Case C-324/19

Request for a preliminary ruling

Date lodged:

19 April 2019

Referring court:

Finanzgericht Hamburg (Germany)

Date of the decision to refer:

3 April 2019

Applicant:

eurocylinder systems AG

Defendant:

Hauptzollamt Hamburg-Stadt

Finanzgericht Hamburg (Finance Court, Hamburg)

Order

In the case of

eurocylinder systems AG

[…]

applicant

[…]

against

Hauptzollamt Hamburg

[…]

defendant

concerning customs duties (including customs tariffs)

the [Fourth] Senate of the Finanzgericht Hamburg (Finance Court, Hamburg) […] on 3 April 2019 […]

[…] **[Or. 2]**

decided:

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

2. The following question is referred to the Court of Justice of the European Union for a preliminary ruling on the validity of an act of the institutions of the Union:

   Is Council Regulation (EC) No 926/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China valid?

[…]

[…] [procedural matters] **[Or. 3]**

Grounds

I.

1 The applicant seeks the repayment of definitive anti-dumping duties on the import of seamless pipes and tubes originating in the People's Republic of China.

2 The applicant, which manufactures high-pressure steel cylinders, imported seamless steel pipes and tubes from the People's Republic of China from May 2014 to December 2015, on which it paid more than EUR 1 000 000 in total in anti-dumping duties on the basis of Regulation (EC) No 926/2009. One of these imports took place on 4 November 2014. On this day it released into free circulation steel pipes and tubes of subheading 7304 5993 20 0 of the Combined Nomenclature, stating TARIC additional code A950. Tianjin Pipe (Group) Corporation (TPCO) was the manufacturer of the pipes and tubes. The defendant, in a decision on import duties of 4 November 2014 (AT/C/40/17432/11/2014/4851), imposed an anti-dumping duty thereon in the amount of EUR 22 123.10. The duty was calculated on the basis of the company-specific anti-dumping duty rate of 27.2% for cooperating manufacturers under Article 1(2) of Regulation (EC) No 926/2009 in conjunction with the annex thereto. TPCO belongs to this group of cooperating manufacturers.

3 By letter of 6 November 2017, the applicant applied for the repayment of the anti-dumping duties imposed by the decision of 4 November 2014. […]

4 The applicant bases its repayment application on the fact that the General Court of the European Union ('the General Court') by judgment of 29 January 2014 (T-528/09) annulled the legal basis for the levying of the anti-dumping duties — Regulation (EC) No 926/2009 — with respect to the export of goods which had been manufactured by Hubei Xinyegang Steel Co. Ltd. The appeal against that judgment was dismissed by the Court of Justice of the European Union ('the Court of Justice') by judgment of 7 April 2016 (C-186/14 P and C-193/14 P). The reasons for the annulment were of a general nature and not limited to the applicant manufacturer in that case. According to the applicant, Regulation (EC) No 926/2009 is therefore invalid in its entirety. **[Or. 4]**

5 By decision of 12 December 2017 (AT/S/00/581/12/2017/4850) the defendant rejected the repayment application. It said that the judgment of the General Court applied solely to the applicant manufacturer in that case and not to imports of the applicant.

6 The defendant rejected the appeal lodged by letter dated 20 December 2017 in its decision on the appeal of 23 August 2018 (RL 490/17). As the effect of Regulation (EC) No 926/2009 had not yet been annulled as against all economic operators, Article 2(2) of the regulation in conjunction with the annex thereto remained the legal basis for the levying of the anti-dumping duties whose repayment was being claimed.

7 By the action brought on 28 September 2015, the applicant pursues its claim further. It refers to the effect *erga omnes* of the annulment of the regulation. In doing so, it relies on the judgment of the General Court of 29 January 2014 (T-528/09). The errors of law found by the General Court result in the annulment of the regulation in its entirety. The applicant calls on the Finance Court to put a question to the Court of Justice on the validity of Regulation No 926/2009.

8 The applicant was neither the manufacturer nor the importer of the goods concerned. Nor did it sell on the imported pipes and tubes, but processed them. There was therefore no resale price. It is not commercially linked to any of the exporters of the goods concerned.

9 After the adoption of the provisional anti-dumping regulation — Regulation (EC) No 289/2009 — the applicant brought an application for a hearing under Article 2 of this regulation. The hearing thereupon took place in Brussels on 24 June 2009.

10 The applicant claims:

> that the decision of the defendant of 12 December 2017, as confirmed in its decision of 23 August 2018, should be set aside.

11 The defendant claims:

> that the action should be dismissed.

