

Case C-506/23

Request for a preliminary ruling

Date lodged:

8 August 2023

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

16 December 2022

Appellant/applicant at first instance:

Network One Distribution SRL

Respondents/defendants at first instance:

Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice București

Agenția Națională de Administrare Fiscală – Direcția Generală de Administrare a Marilor Contribuabili

Autoritatea Vamală Română – Direcția Regională Vamală București

Ministerul Finanțelor – Direcția Generală de Soluționare a Contestațiilor

[...]

[...]

[...]

CURTEA DE APEL BUCUREȘTI (Court of Appeal, Bucharest, Romania)

SECȚIA A IX-A CONTENCIOS ADMINISTRATIV ȘI FISCAL

(Ninth Division for Administrative and Tax Matters)

[...]

ORDER

Public hearing on 16 December 2022

[...]

On the appeal brought by the appellant/applicant at first instance, NETWORK ONE DISTRIBUTION SRL, against the judgment at first instance in civil matters No 2224/06.04.2021 and Order of 10.03.2021 of the Tribunalul București, Secția a IX-A contencios administrativ și fiscal (Regional Court, Bucharest, Ninth Division for Administrative and Tax Matters, Romania), against the respondents/defendants at first instance, the AGENȚIA NAȚIONALĂ DE ADMINISTRARE FISCALĂ – DIRECȚIA GENERALĂ REGIONALĂ A FINANTELOR PUBLICE BUCUREȘTI (National Agency of Tax Administration – Regional Directorate-General of Public Finances, Bucharest, Romania), the AGENȚIA NAȚIONALĂ DE ADMINISTRARE FISCALĂ – DIRECȚIA GENERALĂ DE ADMINISTRARE A MARILOR CONTRIBUABILI (National Agency of Tax Administration – Directorate-General for the Administration of Large-scale Taxpayers, Romania), the AUTORITATEA VAMALĂ ROMÂNĂ (Romanian Customs Authority) through the DIRECȚIA REGIONALĂ VAMALĂ BUCUREȘTI (Regional Customs Directorate, Bucharest, Romania) and the MINISTERUL FINANTELOR – DIRECȚIA GENERALĂ DE SOLUȚIONARE A CONTESTAȚIILOR (Ministry of Finance – Directorate-General for the Settlement of Complaints, Romania), in a dispute concerning a complaint against an administrative tax decision.

The hearing was held in public on 24 November 2022, at which the Court [of Appeal, Bucharest] (also “the referring court”), which required time to give judgment, postponed its delivery until 8 December 2022 and 16 December 2022, and made the following decision:

COURT [OF APPEAL, BUCHAREST]

Following the deliberation in the present dispute, states the following:

Facts

- 1 SC NETWORK ONE DISTRIBUTION SRL (“the applicant”) is a commercial company registered for VAT in Romania. During the period 18.03.2016-28.09.2017, the applicant imported into Romania goods (bicycles, electric bicycles and parts thereof) and submitted to the Romanian customs authorities customs declarations for release for free circulation of those goods, registered on 30.03.2016, for the import operation in respect of which the consignor was EXTRON CO. LTD, registered on 03.05.2017, 24.05.2017, 22.06.2017 and 28.06.2017, for the import operations in which the consignor was AEC Growth CO. LTD, and registered on 26.07.2017 and 28.09.2017, for the import operations in respect of which the consignor was TP Thailand LTD. The applicant declared to the Romanian customs authorities that Thailand was the country of origin of the goods it was importing.

