

Case C-76/20

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:

12 February 2020

Referring court:

Administrativen sad Varna (Bulgaria)

Date of the decision to refer:

5 February 2020

Appellant:

Balev Bio EOOD

Respondent:

Agentsia ‘Mitnitsi’, Teritorialna Direktsia Severna Morska

Subject matter of the main proceedings

Appeal against the judgment of the Rayonen sad Devnya (District Court, Devnya) of 14 October 2019 upholding the administrative order imposing a fine issued by the respondent on 23 August 2018 imposing a financial penalty on the appellant on the grounds of infringement of the Zakon za mitnitsite (Customs Code).

Subject matter and legal basis of the reference

Request for a preliminary ruling pursuant to Article 267 TFEU on the interpretation of Rules 3(a) and 3(b) of the General Rules for the interpretation of the Combined Nomenclature contained in Annex I to Commission Implementing Regulation (EU) 2015/1754 and of headings 4410 and 4419 and subheading 3924100011 thereof.

Questions referred

1. Is Rule 3(a) of the General Rules for the interpretation of the Combined Nomenclature in Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff to be interpreted as meaning that, for the purposes of the classification of products such as those at issue in the main proceedings, which are made up of different materials, the heading covering the material that outweighs the other materials by quantity (bulk) is the ‘heading which provides the most specific description’ or is that interpretation only possible if the heading itself provides for quantity (bulk) as a criterion that provides the most specific, precise and complete description?
2. Depending on the answer to the first question and in light of the [Harmonised System, (‘HS’)] Explanatory Notes on headings 4410 and 4419: Is Commission Implementing Regulation (EU) 2015/1754 to be interpreted as meaning that heading 4419 does not include products of particle board (fibre) in which the weight of the binding substance (thermosetting resin) exceeds 15% of the weight of the board?
3. Is Commission Implementing Regulation (EU) 2015/1754 to be interpreted as meaning that goods such as those at issue in the main proceedings, that is beakers manufactured from a composite material made up of plant lignocellulosic fibres in a proportion of 72.33% and a melamine resin binding substance in a proportion of 25.2%, are to be categorised under subheading 3924 10 00 of Annex I?

Cited legislation and case-law of the European Union

Council Decision 87/369/EEC of 7 April 1987 concerning the conclusion of the International Convention on the Harmonised Commodity Description and Coding System and of the Protocol of Amendment thereto, Annexes thereto.

Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, Articles 1 and 12.

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, Article 56(1) and (2)(a) and Article 57.

Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, Rules 1, 2(b), 3(a), 3(b) and 6 of the General Rules for the interpretation of the Combined Nomenclature (‘the CN’) in Annex I and headings 3909, 3924, 4410 and 4419 thereof.

Judgment of 26 October 2006, *Turbon International*, C-250/05, EU:C:2006:681, paragraph 21.

Judgment of 18 June 2009, *Kloosterboer Services*, C-173/08, EU:C:2009:382, paragraph 31.

Judgment of 18 May 2011, *Delphi Deutschland*, C-423/10, EU:C:2011:315, paragraph 23.

Judgment of 28 July 2011, *Pacific World Limited*, C-215/10, EU:C:2011:528, paragraph 29.

Judgment of 10 March 2016, *VAD BVBA*, C-499/14, EU:C:2016:155, paragraph 30.

Judgment of 17 March 2016, *Sonos Europe*, C-84/15, EU:C:2016:184, paragraph 33.

Judgment of 26 May 2016, *Latvijas propāna gāze*, C-286/15, EU:C:2016:363, paragraphs 30 and 34.

Judgment of 19 October 2017, *Lutz*, C-556/16, EU:C:2017:777, paragraph 40.

Judgment of 5 September 2019, *TDK-Lambda Germany*, C-559/18, EU:C:2019:667, paragraph 33.

Provisions of national law cited

Zakon za mitnitsite (Customs Code), Article 234(1) and (2) point 1.

Zakon za administrativnite narushenia i nakazania (Law on administrative offences and administrative penalties), Article 59(1) and Article 63(1).

Administrativnoprotsesualen kodeks (Code of Administrative Procedure), Article 217(1) and Article 223.

