

Case C-825/19**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 November 2019

Referring court:

Thüringer Finanzgericht (Finance Court of Thuringia), Gotha (Germany)

Date of the decision to refer:

22 October 2019

Applicant:

Beeren-, Wild-, Feinfrucht GmbH

Defendant:

Hauptzollamt Erfurt (Erfurt Principal Customs Office)

Subject matter of the main proceedings

Granting of retroactive authorisation for specific use and the question as to which EU regulation is decisive in this respect in the main proceedings — Regulation (EU) No 952/2013 or Regulation (EEC) No 2454/93 — and which conditions are imposed by the decisive EU regulation, where appropriate, for the granting of authorisation

Subject matter and legal basis of the reference

Subject matter: Interpretation of Article 211 of Regulation (EU) No 952/2013 and, if applicable, of Article 294(2) of Regulation (EEC) No 2454/93

Legal basis: second paragraph of Article 267 TFEU

Questions referred

1. Is Article 211(2) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1, ‘the UCC’) to be interpreted as applying only to applications whose retroactive authorisation period would be valid as from 1 May 2016?
2. If Question 1 is answered in the negative: In the case of applications for retroactive authorisation whose authorisation period is before 1 May 2016, is Article 211 of the UCC to be applied only if the retroactive authorisation was applied for before the new law entered into force, but the customs authorities refused such applications for the first time after 1 May 2016?
3. If Question 2 is answered in the negative: In the case of applications for retroactive authorisation whose authorisation period is before 1 May 2016, is Article 211 of the UCC to be applied even if the customs authorities refused such applications both before and after 1 May 2016 (with different reasoning)?
4. If Questions 1 and 2 are answered in the affirmative and Question 3 is answered in the negative: Is Article 294(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92 (OJ 1993 L 253, p. 1) to be interpreted as meaning that
 - (a) an authorisation could be granted with retroactive effect from the date the original authorisation expired, as provided for in Article 294(3), for a maximum retroactive period of one year before the date the application was submitted and
 - (b) the proof of economic need provided for in Article 294(3) must also exist and attempted deception or obvious negligence be excluded in the case of the successive authorisation under Article 294(2)?

Provisions of EU law cited

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1; ‘the UCC’), Articles 5, 116, 174, 211 and 286;

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 (OJ 2015 L 343, p. 1; ‘the UCCDR’), Articles 148 and 172;

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; ‘the CC’), Articles 21 and 85;

Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1), as last amended by Commission Regulation (EC) No 993/2001 (OJ 2001 L 141, p. 1; ‘the CCIR’), Articles 294 and 508;

Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1);

Guidelines concerning Part II Title I Chapter 2 ‘End-use’ of Commission Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 2002 C 207, p. 2; ‘the 2002 Guidelines’).

Brief summary of the facts and procedure

- 1 The applicant had valid authorisation for placing non-Union goods in free circulation for specific use in respect of mushroom imports up to 31 December 2012. Due to a lack of awareness, no application was submitted for extension of the authorisation, for the granting of what is known as a successive authorisation.
- 2 The failure to submit such an application was noticed during a company audit. As a result, the applicant applied for a successive authorisation on 9 January 2015. The defendant granted that application on 14 January 2015 but only from the date the application was submitted. It refused to grant authorisation with retroactive effect from the date the original authorisation expired under Article 294(2) of the CCIR in force at that time, that is to say, from 1 January 2013.
- 3 By letter of 22 April 2015, in which the applicant referred to its strained economic situation due to ongoing restructuring, it once again requested retroactive authorisation from the expiry of the original authorisation.
- 4 The defendant refused that application for successive authorisation (period from 1 January 2013 to 8 January 2015) by decision of 13 May 2015.
- 5 The applicant lodged an objection to the decision of 13 May 2015. The defendant rejected that objection by objection decision of 6 April 2016. The applicant brought an action against that decision before the referring court on 3 May 2016. In the ongoing main proceedings before the referring court, the defendant issued another decision on 21 March 2019, by which it refused to grant a successive authorisation with new reasoning departing from that of the first refusal. The refusal decision of 21 March 2019 has become the subject of the main proceedings.