- 2 On 30.07.2018, the Direcția Generală Regională a Finanțelor Publice București – Direcția Regională Vamală București (Regional Directorate-General of Public Finances, Bucharest – Regional Customs Directorate, Bucharest, Romania) ('Bucharest Regional Customs Directorate') carried out a customs control on the actual origin of the goods imported by the applicant and concluded that those goods originated in the People's Republic of China.
- 3 The Bucharest Regional Customs Directorate drew up a control report in respect of the applicant [...] [of] 25.09.2019 ('the control report') and [issued] the decision for the regularisation of the situation relating to the additional obligations established in the context of the customs control [...] [of] 25.09.2019 (the 'regularisation decision'). By those acts, the Bucharest Regional Customs Directorate decided, inter alia, that the applicant should pay an anti-dumping duty of 1 739 090 Romanian lei (RON) (approximately EUR 366 896) on the basis of Council Regulation (EU) No 502/2013 of 29 May 2013 amending Implementing Regulation (EU) No 990/2011 imposing a definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China following an interim review pursuant to Article 11(3) of Regulation (EC) No 1225/2009.
- 4 In addition, the customs authorities decided that the applicant should also pay ancillary tax liabilities, namely default interest in respect of anti-dumping duty totalling RON 183 209 (approximately EUR 38 652), established on the basis of Article 114 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, as well as periodic penalty payments totalling RON 158 312 (approximately EUR 33 399), established on the basis of Article 176 of the Codul de procedură fiscală (Romanian Tax Procedure Code), of 0.01% for each day of arrears. Those ancillary tax [liabilities] were set as follows:
 - for the 30.03.2016 operation, as regards the anti-dumping duty, the customs authorities set interest on arrears on the basis of the [Union] Customs Code for the period 31.03.2016-25.09.2019 (1 274 days arrears) at RON 43 050 and, for the same period, also set periodic penalty payments on the basis of the Romanian Tax Procedure Code of RON 38 431;
 - for the 3.05.2017 operation, as regards the anti-dumping duty, the customs authorities set interest on arrears on the basis of the [Union] Customs Code for the period 4.05.2017-25.09.2019 (875 days' arrears) at RON 31 654 and, for the same period, also set periodic penalty payments on the basis of the Romanian Tax Procedure Code of RON 27 229;
 - for the 24.05.2017 operation, as regards the anti-dumping duty, the customs authorities set interest on arrears on the basis of the [Union Customs Code] for the period 25.05.2017-25.09.2019 (854 days' arrears) at RON 40 290 and, for the same period, also set periodic penalty payments on the basis of the Romanian Tax Procedure Code of RON 34 559;

- for the 22.06.2017 operation, as regards the anti-dumping duty, the customs authorities set interest on arrears on the basis of the [Union] Customs Code for the period 23.06.2017-25.09.2019 (825 days’ arrears) at RON 18 166 and, for the same period, also set periodic penalty payments on the basis of the Romanian Tax Procedure Code of RON 15 517;
 - for the 28.06.2017 import operation, as regards the anti-dumping duty, the customs authorities set interest on arrears on the basis of the [Union] Customs Code for the period 29.06.2017-25.09.2019 (819 days’ arrears) at RON 32 693 and, for the same period, also set periodic penalty payments on the basis of the Romanian Tax Procedure Code of RON 27 901;
 - for the 26.07.2017 operation, as regards the anti-dumping duty, the customs authorities set interest on arrears on the basis of the [Union] Customs Code for the period 27.07.2017-25.09.2019 (791 days’ arrears) at RON 9 563 and, for the same period, also set periodic penalty payments on the basis of the Romanian Tax Procedure Code of RON 8 126;
 - for the 28.09.2017 operation, as regards the anti-dumping duty, the customs authorities set interest on arrears on the basis of the [Union] Customs Code for the period 29.09.2017-25.09.2019 (727 days’ arrears) at RON 7 794 and, for the same period, also set periodic penalty payments on the basis of the Romanian Tax Procedure Code of RON 6 550.
- 5 On 7.10.2019, the applicant paid the anti-dumping duty and all of the penalties.
 - 6 The applicant lodged a tax complaint against the inspection report and the regularisation decision. On 25.06.2020, the Direcția Generală de Administrare a Marilor Contribuabili – Serviciul soluționare contestații (Directorate-General for the Administration of Large-scale Taxpayers – Settlement of Complaints Service, Romania) (‘the Directorate-General for the Administration of Large-scale Taxpayers’) adopted Decision No 67 (‘the administrative decision on the tax complaint’) by which it rejected the applicant’s complaint as regards the anti-dumping duty and the ancillary tax liabilities relating to that duty.
 - 7 On 7.12.2020, the applicant brought an action before the Tribunalul București (Regional Court, Bucharest), in which it sought, inter alia, the annulment of the regularisation decision and of the administrative decision on the tax complaint as regards the anti-dumping duty and the ancillary tax liabilities.
 - 8 The applicant claims that Article 114 of the [Union] Customs Code unified the interest and penalties into a single quantum, namely the rate applied by the [Romanian] national central bank to its main refinancing operations, on the first day of the month in which the due date falls, increased by two percentage points. In that context, the applicant disputes the application, to the same principal tax liability, which is additional in nature, of the penalties provided for by the Romanian Tax Procedure Code and submits that that practice infringes

Article 114 of the [Union] Customs Code, since it is an unjustified doubling of penalties.

