Right of guaranteeing associations to contest customs claim to enforce Tir Guarantees

Bundesverband GÏterkraftverkehr und Logistik eV v Bundesrepublik Deutschland
Case C-78/01, ECJ, 23 September 2003

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RIGHT OF GUARANTEEING ASSOCIATIONS TO CONTEST CUSTOMS CLAIM TO ENFORCE TIR GUARANTEES

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The facts

A British freight company, Freight Forwarding Services (FFS), was the holder of a TIR carnet[2] cleared at the German customs office of departure (the Hauptzollamt) for a consignment of 12.5 million cigarettes from Switzerland, to be transported to Morocco via the customs office of destination of Algericas in Spain. The TIR carnet was guaranteed by Bundesverband Güterkraftverkehr und Logistik eV (BGL), a guaranteeing association based in Germany. It in turn was entitled to be indemnified by the International Road Transport Union (IRU), the organisation based in Geneva which prints and distributes TIR carnets. IRU is in turn insured by Préservatrice Foncière Tiard SA (PFA), a member of a larger group of trade insurers.

The latest date for presenting the goods at Algericas was 28 March 1994. That did not happen, as was confirmed by the Spanish customs office in Algericas. The original TIR carnet was subsequently found and sent to the IRU, but it bore a forged stamp of the Spanish customs authorities at the office of destination with the date 28 March 1994. The full amount assessed as lost came to DM 3,197,500. The guaranteeing association is liable to a limit of DM 334,132.75 under the guarantee. The amounts in question were not, by any standard, small.

The German customs authorities then proceeded to claim on the guarantee against BGL for the unlawful diversion of the goods. BGL argued that the consignment had been unloaded in Spain and offered to produce witnesses to support that claim. The German regional court[3] held that if that was indeed proved, it would be the Spanish government, not the German government, to whom the duties were owed. On appeal to the Bundesgerichtshof, the appellate court, it was queried as to whether BGL was barred from adducing such evidence given the time limits in the TIR Convention.

The law

In the EU, the Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) 1975 is implemented by Commission Regulation (EEC) 2454/93 (OJ 1993 L253, p1). In the present dispute, two provisions are in focus – Articles 454 and 455. Article 454 provides:

> (2) Where it is found that, in the course of or in connection with a transport operation carried out under cover of a TIR carnet . . . an offence or irregularity has been committed in a particular Member State, the recovery of duties and other charges which may be payable shall be effected by that Member State . . .
>
> (3) Where it is not possible to determine in which territory the offence or irregularity was committed, such offence or irregularity shall be deemed to have been committed in the Member State where it was detected unless, within the period laid down in Article 455(1), proof of the regularity of the operation

[2] The TIR (Transports Internationaux Routiers) carnet is a customs transit document used for an international transit operation of goods. Each TIR carnet has a unique reference number. A TIR carnet may have 4, 6, 14, or 20 vouchers, as one pair of vouchers is used per country. The number of vouchers indicates the number of countries that can be transited, including the countries of departures and destinations, under cover of this type of carnet (for example a 14-voucher carnet may be used for a TIR transport through up to 7 countries). Each individual TIR carnet can be used for one TIR transport. Once the TIR operation has been terminated at the customs office of destination of the goods, the driver is handed back the TIR carnet duly endorsed by the customs authorities of destination and may proceed with the goods' delivery. The TIR carnet is returned to the International Road Transport Union (IRU) for control and archiving (source: http://www.iru.org/TIR/Carnet.E.html).

[3] Landgericht Frankfurt am Main.

> or of the place where the offence or irregularity was actually committed is furnished to the satisfaction of the customs authorities.
>
> Where no such proof is furnished and the said offence or irregularity is thus deemed to have been committed in the Member State in which it was detected, the duties and other charges relating to the goods concerned shall be levied by that Member State . . .
>
> If the Member State where the said offence or irregularity was actually committed is subsequently determined, the duties and other charges . . . to which the goods are liable in that Member State shall be returned to it by the Member State which had originally recovered them . . .

Article 455 provides that proof of the regularity of the operation shall be furnished within the period referred to in Article 11 of the TIR Convention.

Article 11(1) of the TIR Convention provides that:

> where a TIR carnet has not been discharged or has been discharged conditionally, the competent authorities shall not have the right to claim payment of the sums . . . from the guaranteeing associations unless, within a period of one year from the date of acceptance of the TIR carnet by those authorities, they have notified the association in writing of the non-discharge of conditional discharge.

