or general scheme that such an effect must be given to them; [38]

– a permissible exception to that rule is a situation in which 'EU legislation which was intended to establish a body of rules covering the post-clearance recovery of customs duties contained both procedural and substantive rules forming an indivisible whole, the individual provisions of which could not be considered in isolation with regard to their temporal effect'. [39]

[35] Judgment in *Molenbergnatie*, paragraph 31.

[36] Judgment of 7 November 2018, *O'Brien* (C-432/17, EU:C:2018:879, paragraph 27).

[37] Which is applicable both in the field of customs (see, in particular, judgments of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 9), and of 9 March 2006, *Beemsterboer Coldstore Services* (C-293/04, EU:C:2006:162, paragraphs 19 to 21)), and in other fields (see, inter alia, judgments of 29 January 2002, *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraphs 49 and 50); of 11 December 2012, *Commission* v *Spain* (C-610/10, EU:C:2012:781, paragraph 45); and of 7 November 2018, *O'Brien* (C-432/17, EU:C:2018:879, paragraphs 26 and 27)).

[38] Judgment of 9 March 2006, *Beemsterboer Coldstore Services* (C-293/04, EU:C:2006:162, paragraph 21); 'the substantive rules of Community law may exceptionally be interpreted as applying to situations existing before their entry into force in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them [see judgments of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 9); of 15 July 1993, *GruSa Fleisch* (C-34/92, EU:C:1993:317, paragraph 22); and of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission* (C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 119)]'.

[39] Judgment of 26 March 2015, *Commission* v *Moravia Gas Storage* (C-596/13 P, EU:C:2015:203, paragraph 36), which cites the judgment of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270).

57. If the approach taken in the order for reference and in the observations of the parties and interveners in the preliminary ruling proceedings were to be accepted, it would be necessary to analyse the (procedural or substantive) nature of the articles of the UCC with which the first question is concerned.

58. The outcome of that analysis would favour a finding as to the substantive nature of those provisions, if regard is had to the Court's findings in the judgment in *Molenbergnatie*. In accordance with that judgment, Article 221(3) of the CCC must be 'considered … to be a substantive provision'. [40]

59. In order to classify that article as a material rule, rather than a procedural one, the Court took into account the effects of the failure (on the part of the authorities) to communicate the amount of the debt within a period of three years, in conjunction with the grounds for the extinction of that debt which are listed in Article 233 of the CCC: from these it inferred that, if the circumstances provided for in both provisions are present, the customs debt 'is time-barred and, consequently, extinguished'. [41]

60. Whatever (academic) opinion one might have of those findings, [42] the fact remains that the Court chose to classify Article 221(3) of the CCC, read in conjunction with Article 233 thereof, as a substantive rule.

61. That classification can be transposed, without too much difficulty, to the corresponding provision of the UCC: the content of Article 103(3)(b) of that code, read in conjunction with Article 124(1)(a) thereof, is equivalent to that of Article 221(3) of the CCC.

62. Applying the case-law in *Molenbergnatie* would therefore mean that, since the provisions of the UCC the interpretation of which is being sought are substantive, they should not be applied to customs debts incurred prior to their entry into force.

63. However, the prohibition on applying new substantive rules to facts which occurred prior to their entry into force is effective in the case of 'legal situations that arose and became definitive prior to that entry into force'. [43] That is not the position in the present case, where the limitation period was still running.

64. As the referring court rightly notes, in the case which gave rise to the judgment in *Molenbergnatie*, the debtor's situation had become definitive. By contrast, Jumbocarry's debt was not yet 'time-barred on 1 May 2016'. [44] Hence, the referring court goes on to say, 'the situation of the person concerned differs from the situation to which the judgment in *Molenbergnatie* relates'. [45]

[40] Judgment in *Molenbergnatie*, paragraph 42: 'Article 221(3) [of the CCC] must be considered, unlike Article 221(1) and (2), to be a substantive provision and cannot, therefore, be applied to recovery of a customs debt incurred prior to 1 January 1994'.

[41] *Ibidem*, paragraph 41.