- 9 The Regional Court, Bucharest, delivered judgment No 2224/6.04.2021 dismissing the applicant's application.
- 10 The applicant [...] brought an appeal against that judgment of the Regional Court, Bucharest. The appeal was registered with the Curtea de Apel București, Secția a IX-a de contencios administrativ și fiscal (Court of Appeal, Bucharest, Ninth Division for Administrative and Tax Matters, Romania). In the course of the proceedings, the respondents, the Regional Customs Directorate, Bucharest and the Directorate-General for the Administration of Large-scale Taxpayers, underwent a reorganisation, and the referring court joined, alongside those respondents, as respondents the Romanian Customs Authority – Regional Customs Directorate, Bucharest and the Ministry of Finance – Directorate-General for the Settlement of Complaints. Those latter respondents had not adopted any tax measures in respect of the applicant.

II. Legal context

A. National law

a) Legea nr. 207/2015 privind Codul de procedură fiscală¹ (Law No 207/2015 establishing the Tax Procedure Code)

Article 1, points 20 and 33

20. Interest – ancillary tax liability which represents the equivalent of the damage caused to the holder of a principal claim as a result of non-payment by the expiry of the period, by the debtor, of the principal tax liabilities;

33. Periodic penalty payments – ancillary tax liability which represents the penalty for non-payment by the expiry of the period, by the debtor, of the principal tax liabilities.

Article 173(1)

In the event of non-payment by the expiry of the period, by the debtor, of the principal tax liabilities, after that period interest and periodic penalty payments shall be due.

Article 174(1) [and] (5)

¹ Published in *Monitorul Oficial al României* (Official Journal of Romania) No 547 of 23 July 2015.

(1) Interest shall be calculated for each day of arrears, starting from the day immediately following the expiry of the period and up to – and including – the date on which the amount due is paid.

(5) The interest rate shall be 0.02% for each day of arrears.

Article 176(1) to (3)

(1) Periodic penalty payments shall be calculated for each day of arrears, starting from the day immediately following the expiry of the period and up to – and including – the date on which the amount due is paid. The provisions of Article 174(2) to (4) and [those] of Article 175 shall apply accordingly.

(2) The rate of periodic penalty payments shall be 0.01% for each day of arrears.

(3) The periodic penalty payment does not remove the obligation to pay interest.

European Union law

Council Regulation (EU) No 502/2013 of 29 May 2013 amending Implementing Regulation (EU) No 990/2011 imposing a definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China following an interim review pursuant to Article 11(3) of Regulation (EC) No 1225/2009²

Article 1(1) and (4)

1. A definitive anti-dumping duty is hereby imposed on imports of bicycles and other cycles (including delivery tricycles, but excluding unicycles), not motorised, falling within CN codes 8712 00 30 and ex 8712 00 70 (TARIC codes 8712007091 and 8712007099), originating in the Peoples' Republic of China.

4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code³

Article 114(1) and (2)

[Interest on arrears]

² OJ 2013 L 153, p. 17, 5.6.2013.

³ OJ 2013 L 269, p. 1, 10.10.2013.

1. Interest on arrears shall be charged on the amount of import or export duty from the date of expiry of the prescribed period until the date of payment.

For a Member State whose currency is the euro, the rate of interest on arrears shall be equal to the interest rate as published in the Official Journal of the European Union, C series, which the European Central Bank applied to its main refinancing operations, on the first day of the month in which the due date fell, increased by two percentage points.

