Case C-415/20

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:

7 September 2020

Referring court:

Finanzgericht Hamburg (Germany)

Date of the decision to refer:

20 August 2020

Applicant:

Gräfendorfer Geflügel- und Tiefkühlfeinkost Produktions GmbH

Defendant:

Hauptzollamt Hamburg

Subject matter of the main proceedings

Action for payment of interest on export refunds which should have been granted but were not granted and penalties which were unduly imposed

Subject matter and legal basis of the reference for a preliminary ruling

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Does the requirement under EU law for Member States to repay, with interest, duties levied in breach of EU law also apply where the reason for the repayment is not a finding by the Court of Justice of the European Union that a provision of EU law has been breached, but that the Court of Justice has interpreted a (sub)heading of the Combined Nomenclature?

2. Do the principles relating to a claim to interest established by the Court of Justice of the European Union also apply to the payment of export refunds refused by the Member State authority in breach of EU law?

Provisions of EU law relied on

Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11), recital 65, Articles 49 and 51

Provisions of national provisions relied on

Abgabenordnung (Tax Code), inter alia Paragraphs 37, 233 and 236

Gesetz zur Durchführung der gemeinsamen Marktorganisationen und der Direktzahlungen (Law implementing the common organisation of markets and direct payments; 'MOG'), Paragraphs 6 and 14

Succinct presentation of the facts and the main proceedings

1 The applicant exported poultry carcasses to third countries. In the period between January and June 2012 the defendant principal customs office refused to grant the applicant export refunds on the exported goods, noting that the exported products were not of fair marketable quality because the poultry carcasses had not been completely plucked or had too many giblets, and also imposed a penalty on the applicant on the ground that it had applied for a larger export refund than that to which it was entitled.

2 After the Finanzgericht Hamburg (Finance Court, Hamburg) had decided, on the basis of the interpretation which the Court of Justice placed on subheadings 0207 1210 and 0207 1290 of Annex I to Commission Regulation (EEC) No 3846/87 of 17 December 1987 establishing an agricultural product nomenclature for export refunds in its judgment of 24 November 2011, *Gebr. Stolle* (C-323/10 to C-326/10, EU:C:2011:774), that the presence of a small number of feathers was not prejudicial to a refund and that a total of up to four giblets from those listed therein could be added to the carcasses, the defendant principal customs office granted the applicant the export refunds applied for and refunded the penalties imposed.

3 The applicant then made an application to the defendant principal customs office for the grant of interest on the export refunds which should have been granted but were not granted in the past and the unduly imposed penalties, for the period of the withheld refunds and the penalties imposed, which the defendant principal customs office refused. The defendant principal customs office also dismissed the

objection lodged against the decision to refuse. The applicant therefore brought an action before the referring court.

Succinct presentation of the reasons for the request for a preliminary ruling

The first question referred: interest on penalties unduly paid and reimbursed

4 The applicant cannot base its claim for interest on provisions of national law. Under the first sentence of Article 233(1) of the Tax Code, interest is to be charged on claims arising from the tax debtor-creditor relationship, which also includes claims for refunds under the first sentence of Article 233(1) of the Tax Code, only to the extent to which this is legally prescribed. However, Paragraph 236 of the Tax Code to be considered in this respect is not applicable in the present case since it requires that the underlying amount of the refunds has been claimed, which is not so in this case. Only in that case can a claim for interest arise as from the time of *lis pendens*, that is to the time at which the action is served on the defendant. Nor does Regulation No 800/1999 contain any legal basis on which the applicant could found its claim.

5 However, according to the case-law of the Court of Justice, where (import) duties are reimbursed on the ground that they have been 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 (judgment of 18 January 2017, *Wortmann*, C-365/15, EU:C:2017:19, operative part). This decision of the Court of Justice follows a number of decisions in which the Court of Justice required the Member States under EU law not only to reimburse duties levied in breach of EU law but also to compensate individuals for losses constituted by the unavailability of sums of money (see inter alia judgment of 27 September 2012, *Zuckerfabrik Jülich*, C-113/10, C-147/10 and C-234/10, EU:C:2012:591, paragraph 65), with interest payable, in principle, in respect of the period between the date of the undue payment of the duty at issue and the date of repayment thereof (see judgment of 18 April 2013, *Irimie*, C-565/11, EU:C:2013:250, paragraph 28).

6 Penalties based on Article 51 Regulation No 800/1999 are not duties but fines. However, the referring court has no doubt that the case-law of the Court of Justice cited in the preceding paragraph is to be interpreted in a broad, general manner as meaning that the legal classification of a payment obligation under public law, which is imposed in breach of EU law by the authority of a Member State, as an (import) duty, tax or – as in the present case – penalty, is irrelevant.