[42] The judgment in *Molenbergnatie* is a good illustration of the difficulties associated with drawing a fundamental distinction between procedural and material rules – a distinction that sometimes overlooks the inseparable link between the two. In point of fact, the rule in Article 221(3) of the CCC has as its direct object (*procedural*) requirements governing the communication to the debtor, such as the maximum period within which communication must be effected and the suspensive effects of any appeal that is lodged, even though the late notification of that communication has as its (*substantive*) consequence that the customs debt becomes time-barred.

[43] See point 56 of this Opinion.

[44] Paragraph 4.4.3 of the order for reference.

[45] Paragraph 4.4.3, *in fine*, of the order for reference.

65. Thus, the information contained in the documents before the Court supports the inference:

– that Jumbocarry's customs debt was incurred on 4 July 2013;

– that, at the date – different from that of their entry into force – on which Articles 103 and 124 of the UCC became applicable (that is to say, 1 May 2016),[46] the three-year limitation period applicable to that customs debt had not expired. It would have expired on 4 July 2016 if it had not been suspended, as in fact it was, by the communication from the Inspecteur (on 1 June 2016).

66. In short, Jumbocarry's legal situation in relation to the time-barring of its debt had not become definitive when the Netherlands administration suspended the three-year period by communicating, on 1 June 2016, the grounds on which it was intending to notify the customs debt (in accordance with Article 22(6) and Article 103(3)(b) of the UCC).

67. On that basis, I take the view that there is no reason to object to the application of Articles 103(3)(b) and 124(1)(a) of the UCC. The answer to the first question referred should therefore be in the affirmative.

68. This approach is borne out by the convergent rulings given in the judgments in *Taricco I* and *Taricco II*. The Parliament has referred to the first of those judgments in its written observations, and the parties to the dispute and the interveners in the preliminary ruling proceedings have been able to state their position on the effects of both of them when invited to do so by the Court.

(b) Impact on the present case of the judgments in Taricco I *and* Taricco II

69. One of the issues traditionally debated in the context of the principles of criminal law has been whether a new law should extend the limitation period applicable to an offence before the limitation period in force at the time when that offence was committed has expired.[47]

70. That extension has posed difficulties when analysed from the point of view of the general principle prohibiting the retroactivity *in peius* of criminal laws. Such a prohibition is contained in Article 49(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

71. The two propositions put forward in this regard argue, from opposing positions: (a) that a limitation period which commenced prior to the entry into force of the new law is governed by the previous law (*tempus regit actum*); and (b) that there is nothing to stop the legislature extending a limitation period but the new limitation period (being longer than its predecessor) would apply only to offences which had not yet become time-barred under the previous law.[48]

72. In answering one of the questions referred for a preliminary ruling in *Taricco I*, the Court drew on the case-law of the European Court of Human Rights relating to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which enshrines rights corresponding to those guaranteed by Article 49 of the Charter.

[46] See Article 288 of the UCC, reproduced in point 11 of this Opinion.

[47] The issue has arisen more acutely where an offence that was previously subject to limitation is declared, pursuant to the new law, not to be subject to limitation.

[48] It is generally accepted that, if the (previous) limitation periods have already expired, those laid down in the new law cannot be applied.

73. In accordance with that case-law, the Court held that 'the extension of the limitation period and its immediate application do not entail an infringement of the rights guaranteed by Article 7 of that convention, since that provision cannot be interpreted as prohibiting an extension of limitation periods where the relevant offences have never become subject to limitation'. [49]

74. Advocate General Kokott, in her Opinion in *Taricco I*, had expressed the same view: 'the period of time within which a criminal offence may be prosecuted can still be altered even after the offence has been committed, so long as the limitation period has not expired'. [50]

75. The judgment in *Taricco II* confirmed that finding, in considering 'an extension of a limitation period by the national legislature and its immediate application, including to alleged offences that are not yet time-barred' to be permissible. Such an extension, the Court went on to say, 'do[es] not, in principle, infringe the principle that offences and penalties must be defined by law (see, to that effect, the *Taricco [I]* judgment, paragraph 57, and the case-law of the European Court of Human Rights cited in that paragraph)'. [51]