For a Member State whose currency is not the euro, the rate of interest on arrears shall be equal to the rate applied on the first day of the month in question by the National Central Bank for its main refinancing operations, increased by two percentage points, or, for a Member State for which the National Central Bank rate is not available, the most equivalent rate applied on the first day of the month in question on the Member State's money market, increased by two percentage points.

2. Where the customs debt is incurred on the basis of Article 79 or 82, or where the notification of the customs debt results from a post-release control, interest on arrears shall be charged over and above the amount of import or export duty, from the date on which the customs debt was incurred until the date of its notification.

The rate of interest on arrears shall be set in accordance with paragraph 1.

III. Need to make a request for a preliminary ruling

- 11 Article 267 TFEU instituted direct cooperation between the Court of Justice of the European Union (CJEU) and the national courts (Case C-2/06 *Kempter*, paragraph 41; [and] Case C-136/12 *Consiglio Nazionale dei Geologi*, paragraph 28). A national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to bring before the Court a question concerning the interpretation of EU law that has been raised before it, unless it finds that that question is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union (Case C-561/19 *Consorzio Italian Management and Catania Multiservizi*, paragraph 66).
- 12 The Curtea de Apel București (Court of Appeal, Bucharest) is the court of last instance ruling on the file [...] relating to the applicant, its decision being final. The referring court considers that the provisions of Article 114 of the Union Customs Code are relevant, because they formed the foundation of [Union] law on the basis of which the customs administration imposed on the applicant penalties relating to the anti-dumping duty. Those provisions have not been interpreted by

the Court, and the correct interpretation of the provisions at issue is not without reasonable doubt.

- 13 Even though the customs administration opposed the reference to the CJEU for a preliminary ruling, the referring court considers that the reference to the Court is admissible and necessary. The reference is admissible because the question referred [for a preliminary ruling] concerns the interpretation of [EU] law. The reference to the [EU] court is necessary having regard to the following reasons:
- 14 It is apparent from the Romanian Tax Procedure Code that, because of the non-payment of tax debts at the expiry of the period, taxpayers must pay interest on arrears and periodic penalties. The Romanian Tax Procedure Code also applies in the customs field, supplementing it. According to the Romanian Tax Procedure Code, both interest and penalties are calculated in accordance with the same algorithm, that is to say, for each day of arrears, from the day following the expiry of the period and until the date on which the amount due is paid. The purpose of interest and penalties is different. The tax interest guarantees compensation for the damage caused to the budget as a result of the non-payment at the expiry of the period by the debtor of the principal tax obligations. The periodic penalty payment is the penalty for the non-payment at the expiry of the period by the debtor of the principal tax obligations. The different purpose of interest and penalties may justify applying them cumulatively.
- 15 In the main proceedings, the customs administration, in so far as it considered that the purpose of the penalties laid down in Article 114 of the [Union] Customs Code is to provide compensation for the damage, whereas the purpose of the penalties provided by the Romanian Tax Procedure Code is to penalise the applicant, and since it considered that those penalties could be cumulated, found the applicant liable, as regards the anti-dumping duty, for both categories of penalties. All penalties were applied for the same period, as provided for in Article 114 of the [Union] Customs Code, that is to say [the period] between the date of release for free circulation of the goods subject to import duties and the date of customs control. The element of differentiation consists in the amount of the penalties, since that amount is calculated differently for each category of penalty, either according to the [Union] Customs Code, or according to the Romanian Tax Procedure Code.
- 16 According to settled case-law, where EU legislation does not specifically provide any penalty for an infringement or refers for that purpose to national legislation, the Member States are required to take all the measures necessary to guarantee the application and effectiveness of EU law. For that purpose, while the choice of penalty remains within their discretion, they must ensure in particular that infringements of EU law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (see Case C-36/94 *Siesse* [1995] ECR I-3573, paragraph 20; Case C-91/02 *Hannl-Hofstetter* [2003] ECR I-12077,

paragraph 17; Case C-213/99 *De Andrade* [2000] ECR I-11083, paragraph 20; and judgment of 7 October 2010, C-382/09, *StilsMet*, EU:C:2010:596, paragraph 44).

