

**Case C-427/20**

**Request for a preliminary ruling**

**Date lodged:**

10 September 2020

**Referring court:**

Finanzgericht Hamburg (Germany)

**Date of the decision to refer:**

1 September 2020

**Applicant:**

Flexi Montagetechnik GmbH & Co. KG

**Defendant:**

Hauptzollamt Kiel

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**Finanzgericht Hamburg (Finance Court, Hamburg, Germany)**

**Order**

In the case of

Flexi Montagetechnik GmbH & Co. KG

[...] Bargtheide

- applicant -

[...]

v

Hauptzollamt Kiel (Principal Customs Office, Kiel, Germany)

[...] Kiel

- defendant -

concerning

interest payable on reimbursed customs duties

on 1 September 2020 the Joint Chamber of the Finance Court, Hamburg, having jurisdiction for the *Länder* Free and Hanseatic City of Hamburg, Lower Saxony and Schleswig-Holstein, Fourth Chamber [...]

[...] **[Or. 2]**

**ordered as follows:**

I. The proceedings are stayed pending the preliminary ruling of the Court of Justice of the European Union.

II. The following question on the interpretation of acts of the institutions of the European Union is referred to the Court of Justice of the European Union for a preliminary ruling:

Is there an infringement of EU law, which is a condition for entitlement to interest under EU law as developed by the Court of Justice of the European Union, where a Member State authority imposes a duty in breach of legally valid provisions of EU law and a Member State court makes a finding of that infringement of EU law?

[...] **[Or. 3]**

**Facts of the case:**

- 1 The parties are in dispute about the payment of interest on duties that were recovered by the defendant from the applicant, but in respect of which the applicant was subsequently reimbursed following a legally binding court ruling.
- 2 The applicant exported bolt hooks from Taiwan, which are used in the production of dog leads. Following an external customs examination, the defendant concluded that, in contrast to the registration by the applicant, those goods should not be treated as goods classified under heading 8308 (2.7% rate of customs duty) but as goods classified under heading 7907 (5% rate of customs duty) of the combined nomenclature (CN). The defendant issued two notices for the recovery of customs duties, which the applicant paid.
- 3 By judgment of 20 June 2017 [...] the Bundesfinanzhof (Federal Finance Court, Germany) set aside the two recovery notices on the ground that the recovery of the import duties was unlawful because the goods should have been classified under CN heading 8308; the Federal Finance Court had not made a request to the Court of Justice of the European Union for a preliminary ruling.
- 4 The defendant reimbursed the applicant for the import duties it had paid; however, it rejected the applicant's claim for the payment of interest on the import duties paid for the period from the date of payment until reimbursement.
- 5 Following an unsuccessful objection procedure, the applicant brought a legal action. In the course of the judicial proceedings, the defendant granted the applicant interest relating to the judicial proceedings for the period from the bringing of the action against the recovery notices (September 2014) until the reimbursement of the import duties paid by the applicant (October 2017). In that regard, the legal dispute is settled. The parties are still in dispute as to whether the applicant can also claim interest for the period after the payment of the import duties unlawfully levied [Or. 4] (March 2014) until the bringing of the action against the recovery notices (September 2014). [Or. 5]

**Grounds:**

- 6 [...]
- 7 The Joint Chamber of the Finance Court stayed the proceedings [...] and, pursuant to the second subparagraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU), referred the question set out in the operative part of this order to the Court of Justice of the European Union (CJEU) for a preliminary ruling, because the legal assessment of the case is uncertain.

**I. Legal context**

- 8 The following provisions are relevant for the resolution of the dispute:

## 1. National law

- 9 **Abgabenordnung** (Tax Code, Germany) in the version published on 1 October 2002 (*Bundesgesetzblatt I* p. 3866):

### **Paragraph 1: Scope**

(1) This Code shall apply to all taxes, including the tax rebates governed by German federal law or the law of the European Union in so far as these are administered by the revenue authorities of the Federation or of the *Länder*. It may only be applied subject to the law of the European Union.

...

(3) Subject to the law of the European Union, the provisions of this Code shall apply *mutatis mutandis* to ancillary tax payments ...

### **Paragraph 3: Taxes, ancillary tax payments**

(1) ‘Taxes’ shall mean payments of money, other than payments made in consideration of the performance of a particular activity, which are collected by a public body for the purpose of raising revenue and imposed by the body on all persons to whom the characteristics on which the law bases liability for payment apply; the raising of revenue may be a secondary objective.

...

(3) Import and export duties pursuant to Article 5 numbers 20 and 21 of the European Union Customs Code shall be taxes within the meaning of this Code ...