76. It is true that the national legislation with which the judgments in *Taricco I* and *Taricco II* are concerned differs from that which is at issue in the present dispute. In those cases, there was not, strictly speaking, a new extension of the limitation period applicable to offences, but a sudden reduction of the maximum time for which that period could be interrupted [52] which had the effect 'of neutralising the temporal effect of an event interrupting the limitation period'. [53]

77. It is also true that, following the request for a preliminary ruling submitted by the Corte constituzionale (Constitutional Court, Italy) in *Taricco II*, the Court of Justice looked at the legislation at issue from a perspective different from that which it had adopted in the judgment in *Taricco I*:

– in the judgment in *Taricco I*, it analysed the obligation of the Italian courts to refrain from applying, in criminal proceedings for offences in connection with the collection of value added tax, certain national rules relating to interruption of the limitation period for criminal offences which, in conjunction with the usual length of proceedings in that Member State, led in practice to the impunity of the perpetrators of those offences, to the detriment of the European Union's financial interests;

[49] Paragraph 57 of the judgment in *Taricco I*. The reference to the case-law of the European Court of Human Rights that is contained in that paragraph includes the judgments in *Coëme and Others v. Belgium*, Nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 149, ECHR 2000-VII; *Scoppola v. Italy* (No 2), No 10249/03, § 110 and the case-law cited, 17 September 2009; and *OAO Neftyanaya Kompaniya Yukos v. Russia*, No 14902/04, §§ 563, 564 and 570 and the case-law cited, 20 September 2011.

[50] Opinion of Advocate General Kokott (C-105/14, EU:C:2015:293, point 120). She referred in support of that proposition to the 'judgment of the ECtHR [of 22 June 2000] in *Coëme and Others v. Belgium*, [No 32492/96 and others], § 149, ECHR 2000-VII'.

[51] Paragraph 42 of the judgment in *Taricco II*.

[52] Under the Italian legislation, an *interruption* of that period, as a legal concept different from the *suspension* thereof, caused it to start running again from the date on which it was interrupted. The period of interruption, however, could not last longer than half of the (absolute) limitation period, in accordance with Article 161 of the Criminal Code: as a result of the reform of that code by Law No 251/2005, the maximum duration of the period of interruption was confined to a quarter of the general limitation period. The consequence of that legislative amendment was that, in particular in the investigation of highly complex crimes requiring extensive enquiries, even though the limitation period was the same before and after Law No 251/2005, the interruption brought about by the judicial proceedings was considerably reduced, making it easier for crimes to go unpunished. For that reason, the referring court stated that the amendment in 2005 of the second subparagraph of Article 161 of the Criminal Code, 'by allowing the limitation period to be extended, following an interruption, by only a quarter of its initial duration, is tantamount to not interrupting the limitation period in most criminal proceedings' (paragraph 23 of the judgment in *Taricco I*).

[53] Judgment in *Taricco I*, paragraph 46.

– in the judgment in *Taricco II*, it qualified the findings it had made in the judgment in *Taricco I*,[54] when analysing the duty to disapply the national rules on limitation (which, in Italy, are material in nature, according to the Corte costituzionale (Constitutional Court))[55] in the context of the principle that offences and penalties must be defined by law.[56] It also clarified the functions of the legislature and the criminal court in remedying a situation in which the domestic legal system was not compliant with the requirements arising from the protection of the financial interests of the European Union with a view to imposing effective, proportionate and dissuasive penalties.

78. The perceptible differences between the two judgments are not reflected, however, in the matter at issue in the present case: the validity of immediately applying a new limitation period, longer than the previous one, to facts which are not yet time-barred.

79. On this specific matter, the two judgments converge: paragraph 42 of the judgment in *Taricco II* reproduces without reservation the statement contained in paragraph 57 of the judgment in *Taricco I* and, at the same time, the case-law of the European Court of Human Rights that was cited in the judgment in *Taricco I*.

80. If it is feasible for a new rule to extend the limitation period, with immediate effect, to criminal offences which are not yet time-barred, it will be all the more possible to take that approach where the measure in question is a suspension, for a limited time, of the limitation period applicable to a (non-punitive) customs debt prior to the expiry of the three years which, under the previous legislation, had to have passed in order for that debt to be regarded as time-barred.[57]

2. The second question referred

81. The second question referred is framed very succinctly. The referring court wishes to ascertain whether, 'if the answer to the first question is in the affirmative …', the application of Articles 103(3)(b) and 124(1)(a) of the UCC is compatible with the principles of legal certainty and protection of legitimate expectations.

