

Case C-717/22

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court

Date lodged:

23 November 2022

Referring court:

Rayonen sad Svilengrad (Bulgaria)

Date of the decision to refer:

10 November 2022

Applicant:

SISTEM LUX OOD

Administrative enforcement authority:

Teritorialna direksia Mitnitsa Burgas

Intervener:

Rayonna prokuratura Haskovo, teritorialno otdelenie Svilengrad

Subject matter of the main proceedings

Action brought by SISTEM LUX OOD, with its registered office in Šabac, Republic of Serbia, against an administrative penalty order issued by the deputy director of the Teritorialna direksia Mitnitsa Burgas (Burgas Regional Customs Directorate) in 2021.

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is Article 42(2) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, which exhaustively specifies the administrative penalties that can be applied for breaches of customs legislation, read in conjunction with Article 17(1) of the Charter of Fundamental Rights of the European Union, to be interpreted as meaning that a national provision such as that of Article 233(6) of the *Zakon za mitnitsite* (Customs Law), which provides for an additional administrative penalty in the form of confiscation of the items involved in the offence (removal of property into State ownership), is unlawful? Is confiscation of the items involved in the offence lawful in those cases where the confiscated assets belong to someone other than the offender?
2. Is Article 42(1) of Regulation (EU) No 952/2013, read in conjunction with Article 49(3) of the Charter, to be interpreted as meaning that a national provision such as that of Article 233(6) of the Customs Law, which, alongside fines, provides for the additional penalty of confiscation (removal of property into State ownership) of the items involved in the offence, is unlawful in the following cases by reason of constituting a disproportionately punitive interference with the right to property which is not commensurate with the legitimate goal being pursued: both generally, in those cases where the confiscated asset, being the item involved in the offence, belongs to the offender, and in those cases where it belongs to a third party other than the offender, and particularly in those cases where the perpetrator committed the offence not intentionally but through negligence?
3. Are the provisions of Article 2(1) of Framework Decision 2005/212, read in conjunction with Article 17(1) of the Charter and regard being had to the judgment of the Court of Justice of the European Union of 14 [January] 2021 in Case C-393/19, to be interpreted by way of *argumentum a fortiori* as meaning that they also apply in cases where the act constitutes not a criminal offence but an administrative offence, whereas the difference between the two lies solely in the criterion of ‘large quantities’ in terms of the value of the smuggled items as assumed by the courts? Are the fourth indent of Article 1 of Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property and Article 2(4) of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union to be interpreted in this case as meaning that the term ‘confiscation’ refers specifically to a penalty or measure that must be issued by a court and cannot be ordered by an administrative authority, and is a national provision such as that of Article 233(6) of the Customs Law, read in conjunction with Article 231 thereof, in that sense unlawful?

Provisions of EU law and EU case-law

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, Article 42(1) to (3)

Charter of Fundamental Rights of the European Union, Articles 17 and 49

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 2

Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, Articles 1 and 2

Judgment of the Court of Justice in Case C-393/19

Provisions of national law

Zakon za mitnitsite (Customs Law), Article 231, Article 233(1) to (8)

Zakon za administrativnite narushenia i nakazania (Law on administrative offences and administrative penalties; ‘the ZANN’), Article 7(1) and (2), Article 33(1) and (2), Article 36(1) and (2), Article 53(1) and (2)

Succinct presentation of the facts and procedure

- 1 On 28 May 2021, VU (‘the driver’) drove from the Republic of Türkiye towards the Republic of Serbia, arrived at the Kapitan Andreevo customs post at around 10.00 and joined the ‘HGV arrivals’ lane with an articulated lorry consisting of a Mercedes tractor unit and an attached semi-trailer.
- 2 The articulated lorry was subjected to a check of customs documents and recorded in the ‘road tolls and authorisation procedures’ module of the Bulgarska integrirana mitnicheska informationna sistema na Agentsia Mitnitsi (the Bulgarian Integrated Customs Information System of the Customs Agency, BIMIS).
- 3 According to the duty roster for 28 May 2021, a particular customs official was assigned to ‘check customs documents and record them in the “road tolls and authorisation procedures” module’. When checking the customs declaration, that customs official found that the goods declared in the accompanying paperwork did not correspond to the weight displayed by the electronic weighing machine. A weight of 6 234 kg and five packages were entered in the paperwork. As attested by the weighing slip, the weighing machine indicated a weight of 38 960 kg. With reference to the vehicle registration certificates, the customs official found that the vehicle weighed approximately 15 000 kg when empty and that a discrepancy of 17 726 kg was thus not covered by any paperwork. Because of the discrepancy found, the customs official diverted the vehicle for an x-ray check. Upon