Brief summary of the facts and procedure

- 1 During the period from 9 December 2016 to 11 October 2017, Balev Bio submitted a total of 18 customs declarations for release into free circulation of goods described as ‘bamboo beakers’ under TARIC codes 4419009000 and 4419190000. The goods originated from China and the rate of import duty applicable to them was 0%.
- 2 On 13 June 2017, the respondent performed a physical check of the goods described as ‘bamboo beakers’ in the customs declarations of 12 June 2017. A sample of the goods was taken and sent to the Tsentralna mitnicheska laboratoria

(Central Customs Laboratory) for testing, in the aim of determining the type of goods and their classification.

- 3 On 1 November 2017, a customs laboratory report was prepared on the test results, according to which ‘... this type of beaker (named “Eccoffee cup”) is made up of bamboo fibres, corn starch and melamine (melamine formaldehyde resin). The starch and bamboo fibres are used as filler materials. The sample tested contained 5.3% “inorganic filler” materials’. The report concluded that ‘... the sample tested of the goods described as “beakers of bamboo fibres” was a beaker, namely tableware of plastic containing melamine’. The ratio of plant fibres to melamine formaldehyde resin was not stated.
- 4 Balev Bio submitted a report prepared on 20 December 2017 by the Lesotehniчески университет (University of Forestry) on the composition of the beaker. It stated that the product, a ‘bamboo beaker’ is made up of 72.33% cellulose, hemicellulose and lignin (i.e. plant lignocellulosic fibres) and 25.2% binding substance (namely melamine resin). Based on those values, it was concluded that the product at issue should be categorised as plant-based material (plant lignocellulosic fibres) with a matrix of synthetic binding substance (melamine), and that the product should not be categorised as plastic, as it contained substantially less than 50% synthetic materials.
- 5 The respondent ultimately assumed that TARIC codes 4419009000 and 4419190000 stated for the goods in all the customs declarations checked were incorrect in light of the wording of Chapter 44 of the CN (‘wood and articles of wood; wood charcoal’), as the imported goods were not products of wood. According to the results contained in the report prepared, the goods were ‘tableware of plastic, namely a beaker made of melamine formaldehyde resin containing bamboo fibres and corn starch as filler materials’. The reported stated, based on Rules 1, 2(b), 3(b) and 6 of the General Rules for the interpretation of the CN, that, as it gives the goods their form, including the properties of hardness and rigidity, the plastic in the product (melamine formaldehyde resin) gives the product its essential character, and that the goods should therefore be classed under tariff heading 3924, CN code 3924 10 00 and, in light of their origin (China), TARIC code 3924100011 with a rate of duty of 6.5%.
- 6 As a first step, by decisions adopted in February and September 2018 based on those findings, the respondent corrected the code set out in all the declarations, applied TARIC code 3924100011 and assessed additional customs and VAT debts payable to the State.
- 7 The respondent’s decisions were contested before the Administrativen sad Varna (Administrative Court, Varna). Various chambers of the court dismissed the applications as unfounded. The reason given was that, as the goods are products made up of a composite material of two main substances, namely wood fibres and approximately 25% melamine resin, neither of which fall directly under a CN heading, they have to be categorised in accordance with Rule 3(b) of the General

Rules for the interpretation of the CN, that is by the material that gives them their essential character; that, notwithstanding the fact that the plant fibres outweigh the other components in terms of bulk, the product is not an 'article of wood' for the purposes of classification, as the proportion of synthetic plastic exceeds 15%; and that the synthetic plastic is the other main substance that determines the nature of the product, which is therefore 'tableware of plastic'.

