

Case C-358/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

1 June 2022

Referring court:

Cour de cassation (France)

Date of the decision to refer:

25 May 2022

Appellant in cassation:

Bolloré logistics SA

Respondents in cassation:

Direction interrégionale des douanes et droits indirects de Caen

Recette régionale des douanes et droits indirects de Caen

Bolloré Ports de Cherbourg SAS

Facts and main proceedings

- 1 Bolloré logistics ('Bolloré') acted as guarantor for Bolloré Ports de Cherbourg ('BPC') under a general customs clearance bond taken out on 5 June 2008.
- 2 From 8 December 2011, BPC benefited from the customs warehousing procedure in respect of several tonnes of salt from Australia. On 8 February 2016, the customs administration informed BPC that it was ending this customs duty suspension regime and that it would be notified of the customs debt.
- 3 On 9 March 2016, the customs administration served on BPC a final decision establishing a customs debt and a payment notice. On 21 March 2016, it entered in the accounts the amount of that debt and sent BPC a recovery notice. On 21 March and 21 June 2016, it served on Bolloré, in its capacity as guarantor, two recovery notices for sums corresponding to the secured customs duties.

- 4 Having unsuccessfully challenged the recovery notices issued against them, BPC and Bolloré brought proceedings against the customs administration seeking annulment of those recovery notices and the negative decisions. By a judgment of 1 October 2018, the Tribunal de grande instance de Caen (Regional Court, Caen) dismissed the applications brought by the two companies, which lodged appeals.
- 5 In the case of BPC, the Cour d’appel de Caen (Court of Appeal, Caen), partially setting aside the judgment, annulled the recovery notice served on 21 March 2016 and dismissed all the customs administration’s claims against BPC. Having held that BPC had been able effectively to present its observations, it noted that, pursuant to Articles 217 and 221 of the Community Customs Code (‘CCC’) and Article 345 of the French Customs Code, in order to be recovered by means of a recovery notice, the duties must have been lawfully communicated to the debtor of the customs debt, which requires them first to have been entered in the accounts. In this case, in the absence of prior entry in the accounts, the Cour d’appel ruled that the communication of the duties to BPC was unlawful. Because the customs administration had not appealed in cassation against that judgment, the dismissal of its claims against BPC became irrevocable.
- 6 In the case of Bolloré, the Cour d’appel upheld the judgment. It ruled that the provisions of Article 221 of the CCC and those of Article 67A of the French Customs Code do not apply to the guarantor, but only to the debtor. It held that, by virtue of the accessory nature of the guarantee, the customs administration could not bring proceedings against Bolloré, as joint and several guarantor, before its debt was payable and that the contested duties, which were incurred as a result of the expiry of the customs warehousing procedure, had become payable in respect of Bolloré after the finding that BPC had failed to make payment within the prescribed period. The Cour d’appel concluded that Bolloré should be ordered to pay the customs duties guaranteed by it.
- 7 Bolloré appealed in cassation against that judgment.

The applicable legislation

- 8 The applicable legislation is that in force on the date on which the customs debt was incurred, 8 February 2016.

Relevant provisions of EU law

- 9 Article 195(1) of the CCC provides that the guarantor is to undertake in writing to pay jointly and severally with the debtor the secured amount of a customs debt which falls to be paid.
- 10 Article 213 of the CCC stipulates that where several persons are liable for payment of one customs debt, they are jointly and severally liable for such debt.

- 11 Under Article 217(1) of the CCC, ‘each and every amount of import duty or export duty resulting from a customs debt, hereinafter called “amount of duty”, shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts). ...’
- 12 Article 221 of the CCC provides: ‘1. As soon as it 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 debt 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. ...’