82. The Parliament has intervened in these proceedings because it takes the view that, by its second question, the referring court 'appears' to call into question the validity of the two articles of the UCC with which the first question is concerned, albeit not explicitly.[58]

83. To my mind, however, a reading of the order for reference does not indicate that the second question expresses uncertainty as to the validity of those provisions of EU law. The referring court is calling into question not the validity of those provisions in the abstract but their temporal

[54] According to the judgment in *Taricco I*, the national rules on limitation eliminated the effectiveness and dissuasiveness of the measures laid down to combat illegal activity contrary to the financial interests of the European Union. For that reason, a national court was able to refrain from applying those national provisions, if this were essential for the purpose of ensuring that EU law was given full effect (paragraphs 47 and 49).

[55] Judgment in *Taricco II*, paragraph 27.

[56] The Corte costituzionale (Constitutional Court) observed that, 'in the *Taricco [I]* judgment, the Court ruled on the issue of the compatibility of the rule in that judgment with Article 49 of the Charter … with regard only to the principle of non-retroactivity [, but it] did not … examine the other aspect of the principle that offences and penalties must be defined by law, namely the requirement that the rules on criminal liability must be sufficiently precise' (paragraph 19 of the judgment in *Taricco II*).

[57] The Parliament expresses much the same view after advocating the application of paragraphs 54 to 57 of the judgment in *Taricco I* to this case: 'the requirements arising from the principle of legitimate expectations are stricter in criminal cases than in administrative cases, which include the recovery of a customs debt' (paragraph 42 of its written observations). The Netherlands Government concurs with that assessment in its reply to the Court's questions (paragraphs 5 and 6).

[58] Paragraph 2 of its written observations.

application to a given situation. While it is true that, at the end of its order, that court refers to the disapplication of Article 103(3) of the UCC, it does so, rather, in the context of the particular circumstances of the dispute.

84. The order for reference justifies its invocation of the principles of legal certainty and protection of legitimate expectations on the ground that 'it could be argued' that, at the date on which the customs debt was incurred (4 July 2013), 'it was neither clear nor foreseeable to the person concerned that the customs legislation would be amended in relation to collection and limitation …'. [59]

85. The referring court recognises, however, that, in adopting Article 22(6) and Article 29 of the UCC, the EU legislature strengthened the legal position of the debtor by granting him or her the right to a period of time to express his or her point of view. [60] The connection between those provisions and the suspension of the limitation period during the period allowed for expressing a point of view does not entail a deterioration of the debtor's situation such as to warrant the disapplication of Article 103(3) of the UCC. [61]

86. According to settled case-law, 'the principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law'. [62]

87. As regards the right to rely on the protection of legitimate expectations, the Court has stated that this 'extends, as a corollary of the principle of legal certainty …, to any individual in a situation where … [the] authorities have caused him to entertain legitimate expectations … Information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes assurances capable of giving rise to such expectations. However, a person may not plead breach of the principle unless he or she has been given precise assurances by the administration'. [63]

88. In the first place, none of those principles entails an obligation to maintain the legal order unchanged over time. Moreover, the expectation that legislation will not undergo change is particularly unfounded in a field, such as customs, which calls for constant adaptation. [64] The successive amendments made to the CCC, from its adoption in 1992 until its repeal by Regulation No 952/2013, illustrate this well. The adoption of the UCC was justified by the need to 'take account of the evolution of Union law'. [65]

89. In the second place, as regards the protection of legitimate expectations within the meaning defined above, there is nothing in the documents before the Court that would support the inference that the Netherlands administration gave Jumbocarry 'precise assurances' with respect to collection of the customs debt at any particular time.

[59] Order for reference, paragraph 4.7.2.

[60] Fixed at thirty days by Article 8(1) of the Delegated Regulation on the UCC.

[61] Order for reference, paragraph 4.7.3.