examination with the x-ray machine, it was found that more goods were present than had been declared. On 28 May 2021, the examination of the articulated lorry was begun in the garage intended for detailed examinations next to the ‘HGV arrivals’ lane, in the presence of the driver. Thirteen palettes with aluminium sections of various sizes, lengths, widths, thicknesses and colours were found in the load space. Five of the packages in the load space, according to the paperwork, corresponded in full to the freight of the dispatching enterprise SISTEM ALYUMINYUM SANAYI VE TIDZHARET. It emerged that the goods in the eight packages from the dispatching enterprise PELIT ARSLAN KONTPARLAK FABRIKASA A.SH. AD were undeclared. Those packages comprised the following: aluminium plates of 6 mm [thickness] and a size of 2.8 x 1.3 m, totalling 728 m²; aluminium plates of 12 mm [thickness] and a size of 3.66 x 1.4 m, totalling 307.44 m²; aluminium plates of 12 mm [thickness] and a size of 3.66 x 1.54 m, totalling 152.18 m²; aluminium plates of 4 mm [thickness] and a size of 2.8 x 1.3 m, totalling 152.88 m²; altogether totalling 1 340.5 m².

- 4 Because of the act committed by the driver, an administrative offence notice relating to an infringement under Article 233(1) of the Customs Law was issued by the Teritorialna direktsia Juzhna morska (Juzhna Morska Regional Directorate) on 28 May 2021, on the basis of which administrative enforcement proceedings were launched by the Juzhna Morska Regional Directorate. The undeclared aluminium plates and the articulated lorry used by the driver were confiscated along with the ignition key and the registration certificates in return for corresponding receipts.
- 5 Because of the high value of the goods at issue, a customs inspector responsible for investigations was briefed and, acting on the basis of Article 212(2) of the Nakazatelen kodeks (Criminal Code), initiated an investigation into a criminal offence under Article 242(1)(e) of the Criminal Code at the Burgas Regional Customs Directorate. In accordance with the interpretative ruling of the Obshtoto sabranie na nakazatelnata kolegia na Varhovnia kasatsionen sad (Plenary Formation of the Criminal Chamber of the Supreme Court of Cassation) of 2015 and Article 33(3) of the ZANN, the administrative enforcement proceedings were halted.
- 6 The abovementioned goods at issue and the articulated lorry were included in the investigation as evidence. With a custody certificate dated 3 August 2021, these were handed over to a storage official at the Burgas Regional Customs Directorate.
- 7 On 1 June 2021, the driver, a Serbian national, was included in the investigation as a person suspected of a criminal offence under Article 242(1)(e) of the Criminal Code.
- 8 In the course of the investigation, it was established that the act did not amount to a criminal offence, because the subjective element of the offence could not be proved. Within the meaning of the Criminal Code, the act specified can only be

committed intentionally, with direct intent – that is to say, if the perpetrator is aware of the nature of the act as a danger to society and foresees and wants to bring about its collectively detrimental consequences. In the case in question, there was no evidence for this.