Relevant provisions of French law

- 13 Article 67A of the French Customs Code provides: ‘Subject to the provisions of Article 67B, before any decision is taken pursuant to the Community Customs Code and its implementing provisions, where it is unfavourable or where it gives notification of a customs debt as defined in Article 4(9) of the Community Customs Code, a document shall be sent or delivered to the person concerned by which the customs administration communicates the proposed decision, the grounds for the decision, a reference to the documents and information on which it will be based and the possibility for the person concerned to present his observations within a period of 30 days from service or delivery of that document.’
- 14 Article 345 of the French Customs Code provides: ‘Claims of any nature established and recovered by the customs administration shall be the object of a recovery notice, subject, where necessary, to the referral of the case to the ordinary courts.

...

The recovery notice shall indicate the operative event giving rise to the claim and its nature, its amount and the elements for its settlement. A copy shall be served on the person liable. ...’
- 15 Article 405 of the French Customs Code provides that ‘guarantors shall be required, in the same way as principals, to pay duty and tax, monetary penalties and other sums owed by persons liable guaranteed by them’.

The essential arguments of the parties

- 16 Bolloreé relies on three pleas in law. The Cour de cassation (Court of Cassation) examines the first and third pleas in law.

First plea in law

- 17 In a first plea in law, Bolloreé complains that the judgment orders it to pay a sum in respect of its guarantee of the customs duties owed by BPC, when ‘the guarantor which secures the payment of the customs debt may be sued only if the customs duties are payable in respect of the principal; having held that the customs duties had not been entered in the accounts in respect of BPC (the principal), that the recovery notice issued against BPC had to be annulled and having dismissed all the customs administration’s claims against BPC, the Cour d’appel was not able to order Bolloreé to make payment as guarantor without infringing Article 405 of the French Customs Code, Article 88 of the CCC and Article 2288 of the Code civil (Civil Code).’
- 18 For its part, the customs administration asserts that the security provided for in Article 225 of the CCC may take the form inter alia of a guarantee as part of a ‘general customs clearance bond’, which is governed in domestic law by the Ministerial Decree of 19 October 2006. The guarantor is then jointly and severally liable with the principal for payment of duty and tax owed by the principal. In order for proceedings to be brought against the guarantor, it is sufficient that, in accordance with Article 195 of the CCC, the duty and tax have fallen to be paid, regardless of the fact that the amount of duty owed by the principal has not been entered in the accounts in accordance with Article 217 of the CCC prior to the communication of the debt to the principal pursuant to Article 221(1) of the CCC.
- 19 The customs administration further submits that the entry in the accounts of the customs debt is merely an accounting rule which allows the monitoring bodies of the European Union to ensure the proper accounting of customs claims collected by each of the Member States, in so far as they are transferred to the Community budget, and that although, by virtue of the accessory nature of the guarantee, proceedings could be brought against Bolloreé in its capacity as guarantor only if the customs debt was payable in respect of BPC, the fact that the debt was payable was not called into question by the absence of prior entry in the accounts.
- 20 The Public Prosecutor’s Office claims that in the light of Articles 221 and 222 of the CCC, even if the customs debt exists and is therefore owed, the customs administration cannot demand payment from the debtor when it has not communicated to the debtor the amount of duty which it has entered in the accounts; it is therefore the lawful communication to the debtor of the amount of duty owed in respect of the customs debt that makes the debt payable in respect of the debtor and triggers its payment obligation. Given that, by virtue of the accessory nature of the guarantee, proceedings may be brought against the guarantor for payment of customs duty only if the customs claim is payable in

respect of the debtor, the Public Prosecutor's Office claims that the first plea in law is well founded. It nevertheless considers that its analysis is not manifestly conclusive and therefore asks the Cour de cassation to request a preliminary ruling from the Court of Justice on the interpretation of the CCC.

