

Case C-391/19

Request for a preliminary ruling

Date lodged:

21 May 2019

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

10 May 2019

Appellant in the appeal on a point of law:

‘Unipack’ AD

Respondent in the appeal on a point of law:

Direktor na Teritorialna direktsia ‘Dunavska’ of the Agentsia ‘Mitnitsi’

The Public Prosecutor at the Varhovna administrativna prokuratura of the Republic of Bulgaria

ORDER

[...]

Sofia, 10 May 2019

Varhoven administrativen sad (Supreme Administrative Court) of the Republic of Bulgaria [...].

The case is based on Chapter XII of the Administrativnoprotsesualen kodeks (Code of administrative procedure, ‘the APK’).

It was initiated following the appeal on a point of law lodged by ‘Unipack’ AD against the judgment [...] of the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo), specifically against the part via which the company’s action against authorisation No BG004300/40/000225, which was granted by the head of the Mitnitsa Svishtov (Svishtov Customs Office), [...] for

the use of a special customs procedure, other than transit, specifically against point 16.13 of the annex to the authorisation, was dismissed.

[...] The appellant on a point of law requested that a request for a preliminary ruling be submitted to the Court of Justice of the European Union for the purpose of interpreting Article 172(2) of Commission Delegated Regulation (EU) 2015/2446 in order to clarify the meaning of the term ‘exceptional circumstances’.

The respondent in the appeal on a point of law [...] did not comment on the request for the submission of a request for a preliminary ruling.

[national proceedings] [...]

[...] The Chamber of the Supreme Administrative Court, composed of three members, found that a correct decision in the dispute hinges on the interpretation of a provision of EU law, specifically Article 172(2) of Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (‘the Delegated Regulation’).

The court ruled on the request for a preliminary ruling as follows:

[Or. 2] Parties to the main proceedings:

1. Appellant in the appeal on a point of law — ‘Unipack’ AD, having its registered office and administrative address in Pavlikeni, administrative district of Veliko Tarnovo [...];
2. Respondent in the appeal on a point of law — Direktor na Teritorialna direksia ‘Dunavska’ of the Agentsia ‘Mitnitsi’ (Director of the regional head office for the ‘Danube region’ of the Central Customs Office);
3. The Public Prosecutor at the Varhovna administrativna prokuratura (Supreme Administrative Public Prosecutor’s Office) of the Republic of Bulgaria.

Subject-matter of the main proceedings:

4. The subject of the appeal on a point of law pending before the Supreme Administrative Court is the judgment [...] of the Administrative Court of Veliko Tarnovo to the extent that it dismissed the action of ‘Unipack’ AD. That action was directed against authorisation No BG004300/40/000225, which was granted by the head of the Svishtov Customs Office, [...] for the use of a special customs procedure other than transit, specifically against point 16.13 of the annex to the authorisation, according to which the latter is to take effect on the date of acceptance of the application.

5. The administrative procedure before the customs office was initiated upon the application of 'Unipack' AD for authorisation of the use of a special customs procedure, other than transit, namely end use. [...] Pursuant to Article 211(2) of the Union Customs Code, the applicant requested that it be granted authorisation with retroactive effect from 13 July 2017 for the following product: 'Aluminium foil of a thickness of 0,007 mm, not backed, not further worked than rolled, in rolls, for other uses than the use of household foil'.
6. A Binding Tariff Information (BTI) decision regarding the tariff classification of the product 'Aluminium foil (aluminium alloy 8079), not backed, not further worked than rolled, of a thickness of 7 µm the product is laminated with paper, polyethylene, or polyester and is used for the manufacture of combined packaging as an outer or inner layer' was issued to 'Unipack' AD with effect from 28 September 2015 for a period of six years [...]. The product was classified under CN Code 7607 11 19 and TARIC code 7607 11 19 90 — 'Other'. This code was subsequently deleted by the amendments to the TARIC codes of 1 June 2016.
7. On 13 June 2017 and on 27 June 2017, 'Unipack' AD imported aluminium foil, not backed, declared as 'Other' under tariff code 7607 11 19 93, specifically 6 058 kg net and 23 160.80 kg net, from China. By decision [...] of the head of Svishtov Customs Office, the TARIC code specified in box 33 in the Single Administrative Document of 27 June 2017 for the part of the product described as 'aluminium foil of a thickness of not less than 0,007 mm and less than 0,008 mm, whether or not annealed' was corrected and a new TARIC code, 7607 11 19 30, was defined. Additional customs duties and value added tax were subsequently levied owing to the customs clearance of that product, which included anti-dumping duty of 30% on the basis of Implementing Regulation (EU) 2017/271.
8. Up until 30 September 2017 and 31 October 2017, respectively, the entire quantity of the aluminium foil from the imports of 13 June 2017 and 27 June 2017 was processed for the manufacture of combined [Or. 3] packaging and was not used as household foil.
9. In the period from 26 August 2015 to 18 May 2016, 7 µm aluminium foil under TARIC code 7607 11 19 90 was imported from Turkey and China. In the period from 15 September 2016 to 30 January 2017, 7 µm aluminium foil under TARIC code 7607 11 19 95 was imported from Turkey and China, and, in the period from 21 March 2017 to 7 June 2017, 7 µm aluminium foil under TARIC code 7607 11 19 93 was imported from Turkey.
10. The facts are not in dispute. It is disputed whether the requirements of Article 172(2) of Delegated Regulation (EU) 2015/2446 for retroactive effect of the authorisation for end use have been met.