- 9 On 25 May 2021, in Istanbul, the dispatching enterprise SISTEM ALYUMIYUM SANAYI VE TIDZHARET loaded five packages containing aluminium sections with a gross weight of 6 234 kg into the semi-trailer in the presence of the driver.
- 10 On 27 May 2021, in Istanbul, the dispatching enterprise PELIT ARSLAN KONTPARLAK FABRIKASA A.SH. AD loaded a further eight packages containing aluminium sections and two packages containing catalogues with a total gross weight of 16 780 kg into the semi-trailer in the presence of the driver.
- 11 The driver submitted the paperwork supplied to him by the two dispatching enterprises to the transport firm Fidan Market, Kapikule, Republic of Türkiye, for processing.
- 12 It was shown that the driver ‘was entirely negligent with regard to the customs paperwork for the freight that he was transporting. Although he was present when the goods were loaded and weighed, he had breached his duty as the driver of an international transport to look through the paperwork supplied to him and to check its contents, particularly as to whether it corresponded to the goods actually being transported.’
- 13 In accordance with Article 243(1)(2) of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure), an order of 5 October 2021 issued by the Okrazhna prokuratura Haskovo (Haskovo Regional Public Prosecutor’s Office) halted the criminal proceedings brought by the Burgas Regional Customs Directorate against the driver, who was born in Novi Pazar, Republic of Serbia, on 9 March 1977. With a letter, the Haskovo Regional Public Prosecutor’s Office sent the files, accompanied by that order, to the director of the Burgas Regional Customs Directorate, as the competent authority, for assessment as to whether an administrative offence may have been committed.
- 14 Upon examination of the investigation files by the Burgas Regional Customs Directorate, the administrative enforcement authority decided that the driver’s act constituted an administrative offence within the meaning of Article 233(1) of the Customs Law, the characteristics of which correspond to those set out in Article 242(1)(e) of the Criminal Code.
- 15 In the case in question, the subject and subject matter of the criminal and administrative proceedings were held to be identical.
- 16 The present administrative proceedings pursued by the Burgas Regional Customs Directorate were therefore launched in accordance with Article 36(2) of the ZANN.

- 17 The driver was held to have breached his duty to declare the goods at issue to the Customs Agency in due form. It was found that the goods which he was transporting did not originate within the European Union and a verbal declaration was not permissible. It was held that there had been a breach of the duties enshrined in customs legislation in relation to the introduction of non-EU goods into the customs territory of the European Union. Article 158(1) of Regulation (EU) No 952/2013 of the European Parliament and of the Council provides: ‘All goods intended to be placed under a customs procedure, except for the free zone procedure, shall be covered by a customs declaration appropriate for the particular procedure.’
- 18 On those grounds, it was held that the act had been committed culpably, albeit through negligence, because the driver, while not having intended to bring about the collectively detrimental consequences of the act, had been under a duty and had been in a position to foresee those consequences.
- 19 Article 7(2) of the ZANN reads as follows: ‘Acts committed through negligence shall be left unpunished only in the cases expressly provided for.’ There is no provision in the Customs Law that precludes liability for acts committed through negligence within the meaning of Article 233(1) of that law.
- 20 In the course of the investigation, the market value of the goods at issue was established; however, the objective criterion pertinent to application of the Customs Law is their customs value. Consequently, an opinion of 8 November 2021 from the committee tasked by order of the director of the Burgas Regional Customs Directorate established the customs value of the goods at issue at BGN 73 140.06 (seventy-three thousand, one hundred and forty leva and six stotinki).
- 21 From the findings of the expert report ordered and drawn up in the course of the proceedings, it was established that the value of the articulated lorry came to BGN 74 016.53 (seventy-four thousand and sixteen leva and fifty-three stotinki).
- 22 Under Article 233(8) of the Customs Law, which provides for a penalty, an assessment has to be made as to whether there is proportionality between the value of the goods at issue and the value of the vehicle used to transport the smuggled goods.
- 23 However, according to the judgment of the Court of Justice of 14 January 2021 in Case C-393/19, an instrumentality used to commit a smuggling offence cannot be confiscated if it belongs to a third party who is acting in good faith and is not the offender. Under Article 633 of the Grazhdanski protsesualen kodeks (Code of Civil Procedure), the judgments of the Court of Justice of the European Union are binding on all courts and institutions of the Republic of Bulgaria. Accordingly, the Konstitutsionen sad (Constitutional Court), in its judgment of 30 September 2021, declared the provision in Article 242(8) of the Criminal Code, where it reads

‘even if [it] does not belong to the perpetrator’, which corresponds in meaning to Article 233(8) of the Customs Law, to be unconstitutional.