- 8 The judgements of the Administrative Court, Varna were appealed before the Varhoven administrativen sad (Supreme Administrative Court). By judgment of 29 October 2019, the Supreme Administrative Court set one of the contested judgments aside, giving as its reason that, in that case, the relevant rule is contained in the first sentence of Rule 3(a) of the General Rules for the interpretation of the CN, which states that the heading which provides the most specific goods description is to be preferred to headings providing a more general description; that, moreover, according to General Interpretative Rule 2(b), any reference in a heading to a material is to be taken to include reference to the material alone and to the material mixed or combined with other materials; that, in this case, although the bamboo material is compounded with another material, namely the melamine formaldehyde resin, it outweighs the other materials by quantity and determines the heading that provides the most specific description; and that, for precisely that reason, it falls under Section IX Chapter 44 of the CN ('wood and articles of wood; wood charcoal'), meaning that Balev Bio categorised the goods correctly. The Supreme Administrative Court has yet to rule on the other appeals.
- 9 As a second step, the respondent issued administrative orders imposing fines against Balev Bio on the grounds of incorrect tariff classification, by which it found the company guilty of customs fraud within the meaning of Article 234(1) No 1 of the Customs Code and imposed financial penalties in the amount of its circumvented debts to the State. One of those administrative orders imposing a fine is the subject matter of these proceedings.
- 10 During examination of the action against that notice, the District Court, Devnya, commissioned an expert opinion on the chemical aspects which, as no representative sample was available, had to be prepared based on the case file alone. According to that expert opinion, the substances in the composite material used in the manufacture of the product were identical in terms of content and ratio to the substances listed in the Chinese manufacturer's declaration of conformity of 12 June 2017, namely 75% plant fibres and 25% melamine resin.
- 11 The expert witness concluded that each individual substance in the composite material contributed to the properties of the composite material. It found that the plant fibres were responsible for the following factors: thermal insulation properties, low density, biodegradability, rigidity, health and safety at work, environmental safety, sustainable raw material and price, and that the melamine resin was responsible for the following factors: environmental and mechanical resilience, water-tightness, shape retention, rigidity and longer product life.

- 12 By judgment of 14 October 2019, the District Court, Devnya upheld the administrative orders imposing a fine. It ruled that the product could not be categorised as an article of wood as, in this particular case, the binding substance (thermosetting resin) exceeded 15%; that the product is a composite material made up of two main substances, namely wood fibres and approximately 25% melamine resin by bulk, neither of which fall directly under one CN heading, meaning that the goods have to be categorised in accordance with Rule 3(b) of the General Rules for the interpretation of the CN, that is by the material that gives them their essential character; and that, notwithstanding the fact that the plant fibres outweigh the other components in terms of bulk, the product is ‘tableware of plastic’, not an ‘article of wood’ for the purposes of classification, as the proportion of synthetic plastic exceeds 15%.
- 13 The appeal by Balev Bio in those proceedings is directed against that judgment.
- 14 The Administrative Court, Varna has established contradictory case-law on the legality of the administrative orders imposing fines on Balev Bio in this dispute.
- 15 On the one hand, it has held that, based on General Interpretative Rule 3(b), the product (‘bamboo beaker’) should be categorised under code 3942100011 as, according to the HS Explanatory Notes on heading 4410, that heading covers goods which do not contain more than 15% thermosetting resin by weight.
- 16 On the other hand, it has held that, based on Rule 2(b), the goods, which are made up of a composite material, can be categorised under two or more headings and that Rule 3(a), not Rule 3(b), applies in this case as, given that the plant fibres outweigh the other materials by proportion and in terms of the characteristics and properties they give the goods, they provide the most specific description of the goods.

Main arguments of the parties to the main proceedings

- 17 The appellant argues that the District Court, Devnya, wrongly held that, in the context of General Interpretative Rule 3(b), the plastic (the melamine formaldehyde resin) gives the goods their essential character. In its opinion, the HS Explanatory Notes on the description and coding of goods do not stipulate that the weight of the binding substance in the goods must not exceed 15%. It makes the argument that it follows from the interpretation of the Explanatory Notes that all materials made up of wood fibres mixed with resin, such as the beakers at issue, which are made up of 75% wood fibres and 25% resin, come under Chapter 44, headings 4410 and 4411.
- 18 The appellant argues that interpretation of the CN is not necessary, as the Court of Justice of the European Union has established case-law stipulating that the decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties (judgment of 11 January 2007, *B.A.S. Trucks*, C-400/05, EU:C:2007:22). According to the case-

law of the Court of Justice, the Explanatory Notes in respect of the CN and in respect of the HS are an important aid for interpreting the various tariff headings but do not have legally binding force (judgement of 13 September 2018, *Vision Research Europe*, C-372/17, EU:C:2018:708). The appellant argues in that regard that the product would have to be described as a plastic product if it was made up of plastic or if that material at least outweighed the other materials, rather than accounting, as in the present case, for a mere 24.7% to 33% of the composition of the product.