Provisions cited:

National provisions

11. Article 170(2) APK

‘(2) If the refusal to adopt an administrative act is contested, the contesting party must demonstrate that the requirements for the adoption have been met.’

Provisions of EU law

12. Article 1(1) [and] (2) of Council Regulation (EC) No 925/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foil originating in Armenia, Brazil and the People’s Republic of China

‘Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of aluminium foil of a thickness of not less than 0,008 mm and not more than 0,018 mm, not backed, not further worked than rolled, in rolls of a width not exceeding 650 mm and of a weight exceeding 10 kg and currently falling within CN code ex 7607 11 19 (TARIC code 7607 11 19 10), originating in Armenia, Brazil and the People’s Republic of China (the ‘PRC’).

2. The rate of the definitive anti-dumping duty applicable to the net, free-at-Community-frontier price, before duty, of the products described in paragraph 1 and produced by the companies below shall be as follows: **[Or. 4]**

Country	Company	Anti-dumping duty rate	TARIC additional code
Armenia	Closed Joint Stock Company Rusal-Armenal	13.4%	A943
	All other companies	13.4%	A999
PR China	Alcoa (Shanghai) Aluminium Products Co., Ltd and Alcoa (Bohai) Aluminium Industries Co., Ltd	6.4%	A944
	Shandong Loften Aluminium Foil Co., Ltd	20.3%	A945
	Zhenjiang Dingsheng Aluminium Co., Ltd	24.2%	A946
	All other companies	30.0%	A999
Brazil	Companhia Brasileira de Alumínio	17.6%	A947
	All other companies	17.6%	A999

13. Articles 1 and 2 of Commission Implementing Regulation (EU) 2016/865 of 31 May 2016 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Implementing Regulation (EU) 2015/2384 on imports of certain aluminium foil originating in the People's Republic of China by imports of slightly modified certain aluminium foil from the People's Republic of China, and making such imports subject to registration

‘Article 1

An investigation is initiated pursuant to Article 13(3) of Regulation (EC) No 1225/2009, in order to determine if imports into the Union of:

— aluminium foil of a thickness of not less than 0,007 mm and less than 0,008 mm, not backed, not further worked than rolled, in rolls, of a weight exceeding 10 kg, regardless of the width, whether or not annealed, or

— aluminium foil of a thickness of not less than 0,008 mm and not more than 0,018 mm, not backed, not further worked than rolled, in rolls, of a weight exceeding 10 kg and of a width exceeding 650 mm, whether or not annealed, or

[Or. 5]— aluminium foil of a thickness of more than 0,018 mm and less than 0,021 mm, not backed, not further worked than rolled, in rolls, of a weight exceeding 10 kg, regardless of the width, whether or not annealed, or

— aluminium foil of a thickness of not less than 0,021 mm and not more than 0,045 mm, not backed, not further worked than rolled, in rolls, of a weight exceeding 10 kg, regardless of the width, whether or not annealed, when presented with at least two layers,

originating in the People's Republic of China, currently falling within CN codes ex 7607 11 19 (TARIC codes 7607 11 19 30, 7607 11 19 40 and 7607 11 19 50) and ex 7607 11 90 (TARIC codes 7607 11 90 45 and 7607 11 90 80) are circumventing the measures imposed by Implementing Regulation (EU) 2015/2384.

Article 2

The Customs authorities shall, pursuant to Article 13(3) and Article 14(5) of Regulation (EC) No 1225/2009, take the appropriate steps to register the imports into the Union identified in Article 1 of this Regulation.

Registration shall expire nine months following the date of entry into force of this Regulation.

The Commission, by regulation, may direct customs authorities to cease registration in respect of imports into the Union of products manufactured by producers having applied for an exemption from registration and having been found to fulfil the conditions for an exemption to be granted.