Third plea in law

- 21 In a third plea in law, Bolloré asserts that the formality of the prior establishment of the claim and the implementation of the *inter partes* procedure, as provided for by the French Customs Code, must apply both to the debtor of the customs debt and to the guarantor.
- 22 For its part, the customs administration maintains that Articles 67A to 67C of the French Customs Code do not apply to the guarantor because Article 67D of that Code provides that those articles do not apply to recovery notices served pursuant to Article 345 of the French Customs Code. It infers that the prior delivery of the document provided for in Article 67A of the French Customs Code applies only to the principal debtor and not to the guarantor.

Reasons for the reference for a preliminary ruling

The first plea in law

- 23 The Cour de cassation considers that the first plea in law raises questions as to whether the customs debt is payable.
- 24 According to the national case-law developed on the basis of Article 2313 of the Civil Code, the guarantor may raise against the creditor pleas inherent in the debt in order to evade its liability, but it may not raise against it pleas which are purely personal to the principal debtor.
- 25 However, in so far as the Court of Justice has ruled that Article 221(1) of the CCC does not apply to the guarantor (judgment of 20 May 2021, *BTA Baltic Insurance Company*, C-230/20, not published, EU:C:2021:410, paragraph 35), the Cour de cassation asks whether the unlawfulness of the communication of duties to the debtor, in the absence of prior entry in the accounts, which prohibits their recovery from the debtor, constitutes a plea which is personal to the debtor, within the meaning of the national case-law, which the guarantor cannot raise.
- 26 Such an analysis presupposes, however, that the question whether the customs debt is payable is assessed differently depending on whether its recovery is sought from the debtor or from the guarantor: with regard to the debtor, the debt would be payable only in the case of lawful communication of the duties, the lawfulness of such communication requiring prior entry of the duties in the accounts; with regard to the guarantor, the debt would be payable as soon as the duties have been

entered in the accounts, regardless of the fact that they have not been lawfully communicated to the debtor.

- 27 The Cour de cassation doubts whether this analysis is consistent with Article 195(1) of the CCC, under which the guarantor is to undertake in writing to pay jointly and severally with the debtor the secured amount of a customs debt which falls to be paid. In paragraphs 36 and 37 of the judgment of 20 May 2021, *BTA Baltic Insurance Company* (C-230/20, not published, EU:C:2021:410), the Court of Justice ruled that ‘the very purpose of the guarantee is to provide security in case of non-payment of the customs debt by the debtor, that is, by definition, subsequent to the communication of the amount of customs duty to the debtor’ and that ‘the application to the guarantor of the limitation period established for communication of the amount of the customs debt to the debtor would render the security provided by the guarantor ineffective, since if such communication was made to the debtor on the last day of that period, the guarantor would itself be released from its security obligation at the end of that same day’ [unofficial translations]. This reasoning can be interpreted as meaning that, in view of the very nature of the customs guarantee, the customs debt is payable in respect of the guarantor only if it payable in respect of the debtor. Furthermore, in the judgment of 15 May 2003, *Préservatrice foncière TIARD* (C-266/01, EU:C:2003:282, paragraphs 28 and 29), the Court ruled that the obligation, assumed by the guarantor, to guarantee the performance of the principal obligation imposed on the debtor ‘is accessory, in the sense that, first, the creditor cannot bring proceedings against the guarantor unless the debt covered by the guarantor is payable and, second, the obligation assumed by the guarantor cannot be more extensive than that of the principal debtor’.
- 28 Accordingly, the Cour de cassation is inclined to the view that the customs debt is payable in respect of the guarantor only if it payable in respect of the debtor.
- 29 It notes, however, that the Court of Justice has not expressly interpreted the concept of ‘customs debt which falls to be paid’ in Article 195 of the CCC. In the judgment of 20 May 2021, *BTA Baltic Insurance Company* (C-230/20, not published, EU:C:2021:410), a question was not referred to the Court concerning the interpretation of this concept. In the judgment of 15 May 2003, *Préservatrice foncière TIARD* (C-266/01, EU:C:2003:282), the Court was asked about the interpretation of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention).
- 30 Given the importance of the answer to the question raised by the first plea in law for the uniform application of the CCC, since the customs guarantor plays a key role in the effective recovery of customs duty in all the Member States, and in so far as the correct interpretation of EU law is not so obvious as to leave no scope for any reasonable doubt within the meaning of the judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 21), the Cour de cassation considers that it must request a preliminary ruling from the Court of Justice on the interpretation of Articles 195, 217 and 221 of the CCC.