- 24 The registration certificates of the Mercedes tractor unit and the Schmitz semi-trailer show that they belong to the legal person ZEBEX D.O.O., Republic of Serbia.
- 25 The files of the administrative enforcement proceedings contain a registration document dated 26 November 2021 together with an extract from the Serbian Business Registers Agency, Belgrade, Republic of Serbia, with a Bulgarian translation. These show that TS is the legal representative and owner of the company. In the eyes of the law, the driver, a natural person, and ZEBEX D.O.O., Republic of Serbia, a legal person of which TS is the sole legal representative and owner, are two different subjects. Neither in the criminal proceedings nor in the subsequent administrative enforcement proceedings was any evidence found that the company had been involved in the act committed by the perpetrator. The third party did not know, and also had no way of knowing, that its assets were being used to commit a smuggling offence and it was therefore acting in good faith. Confiscation of the vehicle would constitute a disproportionate and intolerable interference with its right to property.
- 26 It was concluded from these circumstances that the articulated lorry composed of the Mercedes tractor unit and the Schmitz semi-trailer were not subject to confiscation but were to be released to the owner or a person authorised by it.
- 27 The administrative enforcement authority found that, in committing the act at the Kapitan Andreevo customs post on 28 May 2021, that is to say, by transporting the aluminium plates listed above across the border without the knowledge or permission of the Customs Agency, the driver had fulfilled the definition of an offence under Article 233(1) of the Customs Law. It therefore issued an administrative penalty order imposing an administrative penalty on the driver in the form of a fine of BGN 73 140.06 (seventy-three thousand, one hundred and forty leva and six stotinki), which corresponds to 100% of the customs value of the goods, on the basis of Article 233(1) of the Customs Law. In accordance with Article 233(6) of the Customs Law, read in conjunction with Article 233(1) thereof, it was ordered that the aluminium plates with a customs value of BNG 73 140.06 (seventy-three thousand, one hundred and forty leva and six stotinki) be confiscated from the driver and that the articulated lorry consisting of the Mercedes tractor unit and the Schmitz semi-trailer as well as two registration certificates and one ignition key, belonging to the legal person ZEBEX D.O.O., Republic of Serbia, were not to be confiscated but instead released to the owner or to a person authorised by it.
- 28 The proceedings before the referring court were initiated upon the application by SISTEM LUX OOD challenging the administrative penalty order issued in 2021 by the deputy director of the Burgas Regional Customs Directorate.

- 29 By order of 8 February 2022 in administrative enforcement proceedings, the Rayonen sad Svilengrad (Svilengrad District Court) refused to consider the substance of the application to contest the administrative penalty order issued in 2021 by the deputy director of the Burgas Regional Customs Directorate and terminated the proceedings on the ground that the company's application to contest the administrative penalty order, in which it sought to have that order cancelled as incorrect and unlawful, was inadmissible because there was [already] a judgment of 17 January 2022 in place in administrative enforcement proceedings concerning the challenge by the offender against an administrative penalty order issued in 2021 by the deputy director of the Burgas Regional Customs Directorate. Although that judgment had not yet become final and binding at the time of the order, it was held to be unlawful as a matter of principle to rule on the matter again, since this might lead to two contradictory judgments.
- 30 The order was contested. In administrative enforcement proceedings on points of law, the court of cassation, by an order of 1 July 2022, overturned the contested order delivered on 8 February 2022 by Svilengrad District Court in the 2022 administrative enforcement proceedings in so far as it refused to consider the substance of the application by SISTEM LUX OOD to contest the administrative penalty order issued in 2021 by the deputy director of the Burgas Regional Customs Directorate – which ordered the confiscation of the goods involved in the offence, that is to say, the aluminium plates with a total surface area of 1 340.5 m² and a customs value of BGN 73 140.06 – remitted the case to the same chamber for the proceedings to be resumed in that respect and confirmed the contested order in all other respects.