14. Article 1(1), (4) and (5) of Commission Implementing Regulation (EU) 2017/271 of 16 February 2017 extending the definitive anti-dumping duty imposed by Council Regulation (EC) No 925/2009 on imports of certain aluminium foil originating in the People's Republic of China to imports of slightly modified certain aluminium foil

‘Article 1

1. The definitive anti-dumping duty applicable to ‘all other companies’ imposed by Article 1(2) of Regulation (EC) No 925/2009 on imports of certain aluminium foil originating in the People's Republic of China is hereby extended to imports into the Union of:

— aluminium foil of a thickness of not less than 0,007 mm and less than 0,008 mm, regardless of the width of the rolls, whether or not annealed, currently falling within CN code ex 7607 11 19 (TARIC code 7607 11 19 30), or

[Or. 6]— aluminium foil of a thickness of not less than 0,008 mm and not more than 0,018 mm and in rolls of a width exceeding 650 mm, whether or not

annealed, currently falling within CN code ex 7607 11 19 (TARIC code 7607 11 19 40), or

— aluminium foil of a thickness of more than 0,018 mm and less than 0,021 mm, regardless of the width of the rolls, whether or not annealed, currently falling within CN code ex 7607 11 19 (TARIC code 7607 11 19 50), or

— aluminium foil of a thickness of not less than 0,021 mm and not more than 0,045 mm, when presented with at least two layers, regardless of the width of the rolls, whether or not annealed, currently falling within CN code ex 7607 11 90 (TARIC codes 7607 11 90 45 and 7607 11 90 80)

4. The product described in paragraph 1 shall be exempted from definitive anti-dumping duty if it is imported for other uses than the use of household foil. An exemption shall be subject to the conditions laid down in the relevant customs provisions of the Union on the end-use procedure, in particular Article 254 of the Union Customs Code.

5. The duty extended by paragraph 1 of this Article shall be collected on imports originating in the People's Republic of China, registered in accordance with Article 2 of Implementing Regulation (EU) 2016/865 and with Articles 13(3) and 14(5) of Regulation (EU) 2016/1036, with the exception of those produced by the companies listed in paragraph 2 of this Article and with the exemption of those which can demonstrate that they were used for other uses than household foil in accordance with paragraph 4.'

15. Article 254(1), Article 211(1)(a), Article 33(2) and Article 34(1)(a) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code ('the Union Customs Code')

'Article 254

End-use procedure

1. Under the end-use procedure, goods may be released for free circulation under a duty exemption or at a reduced rate of duty on account of their specific use.'

'Article 211

Authorisation

1. An authorisation from the customs authorities shall be required for the following:

(a) the use of the inward or outward processing procedure, the temporary admission procedure or the end-use procedure ...'

[Or. 7] 'Article 33

Decisions relating to binding information

2. BTI or BOI decisions* shall be binding, only in respect of the tariff classification or determination of the origin of goods:

(a) on the customs authorities, as against the holder of the decision, only in respect of goods for which customs formalities are completed after the date on which the decision takes effect;

(b) on the holder of the decision, as against the customs authorities, only with effect from the date on which he or she receives, or is deemed to have received, notification of the decision.'

'Article 34

Management of decisions relating to binding information

1. A BTI decision shall cease to be valid before the end of the period referred to in Article 33(3) where it no longer conforms to the law, as a result of either of the following:

(a) the adoption of an amendment to the nomenclatures referred to in points (a) and (b) of Article 56(2) ...'.

16. Article 172(1) and (2) of Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code

'Article 172

Retroactive effect

(Article 22(4) of the Code)

1. Where the customs authorities grant an authorisation with retroactive effect in accordance with Article 211(2) of the Code, the authorisation shall take effect at the earliest on the date of acceptance of the application.

2. In exceptional circumstances, the customs authorities may allow an authorisation referred to in paragraph 1 to take effect at the earliest one year, in case of goods covered by Annex 71-02 three months, before the date of acceptance of the application.'

[Or. 8] Case-law of the Court of Justice of the European Union

* Translator's note: decisions relating to binding tariff information and decisions relating to binding origin information.

17. At the time of the decision on the submission of a request for a preliminary ruling, a case-law review did not identify any judgments of the Court of Justice on the interpretation of Article 172(2) of the Delegated Regulation in preliminary ruling proceedings.

Arguments of the parties

18. 'Unipack' AD requested the submission of a request for a preliminary ruling.
19. The Director of the regional head office for the 'Danube region' of the Central Customs Office did not comment on the request.