(4) ‘Ancillary tax payments’ are ... interest pursuant to Paragraphs 233 to 237, ... interest on import and export duties pursuant to Article 5 numbers 20 and 21 of the European Union Customs Code ... **[Or. 6]**

### **Paragraph 37: Claims arising from the tax debtor-creditor relationship**

(1) Claims arising from the tax debtor-creditor relationship shall be the tax claim, the tax rebate claim, the liability claim, the claim to an ancillary tax payment, the refund claim pursuant to subsection (2) and the tax refund claims set out in individual tax laws.

(2) Where a tax, a tax rebate, a liability amount or an ancillary tax payment was paid or repaid in the absence of legal grounds, the person on whose account the payment was made shall be entitled to a refund from the recipient of the amount paid or repaid ...

### **Paragraph 233: General**

Interest shall be charged on claims arising from the tax debtor-creditor relationship (Paragraph 37) only to the extent that this is legally prescribed ...

**Paragraph 236: Interest on refund amounts ordered in legal proceedings**

(1) Subject to the provisions of subsection (3) below, where an assessed tax is reduced or a tax rebate granted by final and binding judicial ruling or as a result of such a ruling, interest shall accrue on the amount to be refunded or rebated from the date proceedings commence to the date of payment ...

**2. Applicable provisions of EU law**

- 10 (a) **Customs Code (CC):** Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302 p. 1, as subsequently amended).

**Article 241**

Repayment by the competent authorities of amounts of import duties or export duties or of credit interest or interest on arrears collected on payment of such duties shall not give rise to the payment of interest by those authorities. However, interest shall be paid:

- where a decision to grant a request for repayment is not implemented within three months of the date of adoption of that decision,
- where national provisions so stipulate.

...

- 11 (b) **European Union Customs Code (UCC):** Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the European Union Customs Code (OJ 2013 L 269, p. 1, as subsequently amended):

**Article 116**

(1) Subject to the conditions laid down in this Section, amounts of import or export duty shall be repaid or remitted on any of the following grounds:

- (a) overcharged amounts of import or export duty;

... [Or. 7]

(6) Repayment shall not give rise to the payment of interest by the customs authorities concerned.

...

## II. The relevance of the question referred

- 12 It is uncertain from the point of view of EU law whether the applicant is also entitled to interest for the period from the payment of the import duties unlawfully imposed by the defendant until the bringing of its action against the recovery notices. There is no legal basis in national law for such entitlement to interest. The applicant cannot rely on Paragraph 236(1) of the Tax Code, which is the only provision that might apply in this context, given that this provision only provides for a claim for interest for the period from the bringing of the action until the reimbursement of the import duties; moreover, the defendant has already fulfilled that claim of the applicant. Rather, the success of the action brought by the applicant depends on whether it can base its claim for interest on the entitlement to interest under EU law developed by the CJEU. However, the Joint Chamber of the Finance Court is uncertain as to whether the conditions for entitlement to interest derived by the CJEU from the principle of effectiveness under EU law are also met in a situation – such as that in the present case – in which a Member State authority imposes a duty in breach of legally valid provisions of EU law and a Member State court finds that EU law has been infringed.

## III. Legal considerations of the Chamber

- 13 The CJEU recently ruled, by judgment of 18 January 2017 (*Wortmann*, C-365/15, operative part), that, where duties are levied in breach of EU law, there is an obligation on Member States, arising from EU law, to pay to individuals with a right to reimbursement the corresponding interest which runs from the date of payment by those individuals of the duties reimbursed. That judgment of the Court of Justice follows a series of decisions in which the Court of Justice required Member States under EU law not only to reimburse duties unduly levied but also to reimburse individuals for losses suffered by the unavailability of sums of money (see CJEU, judgment of 27 September 2012, *Zuckerfabrik Jülich and Others*, [Or. 8] Joined Cases C-113/10, C-147/10 and C-234/10, paragraph 65; judgment of 18 April 2013, *Irimie*, C-565/11, paragraph 28). The common feature of the above CJEU judgments is that the Court of Justice has declared invalid or annulled the legal basis for the imposition of the duty under national or EU law on account of an infringement of EU law; in each case the reimbursement of the duties was based on a legislative error on the part of the Member State or the European Union.
- 14 By contrast, the present case is characterised by the fact that the reimbursement of import duties was not based on a legislative error on the part of the EU or the Member State, but on the fact that the Member State authority had erred in law in the way it applied the legally valid EU secondary legislation – namely it applied it incorrectly; in other words, the reimbursement of the import duties was based on an error in the application of the law.

