

Case C-362/20

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:

5 August 2020

Referring court:

Hof van beroep Antwerpen (Belgium)

Date of the decision to refer:

18 June 2020

Appellants:

Openbaar Ministerie

Federale Overheidsdienst Financiën

Respondents:

Profit Europe NV

Gosselin Forwarding Services NV

Subject of the action in the main proceedings

Criminal and tax proceedings brought against the respondents for breaches of customs legislation.

Subject and legal basis of the request for a preliminary ruling

Applicability of the anti-dumping duties referred to in Regulation No 1071/2012 and its Implementing Regulation No 430/2013 to threaded tube or pipe cast fittings, of spheroidal graphite cast iron, from China.

Legal basis: Article 267 TFEU

Question referred

Are threaded tube or pipe cast fittings, of spheroidal graphite cast iron, from China, subject to anti-dumping duties under Commission Regulation (EU) No 1071/2012 of 14 November 2012 imposing a provisional anti-dumping duty on imports of threaded tube or pipe cast fittings, of malleable cast iron, originating in the People's Republic of China and Thailand (OJ L 318 of 15.11.2012, pp. 10-27) and Council Implementing Regulation (EU) No 430/2013 of 13 May 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of threaded tube or pipe cast fittings, of malleable cast iron, originating in the People's Republic of China and Thailand and terminating the proceeding with regard to Indonesia (OJ L 129 of 14.05.2013, pp. 1-11), given the ruling of the Court of Justice of the European [Union], in its judgment of 12 July 2018 in Joined Cases C-397/17 and C-398/17, that tube or pipe cast fittings of spheroidal graphite cast iron are not tube or pipe cast fittings of malleable cast iron and that tube or pipe cast fittings of spheroidal graphite cast iron fall under a different subheading than tube or pipe cast fittings of malleable cast iron?

Provisions of Union law cited

Commission Regulation (EU) No 1071/2012 of 14 November 2012 imposing a provisional anti-dumping duty on imports of threaded tube or pipe cast fittings, of malleable cast iron, originating in the People's Republic of China and Thailand; in particular, recital 28

Council Implementing Regulation (EU) No 430/2013 of 13 May 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of threaded tube or pipe cast fittings, of malleable cast iron, originating in the People's Republic of China and Thailand and terminating the proceeding with regard to Indonesia; in particular, recital 13

Commission Implementing Regulation (EU) 2019/262 of 14 February 2019 amending Council Implementing Regulation (EU) No 430/2013; in particular, Articles 1 and 2

Explanatory Notes to the Combined Nomenclature of the European Union (OJ 2015 C 76, p. 1), as well as the notice concerning the amendment of those Explanatory Notes (OJ 2019 C 2, p. 2)

Article 267 TFEU

Court of Justice case-law cited

Judgment of 12 July 2018, *Profit Europe*, C-397/17 and C-398/17, EU:C:2018:564

Judgment of 2 April 2009, *Hauptzollamt Bremen*, C-134/08, EU:C:2009:229

Judgment of 24 November 2005, *Deutsches Milch-Kontor*, C-136/04, EU:C:2005:716

Judgment of 18 April 2013, *Steinel Vertrieb*, C-595/11, EU:C:2013:251

Provisions of national law cited

Articles 11, 12, 14, 24, 31 to 37 and 41 of the wet van 15 juni 1935 op het gebruik der talen in gerechtszaken (Law of 15 June 1935 on the use of languages in judicial proceedings)

Articles 162, 185, 190, 190b, 194, 195, 199, 200, 202, 203, 203a, 204, 210, 211 of the Wetboek van Strafvordering (Code of Criminal Procedure)

Articles 1, 2, 3, 7 of the Strafwetboek (Criminal Code)