Principal arguments of the parties in the main proceedings

- 6 The defendant is of the opinion that Article 294(2) of the CCIR is decisive for the granting of the requested retroactive authorisation in the present case. As can be seen from Article 294(3) of the CCIR, a successive authorisation under Article 294(2) may be granted with retroactive effect for no more than one year from submission of the application. Furthermore, granting of authorisation under Article 294(2) of the CCIR requires satisfaction of the conditions mentioned in Article 294(3) of the CCIR, that is to say, *inter alia*, that a proven economic need for the retroactive effect exists and the application is in no way related to obvious negligence. The applicant failed to prove the economic need. It also failed to apply for a successive authorisation in good time despite being aware of the procedural provision and despite corresponding notifications, which indicates obvious negligence.
- 7 As a procedural rule, Article 211 of the UCC, which entered into force on 1 May 2016, is not applicable to the present case since, according to the case-law of the Court of Justice, procedural rules are applicable only to proceedings pending when they enter into force and, in the present case, regardless of the renewed decision of 21 March 2019, the administrative proceedings were concluded with the objection decision on 6 April 2016 and were therefore no longer pending when Article 211 of the UCC entered into force.
- 8 The applicant is of the opinion that Article 211 of the UCC is to be applied to the present case, as it is a purely procedural rule and procedural law is fundamentally to be applied with retroactive effect according to the established case-law of the Court of Justice.
- 9 If, however, instead of Article 211 of the UCC, Article 294(2) of the CCIR should have to be applied to the present case, then the retroactive granting of a successive authorisation according to the last-mentioned provision would not require satisfaction of the conditions of Article 294(3) of the CCIR. Paragraph 3 of Article 294 of the CCIR which relates to exceptional circumstances does not apply to the successive authorisation regulated by paragraph 2 thereof. Therefore, an authorisation under Article 294(2) of the CCIR may also be granted with retroactive effect for a period of more than one year, and the exclusion criterion of obvious negligence within the meaning of Article 294(3) of the CCIR would not have to be examined.

Brief summary of the basis for the reference

- 10 From the point of view of the referring court, the decision in the main proceedings rests on whether Article 211 of the UCC can be applied to the facts of the dispute in those proceedings since, if that question is answered in the affirmative, it is immediately apparent from the wording of Article 211(2)(h) of the UCC that the renewal of an authorisation for the same kind of operation and goods can be applied for within three years of expiry of the original authorisation. The question

as to whether Article 211 of the UCC can be applied arises from the fact that the applicant's application was submitted in 2015, that is to say, at a time when that article was not yet in force pursuant to Article 288(2) of the UCC.

- 11 According to the established case-law of the Court of Justice, a distinction must be made between substantive rules and procedural rules when it comes to the question of retroactive application of legislation.
- 12 According thereto, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force (judgment of the Court of Justice of 9 March 2006, *Beemsterboer*, C-293/04, EU:C:2006:162, paragraph 19 and the case-law cited).
- 13 According to these principles, the Court of Justice and the General Court of the European Union have ruled on cases concerning the issue as to whether those cases were to be determined according to the law applicable before the CC entered into force or according to the CC (judgment of the Court of Justice of 24 September 1998, *Sportgoods*, C-413/96, EU:C:1998:430, and judgment of the General Court of 10 May 2001 in Case T-186/97, *Kaufring and Others v Commission*, EU:T:2001:133).
- 14 By contrast, substantive rules are to be applied only to facts which arose when the substantive rules were in force (judgment of the Court of Justice of 23 February 2006, *Molenbergnatie*, C-201/04, EU:C:2006:136, paragraph 34).
- 15 However, the Court of Justice has also exceptionally interpreted the substantive rules of Community law as having to be applied to situations existing before their entry into force in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them (judgment of the Court of Justice of 9 March 2006, *Beemsterboer*, C-293/04, EU:C:2006:162, paragraph 21 and the case-law cited).
- 16 In paragraph 32 of its judgment of 23 February 2006, *Molenbergnatie* (C-201/04, EU:C:2006:136), based on paragraph 11 of its judgment of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270), the Court of Justice also referred to legislation which contains both procedural and substantive rules forming an indivisible whole, the individual provisions of which could not be considered in isolation with regard to the time at which they took effect. In the judgment of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270), the Court of Justice had found such a situation to exist in relation to the entry into force of the then valid Regulation No 1697/79. At that time, the previously existing national regulations were replaced by the new Community regulation, with the result that a uniform overall regulation for the post-clearance recovery of duties existed for the first time at Community law level.
- 17 The referring court fundamentally regards Article 211 of Regulation (EU) No 952/13 as a procedural rule. This is fundamentally supported by its position in