- 19 The respondent contends that the goods have to be categorised based on General Interpretative Rule 3(b), as the plastic (melamine formaldehyde resin) gives the product its essential properties, namely form, stability, overall appearance and the hygienic feeling needed in order to use the product for the preparation of drinks, and thus its essential character; hence the product has to be categorised under subheading 3924 10 00.

Brief summary of the reasons for the reference

- 20 This dispute raises the question of whether, for the purpose of classification of the goods, Rule 3(a) of the General Rules for the interpretation of the CN applies, meaning that the heading covering the material that outweighs the other materials by quantity is the 'heading which provides the most specific description' or, if Rule 3(a) does not apply and Rule 3(b) is the correct rule, the material or component which gives them their essential character has to be identified.
- 21 The abovementioned judgments delivered by various chambers of the Administrative Court, Varna in other proceedings on similar issues contain one possible interpretation of the CN, namely that, even though the plant fibres outweigh the other materials by quantity, the product is not an 'article of wood' and must be categorised by the other main substance (the synthetic plastic) as 'tableware of plastic', because that substance exceeds 15%.
- 22 The other possible interpretation is that given by the Supreme Administrative Court in the abovementioned judgment of 29 October 2019, namely that Rule 3(a) of the General Rules for the interpretation of the CN applies and the heading that covers the material that outweighs the others by quantity should be selected as the heading which provides 'the most specific' description.
- 23 The referring court has doubts, based on the considerations below, as to which is the correct solution.
- 24 It follows from HS Explanatory Note I) on General Interpretative Rule 3 that General Interpretative Rule 3(b) applies only where classification has not been resolved under General Interpretative Rule 3(a). If neither General Interpretative Rule 3(a) nor General Interpretative Rule 3(b) applies, General Interpretative Rule 3(c) applies. Thus the sequence is: a) most specific description; b) essential character; c) heading which occurs last in the nomenclature.

- 25 According to HS Explanatory Note IV) on Rule 3(a), it can be said that ‘a) description by name is more specific than a description by class’, and ‘b) if the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete’.
- 26 HS Explanatory Note V) on Rule 3(a) states that, ‘however, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description than the others. In such cases, the classification of the goods shall be determined by Rule 3(b) or 3(c).’
- 27 HS Explanatory Note VIII) on Rule 3(b) states that the ‘factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods’.
- 28 These tips for the interpretation of Rules 3(a) and 3(b) of the General Rules for the interpretation of the HS appear to suggest that, in the case of products made up of various materials, the quantity of a substance is only relevant when determining the ‘most specific’ heading under Rule 3(a) if it is expressly named as a requirement of the corresponding heading and therefore provides the most specific, accurate and complete description of the goods.
- 29 In that regard and inasmuch as it refers in certain cases to the quantities of materials in mixed products, the Common Customs Tariff fundamentally prefers, in the interests of legal certainty and ease of verification, classification criteria based on objective characteristics and properties of the goods that can be verified at the time of customs clearance. It follows from this that the quantity of a material that specifically identifies the mixed product at issue must be mentioned in the heading itself.
- 30 In other cases, when the quantity of a material is not expressly named in a heading, to assume that the heading which provides the ‘most specific’ description is the heading covering the material that outweighs the other materials by quantity or weight would mean that the application of Rule 3(a) is based on an inadmissible presumption in respect of Rule 3(c) (judgment of 5 September 2019, *TDK-Lambda Germany*, C-559/18, EU:C:2019:667, paragraph 33).
- 31 In this case, it is necessary to examine whether each of the materials of which the goods are made up (72.33% plant fibres and 25.2% melamine resin) can be categorised under the appropriate subheading and, if so, whether one of those subheadings can be held to provide the most specific description of the goods.
- 32 On the one hand, melamine resins, which are expressly named in Chapter 39 of the CN (‘plastics and articles thereof’) are categorised under subheading 3909 20.

According to the HS Explanatory Notes, heading 3909 includes amino-resins, which are used in the manufacture of plastics.