Brief summary of the facts and the procedure in the main proceedings

General

- 1 Proceedings have been brought against Profit Europe NV ('the first respondent' or 'Profit Europe') and Gosselin Forwarding Services NV ('the second respondent' or 'Gosselin Forwarding Services'), as importer and declarant respectively, for the declaration under an incorrect tariff code and the designation of certain tube or pipe cast fittings manufactured from malleable cast iron, originating in the People's Republic of China, which are subject to anti-dumping duties, during the period from 19 November 2012 to 30 June 2015. This entailed 97 declarations, which evaded anti-dumping duties in the amount of EUR 651 954.11 (offence 1).
- 2 In addition, proceedings have been brought against both respondents for the declaration of incorrect customs values on 7 of those declarations, resulting in an underpayment of EUR 10 086 in import duties (offence 2).
- 3 By judgment of 28 March 2019, the rechtbank van eerste aanleg Antwerpen (Court of First Instance, Antwerp, Belgium) acquitted the first respondent of offences 1 and 2, and acquitted the second respondent of offence 1, but found it guilty of offence 2. The tax claim was declared unfounded.
- 4 On 16 April 2019, the Federale Overheidsdienst Financiën (administratie douane en accijnzen) (Federal Public Service Finance (General Administration of Customs and Excise); 'FOD Financiën') lodged an appeal against the aforementioned judgment with the hof van beroep Antwerpen (Court of Appeal, Antwerp, Belgium), the referring court. In addition, the FOD Financiën argues with respect to the proceedings that the rechtbank van eerste aanleg wrongly

refused to refer the question proposed at first instance for a preliminary ruling. With regard to the debt, the FOD Financiën argues that Profit Europe was wrongly acquitted of offences 1 and 2, and that Gosselin Forwarding Services was wrongly acquitted of offence 1, and was given an unduly light sentence for offence 2. It also argued that the tax claim was wrongly dismissed.

- 5 On appeal, the hof van beroep should rule on all the points raised by the FOD Financiën in the appeal. Moreover, it is common cause that Gosselin Forwarding Services is guilty of offence 2, as held by the first court.

Contextualising the dispute with a view to assessing its merits from a criminal-law perspective

- 6 As part of its assessment from a criminal-law perspective, the referring court outlines the customs law context of the dispute as follows.
- 7 Following the imposition by the European Commission, with effect from 16 November 2012 (by Regulation No 1071/2012), of a provisional anti-dumping duty on imports into the Union of threaded tube or pipe cast fittings, of malleable cast iron, originating in the People’s Republic of China and Thailand, a definitive anti-dumping duty on imports into the Union of those goods originating in the People’s Republic of China and in Thailand was imposed with effect from 15 May 2013 (by Implementing Regulation No 430/2013) and the proceeding with respect to Indonesia was terminated.
- 8 The goods concerned were defined in Implementing Regulation 430/2013 as ‘currently falling within CN code ex 7307 19 10 (TARIC code 7307 19 10 10)’ and were subject to an anti-dumping duty of 57,8% ad valorem for imports originating in China and 15,5% ad valorem for imports originating in Thailand.
- 9 Since the introduction of the anti-dumping duty, commodity codes 7307 11 (tube or pipe cast fittings, of cast iron) and 7307 11 00 (tube or pipe cast fittings, of non-malleable cast iron) suddenly appeared much more frequently than commodity code 7307 19 when imported into the Union and, more specifically, into Belgium.
- 10 It is common cause that the imported couplings and fittings from China are manufactured in accordance with ASTM standard A536, which relates to spheroidal graphite cast iron.
- 11 According to the FOD Financiën, which referred to the Explanatory Notes to that commodity code, the expression ‘malleable cast iron’ also includes spheroidal graphite cast iron (heading 7307 19 10).
- 12 Profit Europe was the most important Belgian importer of the aforementioned goods. It relied on Crosstainer NV as declarant. That customs agency was taken over by Gosselin Forwarding Services on 1 April 2016.

- 13 The import declarations for Profit Europe for the period from 2012 to June 2015 were checked. A review showed that tariffs were not applied uniformly to the imported goods.
- 14 Until 19 November 2012, all couplings and fittings were always declared as being made of malleable cast iron (TARIC code 7307 19 10 00).