In the case of a certificate having been obtained in an improper or fraudulent manner, Article 11(2) prescribes a two-year time limit. Article 11 further states that any claim for payment by the customs authorities should be made to the guaranteeing associations within three months after the date on which the association was informed that the carnet had not been properly discharged.

The issues

The guaranteeing association argued that as it had evidence the goods were in fact diverted in Spain, it should not be for the German authorities to enforce the guarantee. Additionally it claimed that it had a right to adduce such evidence before the German court. This is despite the fact that Article 454 is silent on whether a guaranteeing association (as against the customs authorities of another Member State or the duty payer) may be permitted to furnish evidence that the goods were in fact diverted in a Member State other than the country where the customs office of departure is situated.

The problem for the guaranteeing association was the limitation period laid down in the Regulation. Article 454 of the Regulation refers to Article 455 on the issue of time limits; Article 455 in turn refers to Article 11 of the TIR Convention.[4] That article, as paraphrased above, provides for three different time limits (one year, two years and three months), none of which was directly applicable to the issue of proof to be furnished by the guaranteeing association. Does it therefore mean, as contended by BGL, that no time limits will apply?

The problem for the German authorities was a question of their court structure, as much as it was an issue of uncertainty in EU law. In Germany, a dispute over the claim for unpaid duties (including taxes) has to be brought before the finance court but the enforcement of a guarantee contract (even one for the assurance of tax payments) would be a matter for the civil court. That means that two different courts could have the same question to decide, and the likelihood of conflicting findings is not remote.

Another difficult question was whether under Article 454 the German authorities – as the authorities who discovered the irregularity or offence – were under a duty to seek the administrative assistance of another Member State and investigate the suspicions and allegations made by the guaranteeing association.

These are clearly difficult questions for the German court to resolve – the provision of EU law was obviously problematic and equivocal. The TIR Convention offers little guidance – it provides for the

[4] On the meaning of the time limit referred to in Regulation 2454/93 and Article 11, TIR Convention, see Joined Cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797 (especially, para 44).

framework for guaranteed transit but leaves national governments to legislate on the implementation and administration of the system. The matter of international transit is a complicated one. Not only is it governed by three different regimes – the Convention, EU law and domestic law – but there is also the expressed intent that these should be applied in a manner complimentary to each other in the international transit of goods.

The two questions formulated by the Bundesgerichtshof for reference[5] to the European Court of Justice were:

- whether the time limit for furnishing proof referred to in Article 454(3), Regulation 2454/93 applies where a Member State is bringing proceedings against the guaranteeing association, and the association wishes to prove that the offence or irregularity was in fact committed in another Member State;
- whether Articles 454 and 455 require the Member State which detects an offence or irregularity to seek assistance from another Member State in investigating the place where the offence or irregularity was actually committed and the identity of the customs debtors.

Analysis

The ECJ acknowledged that there were problems with the provisions in Articles 454 and 455. The uncertainty was caused by the failure of the articles to address precisely from where evidence might come and whether there are time limits to a third party (or guaranteeing association) furnishing evidence to rebut the presumption in Article 454(3).

The German authorities' argument that the law should not allow the guaranteeing association from adducing evidence on the same matter in two different courts is in effect a policy oriented argument, but the policy was one that relates to the internal administrative or structural difficulties of the German legal system. The jurisprudence of the ECJ is clear that such a defence is no defence in EU law – no Member State may plead that its internal workings make it too difficult to comply with EU law.[6] The ECJ however did not address this point directly; instead, it decided to take a rights-based approach. It held as a fundamental principle of Community law that the right to a fair hearing requires 'any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on the basis of which the penalty is imposed and can produce any evidence relevant to his defence'.[7] That approach to the issue is, it is submitted, too sweeping.

Two comments might be made.

First, the guarantor is not in the position of the tax payer – as the ECJ itself confirmed recently (Case C-266/01 *Préservatrice foncière Tiard SA v Staat der Nederlanden* (judgment of 15 May 2003)), the relationship between the Member State and the guaranteeing association was purely contractual. The ECJ cannot have it both ways. In that case, it held that there was no revenue law element to the relationship which would have excluded it from the operation of the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2000.[8] Here, it deemed that the relationship was one directly related to the imposition of taxes, that is to say, a customs matter. It should also be pointed out that the UNECE[9] Handbook on the TIR Convention (although not legally binding) clearly envisages the guarantee issued by the guaranteeing association as an ordinary contract of guarantee to be enforceable under ordinary national law.[10]

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[5] Using the preliminary ruling procedure as provided for in Article 234 EC.