- 17 The referring court notes that Regulation (EU) No 502/2013 makes no provision for penalties in the event of a breach of [its] provisions. On the other hand, Article 1(4) of that regulation provides that, unless otherwise specified, the rules in force concerning customs duties are to apply.
- 18 In the main proceedings, the provisions on customs duties, namely Article 114 of Regulation (EU) No 952/2013, were the basis for the recovery of the damage by the customs authorities; periodic penalty payments were collected from the applicant, on the basis of those provisions, in addition to the amount of the anti-dumping duty, from the date on which the customs debt was incurred until the date of notification of the latter. That fact seems to differentiate the main proceedings from the case-law referred to in paragraph 16, which concerns the absence of any penalty under [EU] law.
- 19 As regards the penalties provided for in the [Union] Customs Code, according to the case-law on Article 232(1)(b) of (the no longer in force) Regulation (EEC) No 2913/92 establishing the Community Customs Code:
 - the collection of interest on arrears is conditional upon failure to pay the duty by the deadline set and is intended to offset the consequences arising as a result of the payment not having been made by the deadline set and, in particular, to prevent the person who owes the customs debt from taking unfair advantage of the fact that the amounts owing by way of customs debt remain available to him beyond the deadline set for its settlement. It is against that background that Article 232(1)(b) of the Customs Code provides that the rate of interest on arrears cannot be lower than the rate of credit interest (judgment of 31 March 2011, C-546/09, *Aurubis*, EU:C:2011:199, paragraphs 28 [and] 29);
 - interest on arrears in relation to customs duties to be recovered may be charged, on the basis of Article 232(1)(b), only in respect of the period falling after the deadline for payment of the customs debt; that provision neither prevents the financial losses sustained by the customs authorities, nor compensates for the advantages accruing to traders because of the delay, brought about by the behaviour of those traders, before the customs debt is entered in the accounts for the purposes of the Customs Code and before the amount of the debt, or the debtor owing the debt, is determined (judgment in *Aurubis*, paragraph 32).
- 20 The referring court considers that that case-law is not sufficient to clarify the legal issue, in particular whether Article 114 of the [Union] Customs Code unified the interest and penalties into a single quantum, namely the rate applied by the [Romanian] national central bank to its main refinancing operations, on the first day of the month in which the due date falls, increased by two percentage points. In other words, the referring court cannot infer from the case-law whether Article 114 of the [Union] Customs Code established the application of periodic

penalty payments solely for the purpose of compensation for the damage or also for the purpose of penalties.

- 21 The referring court has doubts as to whether an administrative practice, such as that described in paragraph 15, relating to the additional application of the penalties laid down by the Romanian Tax Procedure Code, would have the effect of preventing the financial losses sustained by the customs authorities or compensating for the advantages accruing to traders because of the delay, brought about by the behaviour of those traders, before the customs debt is entered in the accounts for the purposes of the Customs Code and before the amount of the debt, or the debtor owing the debt, is determined (*a contrario*, judgment in *Aurubis*, paragraph 32).
- 22 Similarly, the referring court has doubts as to whether, without the application of the penalties provided for by the Romanian Tax Procedure Code, in conjunction with those applied on the basis of Article 114 of the [Union] Customs Code, the applicant's wrongful conduct would not ultimately have any consequences for the applicant itself (*a contrario*, paragraph 46 of the judgment in Case C-382/09 *StilsMet*).
- 23 For those reasons, the referring court, on the basis of point (a) of the [first paragraph] of Article 267 TFEU, requests the Court of Justice of the European Union to rule on the question set out below in the operative part of [this] decision:

FOR THOSE REASONS,
PROVIDES AS FOLLOWS

On the basis of point (a) of the [first paragraph] of Article 267 of the Treaty on the Functioning of the European Union, requests the Court of Justice of the European Union to rule on the following question: [...] *Must EU law and, in particular, Article 114 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code be interpreted as precluding an administrative practice which, in circumstances such as those in the main proceedings, in respect of the amount of anti-dumping duty, imposes on a taxpayer, in addition to the periodic penalty payments provided for in Article 114 of the regulation, a periodic penalty payment provided for separately in national legislation (Codul de procedură fiscal (Romanian Tax Procedure Code))?*

[...] [national procedural provisions]

[...] [communications to the parties]

[...]

[signatures]

[...]

WORKING DOCUMENT