From 20 December 2012 to 27 October 2014, the couplings and fittings were declared 71 times as being made of malleable cast iron (TARIC code 7307 1910 90) and 8 times as being made of non-malleable cast iron (TARIC code 7307 1110 00).
- 15 From 28 October 2014, the couplings and fittings were always declared as being made of non-malleable cast iron, while the goods concerned were still the same.
- 16 With regard to the application of tariffs, a distinction should be made between threaded couplings (on which anti-dumping duties are payable on import into the Union) and unthreaded couplings, on which no anti-dumping duties are payable.
- 17 During the period when the anti-dumping duties were in force, all couplings and fittings were declared as unthreaded, whereas in fact six types of threaded articles were imported.
- 18 On 14 March 2014, the Centrale Administratie der Douane en Accijnzen (Central Administration of Customs and Excise) delivered six Binding Tariff Informations (BTIs) to Profit Europe, citing commodity code 7307 11 11 00 (tube or pipe cast fittings, of non-malleable cast iron, threaded). Those BTIs were revoked as of 27 March 2015 by decision of 9 April 2015 but could continue to be used for a period of grace of six months (until 26 September 2015). In the decision revoking the BTIs, the commodity code 7307 19 10 and TARIC code 7307 19 10 90 were cited as the correct commodity code (tube or pipe cast fittings, of malleable cast iron, unthreaded).
- 19 On 30 March 2015, the Centrale Administratie der Douane en Accijnzen delivered 20 BTIs to Profit Europe, citing either commodity code 7307 19 10 00 (tube or pipe cast fittings, of malleable cast iron, threaded) or commodity code 7307 19 10 90 (tube or pipe cast fittings, of malleable cast iron, unthreaded).
- 20 In both decisions, reference was made to the CN Explanatory Notes to heading 7307 19 10 which state that the expression ‘malleable cast iron’ includes spheroidal graphite cast iron.
- 21 Reference was also made to the conclusion of the 140th meeting of the Customs Code Committee from 30 September 2014 to 3 October 2014 (item 4.24).
- 22 Profit Europe, however, was of the opinion that spheroidal graphite cast iron was not malleable cast iron and lodged a timely administrative appeal against both the

aforementioned decisions. Those administrative appeals were declared admissible but unfounded.

- 23 As a result, Profit Europe brought two cases before the rechtbank van eerste aanleg Brussel (Belgium) in order to have the decisions on the applicable tariff codes revised.
- 24 In those two cases, the rechtbank van eerste aanleg Brussel referred questions to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling on the interpretation of, in particular, subheading 7307 19 10 (and the CN Explanatory Notes thereto) and subheading 7307 11 00.
- 25 By judgment of 12 July 2018, *Profit Europe*, Joined Cases C-397/17 and C-398/17, EU:C:2018:564, the Court of Justice held inter alia that:
- The decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the corresponding section or chapter notes;
 - The Explanatory Notes are an important aid to the interpretation of the scope of the various tariff headings, despite the fact that they are not legally binding;
 - The opinions of the Customs Code Committee are not legally binding and cannot alter the scope of the CN.
- 26 Furthermore, the Court of Justice found that both the classification proposed by Profit Europe and the classification applied by the Belgian State were incorrect.
- According to the Court of Justice, subheading 7307 11 of the CN code should be interpreted as covering tube or pipe fittings of cast iron which is not deformable under compressive stress.
- According to the Court of Justice, subheading 7307 19 of the CN code should be interpreted as covering tube or pipe fittings of cast iron which is deformable under compressive stress.
- Spheroidal graphite cast iron and malleable cast iron differ in terms of their composition and their production, so that spheroidal graphite cast iron is a category distinct from malleable cast iron and therefore does not fall under CN code 7307 19 10.
- 27 The Court of Justice found that the Combined Nomenclature is to be interpreted as meaning that tube or pipe cast fittings, of spheroidal graphite cast iron, must be classified under subheading 7307 19 90 of the CN.
- 28 In view of the judgment of the Court of Justice, the Belgian State abandoned its defence in those proceedings.