[6] See for example Case C-276/98 *Commission v Portugal* [2001] ECR I-1699, para 20, and Case C-114/02 *Commission v France* [2000] para 11.

[7] Para 52; see also Case C-135/92 *Fiskano v Commission* [1994] ECR I-2885; Case C-142/87 *Belgium v Commission (Tubemeuse)* [1990] ECR I-959.

[8] See also Chuah 'Compulsory guarantees under the TIR Convention' JIML [2003] 9 392.

[9] United Nations Economic Commission for Europe.

[10] Para 0.11-3 states 'if a guaranteeing association is asked . . . to pay the sums referred to in Article 8 . . . and fails to do so within the time limit of three months . . . the competent authorities may rely on national regulations in requiring payment of the sums in

Secondly, the ECJ failed to recognise that in international commercial practice traders and their associations can issue demand guarantees where payment is due simply on demand or the *assertion* of breach by the principal debtor. No evidence to the contrary is admissible. The right to produce evidence is not absolute in the relationship between a guarantor and the beneficiary. The question that should have been answered, but was left unattended, was whether the *specific* terms of the TIR Convention and/or Regulation 2454/93 entitled the guaranteeing association to furnish evidence to show that the goods covered by the TIR carnet were diverted outside German territory. The traverse by the ECJ into *general* principles of law should really only be relied on as a secondary device. It is regrettable that the ECJ did not see fit to deal directly and explicitly with the scope of Article 454 (and the regulation) in this context.

Having decided that BGL had a right to furnish evidence, the ECJ had to deal with the question of time limits. There should naturally be time limits as a matter of policy. International trade and transit of goods depends on certainty: without a peremptory or mandatory time limit, traders and customs authorities can have no closure to the duties underpinned by the TRI carnet. The court accepted that there must be time limits but the question was as to their length. It seems incontrovertible that Articles 454 and 455 do not provide for time limits in this context. The law is in pressing need of improvement; a fact recognised by the Commission and the court in the present case. Nonetheless, that does not help the court in dealing with the issue of time limits. It held that given the silence or deficiency in the regulation, the principle of legal certainty should apply. The general principle of Community law, as far as the court was concerned, required that 'rules imposing charges on a taxpayer be clear and precise so that he may be able to ascertain unequivocally what his rights and obligations are and take steps accordingly'.[11] It is obvious that the ECJ saw the guaranteeing association very much in the position of a taxpayer – again, this conflicts with the approach taken in *Préservatrice Foncière Tiard SA* above. Under these circumstances, it held that the period to be taken as applicable should be the one which is most favourable to BGL out of those which may be identified by the various references in Articles 454 and 455 – namely, two years running from the date of the claim of payment made to BGL.

The ECJ must come to terms with the nature of the relationship between the guaranteeing associations and customs authorities – is it contractual or one between taxpayer and tax collector? The current state of affairs is unsatisfactory. In matters on jurisdiction, the ECJ considered the relationship to be one of contract but in the context of the substantive rights and obligations, it prefers to treat it as one of taxation.

On the final question of the Member State's duty to investigate, the ECJ held that Articles 454 and 455 do not require a Member State which detects an offence or irregularity in connection with the TIR carnet operations to investigate the actual place where the offence or irregularity was committed and the identity of the customs debtors (whether through seeking the assistance of another Member State or not). The burden of proof in the regulation and the TIR Convention seems very much to be on the transport operators as principal debtors. The customs authorities' role is only secondary – indeed, it might be argued that the fact the legal provisions provide for presumptions to apply in the absence of proof (thereby not requiring the customs authorities to seek out relevant evidence) in Article 454(3) supports this. The customs authorities' duty does not extend beyond making the notification of the irregularity, offence or non-discharge of the carnet to the guaranteeing association and the principal debtor. That is to be commended. Customs authorities are legally bound to deal with irregularities and offences: they are not responsible for carrying out investigations for the benefit and interest of the customs debtors. It is not a rule of revenue law that the authorities should help prove that the taxpayer is exempt from a certain tax. That burden must fall on the debtors themselves.

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question because what is involved in such cases is a failure to carry out a contract of guarantee entered into by the guaranteeing association under national law' (http://www.unece.org/trans/bcf/tir/handbook/english/newtirhand/60.pdf).

[11] Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931; Joined Cases 92/87 and 93/87 *Commission v France and UK* [1989] ECR 405; Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431.