the structure of the provisions and its essential content. Article 211 of the UCC does of course contain some criteria for granting authorisations, which did not in any case explicitly exist in Article 291 et seq. of the CCIR. From the point of view of the referring court, this raises the question as to whether Article 211 of the UCC is to be regarded as a purely procedural rule or as a rule which, as in the judgment of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270), contains both procedural and substantive rules forming an indivisible whole, the individual provisions of which could not be considered in isolation with regard to the time at which they took effect. This view is supported by the fact that, in the case of retroactive effect, the customs declarations concerned are to be declared invalid under Article 174 of the UCC, in conjunction with Article 148(4)(d) of the UCCDR, and are to be replaced by declarations for placement under the end-use procedure and the import duties paid are to be reimbursed under Article 116(1) of the UCC. To that extent, there are at least indirectly substantive legal consequences. On the other hand, unlike in the dispute which gave rise to the judgment of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270), Regulation No 952/2013 did not create, with the UCC, a first-time law at EU level, since the CC had already been codified with Regulation No 2913/92 as Community law (EU law). The UCC in the version of Regulation No 952/2013 replaced the CC in the version of Regulation No 2913/92 (Article 286(2) of the UCC), which had been amended several times (see recital 12 of Regulation No 952/2013), with the intention of making customs legislation more modern, simple, streamlined and transparent (see recitals 43 and 56 of Regulation No 952/2013).

- 18 The referring court notes from the previous case-law of the General Court of the European Union the further principle that procedural rules apply only to proceedings pending at the time when they enter into force and in which the applications were submitted after the new law entered into force, as administrative proceedings that have already been concluded with a decision (Article 5(39) of the UCC) can no longer be regarded as ‘proceedings pending’ (judgments of the General Court of 10 May 2001, *Kaufring and Others v Commission*, T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, EU:T:2001:133, paragraph 35, and of 9 June 1998, *Unifrijo Gadus and CPL Imperial 2 v Commission*, T-10/97 and T-11/97, EU:T:1998:118, paragraph 18 et seq.). On the other hand, in paragraph 35 of its judgment of 10 May 2001, *Kaufring and Others v Commission* (T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, EU:T:2001:133), the General Court refers to paragraph 22 of the judgment of the Court of Justice of 6 July 1993, *CT Control (Rotterdam) and JCT Benelux v Commission* (C-121/91 and C-122/91, EU:C:1993:285). In the case giving rise to that judgment of the Court of Justice, the applicant had submitted an application for remission in October 1985, that is to say, when Regulation No 1430/79 was still in force. That application for remission had been refused by the Netherlands authorities in 1986. This had resulted in judicial proceedings in the Netherlands in which the court in that case found the refusal to be invalid in November 1989. The Netherlands

administration had then submitted the application for repayment to the EC Commission, which only decided on the application within six months, instead of four. In 1985, the procedural law in force at that time provided for the Commission to take a decision within four months; from 1987 it had six months. The referring court infers therefrom that, in the case of procedural rules, the law in force at the time of the decision is to be applied, regardless of when the underlying application is submitted.

- 19 However, should the Court of Justice answer either of Questions 1 and 2 in the affirmative and, in so far as it makes a ruling on Question 3, answer Question 3 in the negative, the referring court will have to decide on the dispute in accordance with Article 294(2) of the CCIR, which was in force when the application was submitted. The German customs administration is of the opinion that a retroactive successive authorisation under this provision may have retroactive effect for not more than one year, as provided for in Article 294(3) of the CCIR in respect of 'exceptional circumstances'. Furthermore, it also demands, in the case of a successive authorisation under paragraph 2 of Article 294 of the CCIR, the proof of economic need provided for in paragraph 3 thereof and the exclusion of attempted deception or obvious negligence (Article 294(3)(a) of the CCIR) as additional authorisation conditions. No such limitation can be inferred either from the wording of Article 294(2) of the CCIR or from the 2002 Guidelines issued for interpreting the rule, which only deal with retroactive authorisation under Article 294(3) of the CCIR. However, the provision of Article 294(2) of the CCIR relates to the renewal of an authorisation for the same kind of operation and goods. In the opinion of the referring court, it therefore has a meaning that is independent of the provisions of paragraph 3, with the result that the authorisation conditions of paragraph 3 cannot be applied to the successive authorisation under paragraph 2.

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