- 29 On 4 January 2019, the Official Journal of the European Union published an amendment to the CN Explanatory Notes so that, in the explanatory note to subheading 7307 19 10 (Of malleable cast iron), the passage ‘The expression “malleable” includes spheroidal graphite cast iron’ under that heading was deleted, and the following new explanatory note to heading ‘7307 19 90 (Other)’ was inserted: ‘This subheading includes fittings of spheroidal graphite cast iron’.
- 30 As a result of the aforementioned judgment of the Court of Justice, Implementing Regulation 430/2013 was amended by Implementing Regulation 2019/262. In particular, CN code ex 7307 19 90 and the corresponding TARIC code were added to the codes of commodities subject to the definitive anti-dumping duty listed in Implementing Regulation 430/2013.

Main submissions of the parties to the main proceedings

- 31 The FOD Financiën argues that the foregoing does not answer the question of whether anti-dumping duties are payable, pursuant to Regulation No 1071/2012 and Implementing Regulation No 430/2013, on the threaded tube or pipe cast fittings, of spheroidal graphite cast iron, imported by Profit Europe,
- 32 According to the FOD Financiën, recital 28 of Regulation No 1071/2012, which is referred to in recital 13 of Implementing Regulation No 430/2013, indicates that anti-dumping duties should also be levied on goods made of malleable spheroidal graphite cast iron.
- 33 Recital 28 of Regulation 1071/2012 can be found under the heading ‘B. Product concerned and like product
- [...]
2. Like product’,
- and reads as follows:
- ‘The authorities of one of the Member States pointed out the fact that, according to the explanatory notes to the Combined Nomenclature, the expression “malleable” [cast iron] includes spheroidal graphite cast iron (identical to ductile cast iron). While no sales of threaded fittings made from ductile cast iron were reported by any interested party during the [investigation period], there is evidence that this is possible. As these fittings have the same basic physical characteristics as the threaded malleable fittings investigated, it is considered appropriate to clarify that ductile iron products are falling within the scope of the proceeding and the measures.’
- 34 All parties agree that the legal considerations within a regulation have no binding legal force.

35 The respondents both argue that a preamble cannot be used to broaden the scope of a regulation and that the points of a preamble cannot be validly relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording. In that regard, they refer to the judgments of the Court of Justice of 2 April 2009, *Hauptzollamt Bremen*, C-134/08, EU:C:2009:229, paragraph 16, and of 24 November 2005, *Deutsches Milch-Kontor*, C-136/04, EU:C:2005:716, paragraph 32, and the case-law cited therein.

36 They refer expressly to the reasoning of the Court of Justice in its judgment of 12 July 2011, *Profit Europe*, in Joined Cases C-397/17 and C-398/17, EU:C:2018:564, where it is stated in paragraph 32 that malleable cast iron is an intermediate product between lamellar graphite iron (grey iron) and cast steel, which can be easily cast and becomes tough and malleable after a suitable heat treatment during which the carbon partly disappears or changes its make-up and it finally deposits in the form of nodules.

Paragraph 45 of the aforementioned judgment expressly states that spheroidal graphite cast iron and malleable iron differ in terms of their composition and method of production.

37 Malleable cast iron constitutes a specific category within the standardised form of cast iron. This standard ‘cast iron’ comprises six large families of cast iron according to the structure of the graphite of which they are composed, including, more specifically, cast iron with graphite in the form of tempering coal, also called ‘malleable cast iron’ and designated by code EN-GJM.

The malleability of spheroidal graphite cast iron does not result from a suitable heat treatment because spheroidal graphite cast iron has a graphite form different from malleable cast iron, i.e. a nodular graphite form instead of tempering coal. Spheroidal graphite cast iron is referred to by code EN-GJS.

38 The respondents further argue that Implementing Regulation 2019/262 broadens the scope of Implementing Regulation No 430/2013 and therefore cannot be applied retroactively, and they refer in that regard to the judgment of the Court of Justice of 18 April 2013, *Steinel Vertrieb*, C-595/11, EU:C:2013:251.

Brief summary of the reasons for the referral

39 In view of the aforementioned lack of clarity regarding the scope of application of the anti-dumping measures of Implementing Regulation No. 430/2013, the hof van beroep Antwerpen is of the opinion that the abovementioned question should be referred for a preliminary ruling.