The third plea in law

- 31 The Court of Justice has ruled that observance of the rights of the defence is a fundamental principle of European Union law, in which the right to be heard in all proceedings is inherent. In accordance with that principle, which applies where the authorities are minded to adopt a measure which will adversely affect an individual, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision (judgments of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraphs 33, 36 and 37; of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraphs 81 and 82; and of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraphs 28 and 30). The Court states that the purpose of that rule is to enable the person concerned, in order to ensure that he is in fact protected, 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, thereby enabling the competent authority effectively to take into account all relevant information.
- 32 These principles have been enshrined in national law. Article 67A of the French Customs Code requires inter alia that, before any decision is taken pursuant to the Community Customs Code and its implementing provisions, where it gives notification of a customs debt, the customs administration must send or deliver to the person concerned a document by which the customs administration communicates the proposed decision, the grounds for the decision, a reference to the documents and information on which it will be based and the possibility for the person concerned to present his observations within a period of 30 days from service or delivery of that document.
- 33 As there is thus an *inter partes* phase before the notification of the customs debt to the debtor, the fact that the service of a recovery notice under Article 345 of the French Customs Code does not give rise to a new *inter partes* phase where the customs debt is not paid within the prescribed period cannot infringe the rights of the debtor of the customs debt.
- 34 With regard to the customs guarantor, on the other hand, in accordance with the case-law of the Court of Justice, the customs administration is not obliged to communicate to it the amount of duty. Therefore, where the customs administration sends a recovery notice to the guarantor in the event that the debtor of the customs debt fails to make payment within the prescribed period, that document may be, as in the present case, the first to be served on the guarantor.
- 35 Consequently, the Cour de cassation asks whether the rights of defence of the guarantor are affected by the fact that under Article 67D of the French Customs Code there is no *inter partes* phase before the service of a recovery notice pursuant to Article 345 of that Code. It cannot find in the case-law of the Court of

Justice the elements which would enable it to answer this question with certainty, in the light of the need to balance this requirement with the obligation on the national authority to use all available means, in respect of both the principal debtor and the guarantor, to secure payment of the duties, or regarding the very principle of such a requirement in respect of the guarantor where it is established that the debtor of the customs debt was itself able to exercise its rights of defence. A second question should therefore be referred to the Court of Justice for a preliminary ruling.

The questions referred for a preliminary ruling

- 36 The Cour de cassation therefore refers the following questions to the Court of Justice of the European Union for a preliminary ruling:

‘1. Must Articles 195, 217 and 221 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, be interpreted as meaning that the customs administration may not demand payment of a customs debt from the joint and several guarantor when the duties have not been lawfully communicated to the debtor?’

2(a) Does observance of the rights of the defence, including the right to present observations before any measure adversely affecting a person, which is a fundamental principle of EU law, mean that where, in the case of non-payment of the customs debt by the debtor within the prescribed period, its recovery is sought from the guarantor, the customs administration must first place the guarantor in a position in which it can effectively make known its views as regards the information on which the customs administration intends to base its decision to enforce payment?’

(b) Is the fact that the debtor of the customs debt has itself been placed in a position in which it can effectively make known its views before the communication of the duties relevant to the answer to Question 2(a)?

(c) If Question 2(a) is answered in the affirmative, what is the decision adversely affecting the guarantor before which there must be an *inter partes* phase: the decision of the customs administration to enter the duties in the accounts and to notify them to the debtor of the customs debt or the decision to enforce payment from the guarantor?’