- 15 In its request to the Court of Justice for a preliminary ruling of 26 August 2020 [...], the Joint Chamber of the Finance Court stated that it believed that the main idea behind the case-law of the CJEU, according to which Member States are obliged to reimburse with interest any duties levied in breach of EU law, is that if the Court of Justice declares invalid or annuls acts of the European Union or of the Member States on the grounds of an infringement of EU law, the effects of such acts should generally cease to apply (*argumentum e contrario* the second subparagraph of Article 264 TFEU). As a result of that consideration, individuals are entitled not only to reimbursement of the duties unduly levied but also to payment of the corresponding interest (see CJEU, judgment of 27 September 2012, *Zuckerfabrik Jülich and Others*, Joint Cases C-113/10, C-147/10 and C-234/10, paragraph 65; to that effect, CJEU, judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, paragraph 205). That is the only way of reinstating the situation which would have existed had the act implementing the EU regulation that was subsequently declared invalid or annulled, or the act implementing the Member State's tax law in breach of EU law, never been adopted (see, to that effect, Opinion of Advocate General Sanchez-Bordona, C-365/15, point 66). [Or. 9]
- 16 The main proceedings, however, seem not to involve a matter of restoring the full effectiveness of EU law, but of correcting an individual decision of a Member State authority that has incorrectly applied the relevant and legally valid EU secondary legislation in a specific case. The question whether and under what conditions the individual decision is corrected, however, is primarily a matter for national law, which in the specific case only grants the applicant entitlement to interest in the legal proceedings for the period from the bringing of the action against the unlawful imposition of duties until the reimbursement of the duties paid.
- 17 However, in *Littlewoods Retail and Others* (judgment of 19 July 2012, C-591/10), which concerned a case where a taxable person had overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation, the CJEU also held that Member States are obliged to repay with interest amounts of tax levied in breach of EU law (paragraph 26). In the main proceedings in *Littlewoods Retail and Others*, the infringement of EU law was neither based on a provision of national law nor a provision of EU law that was subsequently declared inapplicable or annulled by the Court of Justice. The infringement of EU law consisted in a taxable amount mistakenly being taken to be greater than it was (see Opinion of Advocate General Trstenjak of 12 January 2012 in Case C-591/10, point 6) and was also not established by the CJEU itself but was based solely on the findings of the Member State authority or Member State court. The CJEU also stressed in *Wortmann* that it is 'a matter for the referring court' to determine whether duties have been levied in breach of EU law (see judgment of 18 January 2017, *Wortmann*, C-365/15, paragraph 39). That statement could be another argument in favour of the position that there is an infringement of EU law, which is a condition for entitlement to interest under EU law as developed by the CJEU, where [Or. 10] the Member State authority

imposes the duty in breach of legally valid provisions of EU law and the national court makes a finding of that infringement of EU law.

- 18 What is more, the aspect frequently emphasised by the CJEU of compensating an individual for the pecuniary disadvantages suffered due to the lack of availability of funds (see CJEU, judgment of 27 September 2012, *Zuckerfabrik Jülich and Others*, Joined Cases C-113/10, C-147/10 and C-234/10, paragraph 65; judgment of 18 April 2013, *Irimie*, C-565/11, paragraph 21) applies equally to situations in which duties are unlawfully levied against an individual because the Member State authority misapplied EU law. It does not seem to make any difference to the person liable to pay the duty whether the duty was paid on the basis of a regulation or legal norm that breaches EU law or on the basis of – like here – a decision taken by customs authorities that is simply in breach of (EU) law because it was incorrect. In both situations, the individual does not have available the amount of money levied, which could have been used freely had the customs authorities applied EU law correctly.
- 19 The Joint Chamber also considered that the reason for awarding interest according to the case-law of the Court of Justice is probably also the prohibition of unjust enrichment (see Opinion of Advocate General Sharpston of 27 October 2011 in Joined Cases C-113/10, C-147/10 and C-234/20, *Zuckerfabrik Jülich and Others*, point 125). If the Member State imposes a levy on an economic operator, for which the Member State has no legal claim, the Member State is unduly enriched. Such undue enrichment, however, occurs regardless of the reason for which the unjustified increase in assets on the part of the Member State has occurred.
- 20 Lastly, the Joint Chamber considered that, in its judgment of 18 January 2017 (*Wortmann*, C-365/15), the CJEU pointed out scenarios in which the subsequent correction of duties initially imposed in the wrong amount does not trigger entitlement to interest (paragraph 29 et seq. of the judgment). Those scenarios, **[Or. 11]** however, have in common that the recalculation of the duties is based on subsequent information. In the main proceedings, however, the reimbursement of the duties was not due to subsequent factual information but due to the implementation of the court ruling of the Member State court, which had set aside the recovery notice issued by the Member State authority because that authority had incorrectly applied the relevant EU law.
- 21 In view of the uncertainties expressed above as to the interpretation of the relevant EU law, the Joint Chamber decided to refer the question set out in the operative part of this order to the CJEU for a preliminary ruling.

[...]