[62] Judgment of 3 December 2019, *Czech Republic* v *Parliament and Council* (C-482/17, EU:C:2019:1035, paragraph 148).

[63] *Ibidem*, paragraph 153.

[64] As the Council notes in its written observations, paragraph 46.

[65] Recital 2 of the UCC.

90. In the third place, the principle of legal certainty does not rule out the possibility that provisions may have to be interpreted, in the case where their content poses interpretational difficulties that create uncertainty for those affected by such provisions or those who have to apply them: it was precisely in order to dispel such uncertainty that the judicial cooperation mechanism provided for in Article 267 TFEU was established.

91. In the fourth place, the introduction of Article 103(3)(b) of the UCC does not in fact bring about a change in the previous legislative position. Rather, it meets the need to lend certainty to an obligation incumbent on the administrative authorities which was already present under the CCC, according to the Court's case-law, [66] and the enactment of which into legislation fell to the national legislature because it had not been specifically addressed by the EU legislature.

92. The present case is not about the debtor's right to have its customs debt automatically and unavoidably extinguished three years after it was incurred; rather, it is about an expectation that this would be the case, including under the rules of the CCC that were in force at the time when that debt was incurred.

93. No such right existed, as I have said. What existed was, rather, the expectation that the customs debt would become time barred on expiry of the three-year period, provided that that period was not suspended, an eventuality which could arise either on account of an appeal or on account of an action by the administrative authorities aimed at communicating their intention to collect the customs debt prior to adopting the decision to do so.

94. As the Netherlands Government has submitted, [67] the point in time at which the customs debt would be extinguished could not be fixed in advance with any certainty while the CCC was in force, since Article 221(3) of the CCC provided for the possibility of suspension in the event of an appeal being lodged under Article 243. [68]

95. The Court's interpretation of Article 221(3) supported the inference that, even while the CCC was in force, the communication from the administration interrupted the three-year period for notifying the customs debt (and had the corresponding effect on limitation). [69]

96. In the fifth place, as the referring court rightly notes, the extension of the limitation period, through the suspension inherent in the communication effected in accordance with Article 103(3)(b) of the UCC, is directly linked to the opportunity offered to the debtor to be heard before the customs authority adopts a decision unfavourable to his or her interests.

97. That rule strikes a balance between the debtor's right to be heard and the European Union's financial interests. What is more, the need for such a balance is not a new feature of the UCC and the rationale that the communication from the administrative authorities should suspend the limitation period existed beforehand.

[66] See the interpretation of the corresponding articles of the CCC in the judgments in *Molenbergnatie* and *CEVA*, cited in point 38 et seq. of this Opinion.

[67] Paragraph 58 of its written observations.

[68] In accordance with the first subparagraph of Article 243(1) of the CCC, 'any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually'.

[69] Point 39 of this Opinion.

98. In the sixth place, even if the extension of the limitation period by virtue of the suspensive effects of the communication notified to the debtor could be classified as a 'new feature' by comparison with the CCC regime in force on 4 July 2013 (when Jumbocarry's debt was incurred), the immediate application of Article 103(3)(b) of the UCC as from 1 May 2016 would not undermine legal certainty as regards the applicable legislation.

99. Any diligent customs operator would have been aware of the Court's interpretation of the temporal application of the procedural and substantive rules relating to the future effects of legal situations which have not yet become definitive. This is settled case-law dating back, in the field of customs, to 1981.[70]

100. Lastly, the immediate application of Article 103(3)(b) of the UCC allows for the equal treatment of any importer whose debt had not been extinguished by limitation at the date on which the UCC became fully applicable, whether that debt had been incurred before or after that date. From 1 May 2016, everyone in the situation envisaged in Article 22(6) of the UCC enjoys a right to be heard, for the same period of time, calculated in the same way.

V. Conclusion

101. In the light of the foregoing, I suggest that the Court reply as follows to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands):

'Articles 103(3)(b) and 124(1)(a) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code are applicable to a customs debt which was incurred prior to 1 May 2016 and the limitation period of which had not yet expired at that date, without, in being so applicable, infringing the principles of legal certainty and protection of legitimate expectations.'

[70] Judgment of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270).