Grounds for the order for reference

20. Council Regulation (EC) No 925/2009 (the original Regulation) imposed a definitive anti-dumping duty of 30% on imports of aluminium foil of a thickness of not less than 0,008 mm and not more than 0,018 mm, not backed, not further worked than rolled, in rolls of a width not exceeding 650 mm and of a weight exceeding 10 kg, from the People's Republic of China for all companies other than those specified in Article 1(2) of that regulation. In December 2015, the period of validity of the measures relating to the same product was extended by Commission Implementing Regulation (EU) 2015/2384. On the basis of Article 13 of the basic Regulation, the Commission initiated an investigation via Implementing Regulation (EU) 2016/865 ('Regulation initiating an investigation'). In accordance with Article 13(3) and Article 14(5) of the basic Regulation, the Commission directed the customs authorities, via the Regulation initiating an investigation, to make imports of the slightly modified product originating in the PRC subject to registration.
21. By way of Commission Implementing Regulation (EU) 2017/271, the definitive anti-dumping duty applicable to 'all other companies' and imposed by Article 1(2) of Regulation (EC) No 925/2009 on imports of certain aluminium foil originating in the People's Republic of China is extended to imports into the Union of aluminium foil of a thickness of not less than 0,007 mm and less than 0,008 mm, regardless of the width of the rolls, whether or not annealed, currently falling within CN code ex 7607 11 19 (TARIC code 7607 11 19 30) (see first indent of Article 1(1) of the regulation). The duty extended by Article 1(1) is to be collected on imports originating in the People's Republic of China, registered in accordance with Article 2 of the Regulation initiating an investigation (Article 1(5) of Implementing Regulation (EU) 2017/271). The product described in paragraph 1 is to be exempted from definitive anti-dumping duty if it is imported for other uses than the use of household foil. The exemption is to be applied under the end-use procedure conditions pursuant to Article 254 of the Union Customs Code.
22. Pursuant to Article 211(1)(a) of the Union Customs Code, authorisation from the customs authorities is required for the use of the end-use procedure. The authorisation contested before the Administrative Court of Veliko Tarnovo, by means of which **[Or. 9]** retroactive effect on the date of acceptance of the

application was granted pursuant to Article 172(1) of Commission Delegated Regulation (EU) 2015/2446 (point 16.13 of the authorisation), is such authorisation.

23. The appellant in the appeal on a point of law requested that the retroactive effect of the authorisation also be extended to cover the imports of 13 June 2017 and of 27 June 2017 made before the date of acceptance of the application (18 August 2017), which would be conceivable under the conditions set out in Article 172(2) of the Delegated Regulation, namely in exceptional circumstances. Pursuant to Article 170(2) APK, the applicant bears in the proceedings at first instance the burden of proving that the requirements for retroactive effect pursuant to Article 172(2) of the Delegated Regulation have been met.
24. The need for interpretation concerns the question of whether the change in the tariff classification of the products imported by the appellant in the appeal on a point of law and the resulting expiry of the validity of the BTI decision, the conduct of the customs authorities in accepting the customs declarations based on the BTI decision and the nature of the use of the products suggest exceptional circumstances within the meaning of the Delegated Regulation.
25. The adjudicating Chamber of the Supreme Administrative Court requests an interpretation of the aforementioned provision of the Delegated Regulation and therefore refers the following question for a preliminary ruling pursuant to Article 267 TFEU:

Does it constitute exceptional circumstances within the meaning of Article 172(2) of the Delegated Regulation, which would provide a basis for the granting of authorisation with retroactive effect pursuant to Article 211(2) of the Union Customs Code for the use of the end-use customs procedure pursuant to Article 254 of the Union Customs Code in relation to an import of products that took place before the date of acceptance of the application for authorisation and after the expiry of the validity of a BTI decision in favour of the holder of the procedure for those products due to an amendment to the Combined Nomenclature, if, in the period (of approximately 10 months) between the expiry of the validity of the BTI decision and the import for which the use of the end-use procedure was requested, several (nine) imports of products were made without the customs authorities having corrected the declared Combined Nomenclature code, and the goods were used for a purpose exempted from the anti-dumping duty?

[National proceedings] [...]

For the above reasons and on the basis of Article 267(1)(b) TFEU [national proceedings] [...] the Supreme Administrative Court, as a Chamber composed of three members of the 1st Section, makes the following

ORDER

[Or. 10] [national proceedings] [...]

The Court of Justice of the European Union is REQUESTED to answer the following question by way of a preliminary ruling pursuant to Article 267(1)(b) TFEU:

Does it constitute exceptional circumstances within the meaning of Article 172(2) of Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, which would provide a basis for the granting of authorisation with retroactive effect pursuant to Article 211(2) of the Union Customs Code for the use of the end-use customs procedure pursuant to Article 254 of the Union Customs Code in relation to an import of products that took place before the date of acceptance of the application for authorisation and after the expiry of the validity of a BTI decision in favour of the holder of the procedure for those products due to an amendment to the Combined Nomenclature, if, in the period (of approximately 10 months) between the expiry of the validity of the BTI decision and the import for which the use of the end-use procedure was requested, several (nine) imports of products were made without the customs authorities having corrected the declared Combined Nomenclature code, and the goods were used for a purpose exempted from the anti-dumping duty?

The proceedings are [...] STAYED pending the decision of the Court of Justice of the European Union.

[National proceedings] [...]