It refers to its previous submission. **[Or. 5]**

12 […] [procedural matters]

13 The Chamber stays the proceedings by analogous application of Paragraph 74 of the Finanzgerichtsordnung (Code of procedure of finance courts) and refers the question set out in the operative part to the Court of Justice under subparagraph (b) of the first paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU) because the legal assessment of the case depends on the application of an EU legal instrument whose validity is in doubt.

14 **1. Admissibility of the request for a preliminary ruling**

The applicant can rely on the invalidity of Regulation (EC) No 926/2009. An economic operator who has submitted an application for the repayment of anti-dumping duties paid by it may, if the repayment is refused, raise objections to the validity of the regulation concerned in a case before a national court. That court may or must, under the conditions of Article 267 TFEU, refer a question to the Court of Justice concerning the validity of the regulation in question (Court of Justice, judgment of 18 October 2018, *Internacional de Productos Metálicos SA*, C-145/17 P, paragraph 61; judgment of 14 June 2012, *CIVAD*, C-533/10, paragraph 33).

15 There is no exception here. This would only be the case if the applicant could have brought a direct action against Regulation (EC) No 926/200. This is not the case. It was not the subject of the anti-dumping investigation. It had merely participated in a hearing. Nor could it have brought a direct action against the regulation under the final clause of the fourth paragraph of Article 263 TFEU. The anti-dumping duty was first imposed by the decision of the relevant national authority (see for a comparable set of circumstances: Court of Justice, judgment of 18 October 2018, C-207/17, *Rotho Blaas Sri*, paragraph 26 et seq., in particular paragraph 40).

16 **2. Legal context**

a) The conditions for the repayment are governed by either Article 236 of **[Or. 6]** Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, ‘the Customs Code’) or Article 116(1)(a) in conjunction with Article 117(1) and Article 121 of Regulation (EU) No 952/2013 of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1, ‘the Union Customs Code’), which came fully into force on 1 May 2016 and simultaneously repealed the Customs Code (Article 286(2) in conjunction with Article 288(2) of the Union Customs Code). For the purposes of the reference proceedings, it is not necessary to clarify which are the applicable provisions as the same conditions are contained in the respective provisions applicable under both regulations.

17 At a substantive level, the first paragraph of Article 236(1) of the Customs Code provides:

> Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

Article 116(1)(a) of the Union Customs Code provides:

> 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 …

Article 117(1) of the Union Customs Code, in part, provides:

> An amount of import or export duty shall be repaid or remitted insofar as the amount corresponding to the customs debt initially notified exceeds the amount payable …

18 In respect of the formal conditions, in particular the application period, the following applies.

The first paragraph of Article 236(2) of the Customs Code provides:

> Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor. **[Or. 7]**

Article 121(1)(a) of the Union Customs Code provides:

> Applications for repayment or remission in accordance with Article 116 shall be submitted to the customs authorities within the following periods:
>
> (a) in the case of overcharged amounts of import or export duty …, within three years of the date of notification of the customs debt …

19 b) By Article 1(1) of Council Regulation (EC) No 926/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China (OJ 2009 L 262, p. 19), a definitive anti-dumping duty was levied on the import of certain pipes and tubes originating in the People's Republic of China.

Under Article 1(2) of Regulation (EC) No 926/2009 the company-specific anti-dumping duty rate amounted to 27.2% for the cooperating undertakings listed in the annex to the regulation. In particular, the following were listed in the annex to the regulation:

Hubei Xinyegang Steel Co., Ltd

Tianjin Pipe (Group) Corporation (TPCO)

20 Under Article 1(3) of Regulation (EC) No 926/2009, unless otherwise specified, the provisions in force concerning customs duties shall apply.

21 c) Regulation (EC) No 926/2009 is based on Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1968 L 56, p. 1; 'the basic regulation'). Under 'Determination of injury', Article 3(9) of this regulation states:

> A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.
>
> In making a determination regarding the existence of a threat of material injury, consideration should be given to **[Or. 8]** such factors as:
>
> (a) a significant rate of increase of dumped imports into the Community market indicating the likelihood of substantially increased imports;
>
> (b) sufficient freely disposable capacity of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the Community, account being taken of the availability of other export markets to absorb any additional exports;
>
> (c) whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports; and
>
> (d) inventories of the product being investigated.
>
> No one of the factors listed above by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury will occur.

22 Article 9(4) of the basic regulation provides:

> Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting by simple majority on a proposal submitted by the Commission after consultation of the Advisory Committee …

23 **3. The relevance of the question referred**

The applicant seeks the repayment of anti-dumping duties which were set on the basis of Regulation (EC) No 926/2009. That the imported pipes and tubes fall within the material and temporal scope of this regulation is not in dispute between the parties.