7 On the other hand, it appears uncertain to the referring court, as regards EU law, whether the obligation on Member States described above exists also in cases where the reason for the repayment is not a breach of EU law by the legal basis, as found by the Court of Justice of the European Union, but – as in the present case –

(merely) an interpretation by the Court of Justice of a (sub)heading of the Combined Nomenclature.

8 However, in the view of the referring court, the aspect of compensation for the financial disadvantages suffered by the individual as a result of the unavailability of sums of money, repeatedly highlighted by the Court of Justice (see inter alia judgment of 18 April 2013, *Irimie*, C-565/11, EU:C:2013:250, paragraph 21) probably also holds true of the main proceedings. The applicant also sustained losses in that it did not have available to it in the form of current assets the financial resources which it had to raise to pay the unduly imposed penalties.

9 As regards the time at which an interpretation which, in the exercise of the jurisdiction conferred upon it by Article 267, the Court of Justice gives, has effect, it is settled case-law that such interpretation clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force and it thus follows that the rule as so interpreted may, and must, be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action (judgment of 22 October 1998, *IN.CO.GE.'90 and Others*, C-10/97 to C-22/97, EU:C:1998:498, paragraph 23). In the present case too, the interpretation which the Court of Justice gives to subheadings 0207 1210 and 0207 1290 of Annex I to Regulation No 3846/87 in its judgment of 24 November 2011, *Gebr. Stolle* (C-323/10 to C-326/10, EU:C:2011:774) consequently has effect *ex tunc* with the result that the penalty imposed on the applicant was contrary to EU law from the outset and thus imposed in breach of EU law.

The second question referred: interest on export refunds paid late

10 There is no provision in EU law which provides for a claim to interest in the event that an export refund is unduly paid late. In particular, as regards the present case, Article 49(8) of Regulation No 800/1999 makes no mention of what rights the exporter has if the time limit referred to therein has expired and the authority of the Member State has not paid the export refund. Consequently, in principle it is probably for the national legal system of each Member State to lay down the conditions for payment of interest on State subsides which are paid late.

11 National law contains no general legal principle relating to (adequate) interest on overdue State payments, but only interest in accordance with precisely defined conditions. In the present case, Paragraph 14(2) of the MOG, read in conjunction with Article 236 of the Tax Code, are to be considered. However, in this respect it is necessary for there to be *lis pendens* (see paragraph 4 above), which did not apply to the present case since no proceedings for reimbursement of the penalties had been brought.

12 Since the applicant was paid export refunds for the exported poultry carcasses, to which it was entitled under EU law, very late, it sustained losses arising from the

unavailability of these sums of money; consequently, it was probably in a similar situation to that of a person required to pay duty in breach of EU law.

13 The Court of Justice has highlighted the aspect of the 'certain symmetry' between, on the one hand, operators who have gained an advantage because of an error contrary to EU law and, on the other, operators who have suffered a disadvantage because of an error contrary to EU law (judgment of 18 January 2017, *Wortmann*, C-365/15, EU:C:2017:19, paragraph 29). According to recital 65 of Regulation No 800/1999, in order to ensure equal treatment for exporters in Member States, explicit provision should be made, as far as export refunds are concerned, for any amount over-paid to be reimbursed with interest by the beneficiary. In accordance with this requirement laid down in EU law, the national legislature stipulated in the first sentence of Paragraph 14(1) of the MOG that interest is to be charged on claims to reimbursement of benefits from the time they arise. A national legal order guided by the principle of symmetry might be organised in such a way as to require that an operator should also be able to claim interest from the time the export refund is wrongly refused since otherwise the aspect of the 'certain symmetry', highlighted by the Court of Justice, between the situation of the operator and that of the customs authority, would be achieved in only a highly incomplete manner.

14 At least in Paragraph 14(2) of the MOG the Member State stipulated that interest is to be charged on claims to benefits, which include export refunds under Paragraph 6(1)(1a) of the MOG, from the time of *lis pendens*, that is to say the time at which the action is served on the defendant. The operator is consequently entitled in part to appropriate compensation for the financial losses which he has sustained because the Member State paid the export refunds late in contravention of EU law. However, in the present case the applicant has not exercised the claim to export refunds, as has already been stated (see paragraph 4 above), by bringing proceedings.

15 In practice, it is common for an operator not to pursue his claim to export refunds through the courts, but merely by means of a first-stage appeal against the customs authority of the Member State, where the parties await the outcome of a test case for reasons of economy of procedure. In this case, the operator cannot claim any interest under national law if the outcome of the test case is in his favour, which can be justified by the fact that the decision not to exercise the claim by bringing proceedings, but rather to await the outcome of a test case, is an autonomous decision of the operator, who must then also bear the legal consequences, namely waiver of a claim to interest under Paragraph 236 of the Tax Code.