The essential arguments of the parties in the main proceedings

- 31 The Rayonna prokuratura Haskovo, teritorialno otdelenie Svilengrad (Haskovo District Public Prosecutor's Office, Svilengrad Regional Division) submits that its participation in the administrative enforcement proceedings is not necessary, given that it is not a party to the legal proceedings and cannot therefore make use of its option to submit an opinion on the questions posed by the applicant's legal representative.
- 32 In the view of the applicant's legal representative, the questions submitted to the Court of Justice in Luxembourg for a preliminary ruling are crucially important for a shift in the settled case-law of the Bulgarian courts, and the answers to them will lead to justice and proportionality between administrative offences under the Customs Law and the associated additional penalty of confiscation (removal of property into State ownership) of the items involved in the offence in the case where the goods belong to a person or company other than the offender or the offender committed the offence not intentionally but through negligence.
- 33 The Burgas Regional Customs Directorate refers to Article 42(1) of Regulation (EU) No 952/2013. To substantiate its view, it further refers to Articles 79(1) and

198(1) of Regulation (EU) No 952/2013. It argues that, in the present case, although the goods confiscated belong to a person other than the offender, namely the applicant company SISTEM LUX, Serbia, account had to be taken of the fact that this person is the debtor in the customs transit procedure. As such, it argues, the obligation of total liability for the customs debt and other State claims in relation to the goods falls to SISTEM LUX; accordingly, it can be penalised if it fails to meet those obligations. Seen in that light, the confiscation of the items involved in the offence imposed in the administrative penalty order issued by the Burgas Regional Customs Directorate in accordance with Article 233(6) of the Customs Law is, it submits, a penalty for non-compliance with customs legislation within the meaning of Article 198(1)(a) of Regulation (EU) No 952/2013 – a measure necessary where one of the obligations laid down in the customs legislation concerning the introduction of non-EU goods into the customs territory of the European Union has not been fulfilled. Therefore, it argues, rather than Article 42 of Regulation (EU) No 952/2013 running counter to Article 233(6) of the Customs Law, the latter is a proportionate and dissuasive measure against non-fulfilment of obligations arising from customs legislation. It further submits that Article 2 of Framework Decision 2005/212, cited in the third question, means that each Member State must take the necessary measures to enable it to confiscate instrumentalities from criminal offences carrying a custodial sentence of more than one year. It argues that the present case concerns administrative enforcement proceedings dealing with the offence of smuggling, which does not carry a custodial sentence and to which Framework Decision 2005/212 therefore does not apply. Nor, it posits, does the Framework Decision apply *a fortiori*, since its objective is to establish minimum standards for the confiscation of crime-related instrumentalities and proceeds. The Burgas Regional Customs Directorate is consequently of the opinion that the request for a preliminary ruling made to the Court of Justice does not relate to the present case, deems it therefore unfounded and considers that it should be rejected.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 34 It seems possible to the referring court that the national provision in Article 233(6) of the Customs Law runs counter to the provisions of EU law cited in the request for a preliminary ruling in the case where the assets to be confiscated belong to a person other than the offender or where the latter committed the administrative offence through negligence.
- 35 In the view of the court, the option provided for in Article 233(6) of the Customs Law of imposing the additional penalty of confiscation (removal of property into State ownership) of the items involved in the offence alongside a monetary penalty may result in a lack of proportionality between the administrative offence and the imposed penalty of confiscation (removal of property into State ownership) of the items involved in the offence as enshrined as a principle in Article 42(1) of Regulation (EU) No 952/2013, read in conjunction with Article 49(3) of the Charter. Moreover, the abovementioned provisions of national

law could be incompatible with the principle enshrined in Article 17(1) of the Charter that everyone has the right to freely use his or her lawfully acquired possessions and may be deprived of his or her possessions only in the public interest and subject to fair compensation being paid.

- 36 Where a corresponding penalty is to be imposed in connection with an breach of the obligation to declare goods in accordance with Article 233(1) of the Customs Law, as long as that act does not constitute a criminal offence, the additional penalty of confiscation (removal of property into State ownership) of the items involved in the offence, borne by the owner of the goods who is not the offender or by the offender where the offence was committed through negligence rather than intentionally, that confiscation must reflect the requirement enshrined in Article 42(1) of Regulation (EU) No 952/2013, read in conjunction with Article 49(3) of the Charter – which prohibits measures and proceedings in which the severity of penalties is disproportionate to the criminal or administrative offence.
- 37 Given the foregoing comments, it is possible, in the view of the referring court, that the provisions of national law in the Republic of Bulgaria are incompatible with EU law and that the penalties in Bulgarian law go beyond what is necessary to meet the obligations under Article 42 of Regulation (EU) No 952/2013 and to achieve the objectives pursued by that regulation.