24 The three-year time limit within which to seek repayment (first subparagraph of Article 236(2) [of the Customs Code] or Article 121(1)(a) of the Union Customs Code) was observed. The time period began on the day after the issue of the decision on import duties of 4 November 2014 (second paragraph of Article 3(1) of **[Or. 9]** Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ, English Special Edition 1971(II), p. 354). This was 5 November 2014. As 5 November 2017 was a Sunday, the period expired at midnight on the next working day, 6 November 2017 (first paragraph of Article 3(4) of Regulation No 1182/71). On this day, the repayment application was received by fax by the defendant.

25 By judgment of the General Court of 29 January 2014 (T-528/09), Regulation (EC) No 926/2009 was annulled in so far as it concerned the import of goods which were manufactured by Hubei Xinyegang Steel Co., Ltd. In respect of all other imports into the EU which are covered by it, the regulation is still valid (see Court of Justice, judgment of 14 June 2012, *CIVID*, C-533/10, paragraph 33). As it is still valid, the defendant must apply it. In applying the regulation, there is no entitlement to be repaid as the anti-dumping duties originally set were legally owed. If the regulation were also null and void in respect of the imports of the applicant, the anti-dumping duties originally set would have to be repaid, as they would not be legally owed within the meaning of the first subparagraph of Article 236(1) of the Customs Code or would constitute in this respect an overcharging of import duties (Article 116(1)(a) of the Union Customs Code).

26 Since the present Chamber, as a national court or tribunal, is not itself authorised to annul acts of the institutions of the Union, which include anti-dumping regulations of the Council (Court of Justice, judgment of 22 October 1987, *Foto-Frost*, Case 314/85, paragraph 15; judgment of 6 December 2005, *Gaston Schul Douaneexpediteur BV*, C-461/03, paragraph 21), it is necessary to have recourse to the Court of Justice.

27 **4. Legal considerations with regard to the question referred**

Regulation (EC) No 926/2009 is null and void if it infringes a higher-ranking principle of law. Only an infringement of the basic regulation falls to be considered.

By judgment of 29 January 2014 (T-528/09), the General Court determined that Regulation (EC) No 926/2009 infringed Article 3(9) and Article 9(4) of the basic regulation (paragraph 92 of the judgment).

28 Article 3(9) of the basic regulation sets down the principles for the determination of a threat of **[Or. 10]** material injury. The General Court (paragraph 91 of the judgment) found that, in the assessment of the four factors relating to the analysis of a threat of injury laid down in this provision, one factor (stocks) was regarded as irrelevant by the EU institutions, two factors showed inconsistencies between the Commission's estimates, confirmed by the Council in the contested regulation, and the relevant post-investigation period data (volume of imports and price of imports) and one factor (capacity of the exporter and risk of redirection of exports) was incomplete in respect of the relevant evidence to be taken into account.

29 The General Court further explained (paragraph 91 of the judgment):

> Those inconsistencies and lacunae must be viewed in the context of the requirements laid down by the basic regulation that the threat of injury must be based 'on facts and not merely on an allegation, conjecture or remote possibility' and that the change in circumstances which would create a situation in which the dumping would cause injury must be 'clearly foreseen and imminent'.

30 Carrying out that exercise, the General Court came to the conclusion that the Council had made a manifest error of assessment and infringed the obligation under Article 3(9) of the basic regulation (paragraph 92 of the judgment).

31 Article 9(4) of the basic regulation specifies that a definitive anti-dumping duty may only be imposed if, arising from the facts as finally established, there is an injury to a domestic industry. This was not the case, because it had not been possible to prove an injury (in the form of a threat of injury) without erring in law (paragraph 92 of the judgment).

32 The Court of Justice, by judgment of 7 April 2016 (C-186/14 P and C-193/14 P), dismissed the appeal which was lodged against the judgment of the General Court of 29 January 2014.

33 In the opinion of the referring court, the grounds which led to the annulling of Regulation (EC) No 926/2009 as regards Hubei Xinyegang Steel Co., Ltd are of a general nature. They concern the determination **[Or. 11]** of the injury to the domestic industry, which is a prerequisite for the levying of an anti-dumping duty. Accordingly, the referring court is of the opinion that Regulation (EC) No 926/2009 should be annulled in its entirety for the reasons laid down in the judgment of the General Court of 29 January 2014.

[…]

[signatures]

[…]