- 33 On the other hand, it follows from Note 3 on Chapter 44 of the CN ('wood and articles of wood; wood charcoal') that that chapter applies to articles of 'densified' wood as it applies to such articles of wood.
- 34 According to the notes on the subheadings in Chapter 44 of the HS, products such as bamboos in chips or shavings (used in the manufacture of particle board, fibreboard or cellulosic pulp) and articles of bamboo or other ligneous materials that are not wickerwork or furniture or other goods expressly covered by other chapters are to be categorised with the corresponding articles of wood in Chapter 44 (e.g. in the case of headings 4410 and 4411) except where the context requires otherwise.
- 35 In that regard, Note 6 on Chapter 44 [CN] states: 'Subject to note 1 above [goods not covered by Chapter 44] and except where the context otherwise requires, any reference to "wood" in a heading of this chapter applies also to bamboos and other materials of a woody nature.'
- 36 The HS Explanatory Notes to heading 4410 state that particle board is a flat product manufactured to various lengths, widths or thicknesses by compression or 'extrusion', that the raw materials used in its manufacture are mostly wood particles obtained by mechanical crushing of logs or wood waste, that they can be manufactured from other ligneous materials, such as bagasse, bamboo or cereal straw particles or from flax or hemp waste, and that particle board is usually agglomerated using an organic binding substance, generally a thermosetting resin that does not exceed 15% of the weight of the board.
- 37 Heading 4410 also covers impregnated particle board, in which case the quantity of impregnation substance may exceed that. As, according to the [HS] Explanatory Notes on this heading, impregnation must be carried out by soaking the particle board with one or more materials not necessary for the cohesion of the basic material, in order to give the board additional properties, such as making it waterproof, resistant to rotting or insect damage, non-flammable or low-flammable or resistant to chemicals or electricity or in order to increase its density, the exemption in terms of the weight of the resin in mixed products made up of wood particles does not apply to the product at issue in this case, as there is no evidence that the melamine resin was used as an impregnation substance. On the contrary, the melamine was used solely as a binding substance.
- 38 It would appear that, in order to categorise goods such as those at issue under subheading 4419 00 90 in Chapter 44, the melamine resin in the composite material should not exceed 15% of the total weight of the composite material, which it does in the goods at issue.
- 39 That being so, it cannot be assumed that heading 4410 which, based on the General Interpretative Rules and Note 6 on Chapter 44 [CN], is the correct

heading for the plant fibres (bamboo fibres), provides the most accurate description of the goods.

- 40 For those reasons, and because the CN contains no guidance for the classification of goods containing more than 15% melamine resin, it has to be assumed that both headings covering the respective materials, namely 4410 and 3909, are equally specific, meaning that the goods must be categorised in accordance with Rule 3(b).
- 41 If, however, the interpretation in the HS Explanatory Notes is disregarded or it is assumed that the requirement that the proportion of resin should not exceed 15% does not have binding force, a different interpretation, namely that made by the Supreme Administrative Court, is possible.
- 42 If the goods must be categorised in accordance with Rule 3(b), it is necessary to examine which of the materials gives the goods their essential character.
- 43 In that regard, the referring court has doubts as to whether the material that determines most of the characteristics (properties) of the product should be regarded as the material that gives the goods their essential character.
- 44 According to HS Explanatory Note VIII on Rule 3(b), the factor which determines essential character can vary as between different kinds of goods.
- 45 In order to establish which material gives the goods their essential character, it is necessary to identify, in application of each of the criteria named (nature of the material, bulk, quantity, weight, value), the material or substance which, if removed, would cause the goods to lose their essential character (judgments of 26 October 2006, *Turbon International*, C-250/05, EU:C:2006:681, paragraph 21, and of 18 June 2009, *Kloosterboer Services*, C-173/08, EU:C:2009:382, paragraph 31).
- 46 Only if it were such a material would the material present in the mixture in the greatest proportion or the material that gives the mixture most of its properties determine the essential character of the product. If essential character cannot be determined unequivocally, Rule 3(c) is to be applied and it is not to be presumed that the substance present in the mixture in the greatest proportion gives the product its essential character (judgment of 26 May 2016, *Latvijas propāna gāze*, C-286/15, EU:C:2016:363, paragraphs 30 and 34).