

**Case C-87/20**

**Request for a preliminary ruling**

**Date lodged:**

19 February 2020

**Referring court:**

Bundesfinanzhof (Germany)

**Date of the decision to refer:**

15 October 2019

**Appellant in the appeal on a point of law:**

Hauptzollamt B

**Respondent in the appeal on a point of law:**

XY

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[...]

**BUNDESFINANZHOF (FEDERAL FINANCE COURT)**

**ORDER**

In the case of

Hauptzollamt (Principal Customs Office) B

defendant and appellant in the appeal on a point of law

against

XY

applicant and respondent in the appeal on a point of law

[...]

concerning confiscation due to lack of an import permit

the Seventh Chamber

made the following order at the sitting of 15 October 2019: **[Or. 2]**

Operative Part

1. I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

Is Article 57(5)(a) of Regulation No 865/2006, as amended by Regulation No 2015/870, to be interpreted as meaning that an importer carrying a total of more than 125 grams (g) of caviar of sturgeon species (*Acipenseriformes spp.*) in individually marked containers, for which he presents neither a (re-)export document nor an import permit, is to be allowed to keep up to 125 g of caviar, provided that the import is not for any of the purposes listed in the first subparagraph of Article 57(1) of Regulation No 865/2006?

If that question is to be answered in the affirmative:

Do specimens introduced into the customs territory of the European Union also qualify as personal and household effects within the meaning of Article 7(3) of Regulation (EC) No 338/97 where the importer declares at the time of introduction that he intends to present the imported items as a gift to other persons?

2. The proceedings are stayed pending the decision of the Court of Justice of the European Union on the questions referred for a preliminary ruling.

Grounds

I.

- 1 In December 2015, the applicant and respondent in the appeal on a point of law ('the applicant') entered the customs territory of the European Union via the green channel, for persons with 'nothing to declare', of the airport customs post of the defendant and appellant in the appeal on a point of law ('the Principal Customs Office'). She was carrying six 50 g tins of caviar (black Beluga, Latin: *Huso huso*). The Principal Customs Office confiscated the caviar, as she did not have the permits required under Paragraph 51(2) of the Bundesnaturschutzgesetz ([...] Federal Law on Nature Conservation, 'the BNatSchG' [...]).
- 2 The action brought subsequently was upheld in part. The Finanzgericht (Finance Court) found that sturgeon eggs, including of bred specimens, are indeed covered by Annex B to Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, as amended by Commission Regulation (EU) No 1320/2014 of 1 December 2014 amending Council Regulation (EC) No 338/97 on the protection of species **[Or. 3]** of wild fauna and flora by regulating trade therein [...], and that an import permit

was therefore required in order to import the caviar, but that none had been presented so far. It found that the applicant was, however, able to import two tins without a permit, as she intended to use them not for commercial purposes, but to present them as a gift to her children or to use them herself. It stated that Article 57(5) of Commission Regulation (EC) No 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, as amended by Commission Regulation (EU) 2015/870 of 5 June 2015 amending, as regards the trade in species of wild fauna and flora, Regulation (EC) No 865/2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 [...] is a quantitative exemption rule that allows non-commercial importers to import small quantities without a permit subject to certain conditions; where that limited quantity is exceeded, there is no justification for excluding the exemption completely if, on the basis of the circumstances of the case in question, there is no evidence of importation for commercial purposes. Confiscation was therefore unlawful inasmuch as the Principal Customs Office did not allow the applicant to keep two tins of caviar.

- 3 The Principal Customs Office lodged an appeal on a point of law against that judgment. It argued that, if the quantity specified in Article 57(5) of Regulation No 865/2006 is exceeded, the full quantity of caviar of sturgeon species introduced must be confiscated due to the lack of an import permit, and that, furthermore, caviar intended as a gift for third parties ceases to qualify as personal or household effects.

## II.

- 4 [Stay of proceedings] [...]  
 5 [Repetition of the questions referred for a preliminary ruling] [...] **[Or. 4]** [...]  
 6 [...]  
 7 [...]

## III.

- 8 The chamber is of the opinion that Regulation No 338/97 and Regulation No 865/2006 (each in the amended version referred to above) apply to the case in question. There are doubts as to their interpretation which are material to the decision in the case in question.

### 9 **Applicable EU law:**

- 10 Article 2(b) of Regulation No 338/97:

For the purposes of this Regulation: ‘Convention’ shall mean the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Cites).

11 Article 2(j) of Regulation No 338/97:

For the purposes of this Regulation: ‘personal or household effects’ shall mean dead specimens, parts and derivatives thereof, that are the belongings of a private individual and that form, or are intended to form, part of his normal goods and chattels.

12 Article 2(t) of Regulation No 338/97:

For the purposes of this Regulation: ‘specimen’ shall mean any animal or plant, whether alive or dead, of the species listed in Annexes A to D, any part or derivative thereof, whether or not contained in other goods ...

13 Article 3(2)(a) of Regulation No 338/97:

Annex B shall contain: (a) **[Or. 5]**

14 the species listed in Appendix II to the Convention, other than those listed in Annex A, for which the Member States have not entered a reservation.

15 The first subparagraph of Article 4(2) of Regulation No 338/97:

The introduction into the Community of specimens of the species listed in Annex B shall be subject to completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import permit issued by a management authority of the Member State of destination.

16 The first sentence of Article 7(3) of Regulation No 338/97:

Personal and household effects

By way of derogation from Articles 4 and 5, the provisions therein shall not apply to dead specimens, parts and derivatives of species listed in Annexes A to D which are personal or household effects being introduced into the Community, or exported or re-exported therefrom, in compliance with provisions that shall be specified by the Commission.

| Annex to Regulation No 338/97: |         |   |         |                          |
|--------------------------------|---------|---|---------|--------------------------|
|                                | Annex A | Annex B   | Annex C | Common name              |
| ...                            |         |   |         |                          |
| <b>ACTINOPTERYGII</b>          |         |   |         | <b>Fish</b>              |
| Acipenseriformes               |         |   |         |                          |
|                                |         | ACIPENSERIFORMES spp. (II) (Except for the species included in Annex A) |         | Sturgeons and paddlefish |
| ...                            |         |   |         |                          |

18 Article 57 of Regulation No 865/2006:

1. The derogation from Article 4 of Regulation (EC) No 338/97 for personal or household effects, provided for in Article 7(3) of that Regulation, shall not apply to specimens used for commercial gain, sold, displayed for commercial purposes, kept for sale, offered for sale or transported for sale. ...

2. ...

3. The first introduction into the Community of personal or household effects, including hunting trophies, by a person normally residing in the Community and involving specimens of species listed in Annex B to Regulation (EC) No 338/97 [Or. 6] shall not require the presentation to customs of an import permit, provided that the original of a (re-)export document and a copy thereof are presented.

4. ...

5. By way of derogation from paragraphs 3 and 4, the introduction or re-introduction into the Community of the following items listed in Annex B to Regulation (EC) No 338/97 shall not require the presentation of a (re-)export document or an import permit:

(a) caviar of sturgeon species (*Acipenseriformes* spp.), up to a maximum of 125 grams per person, in containers individually marked in accordance with Article 66(6); ....

19 **Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'):**

20 Conf. 12.7 (Rev. CoP17) — Conservation of and trade in sturgeons and paddlefish

...

The conference of the parties to the convention

...

2. Recommends, with regard to regulating trade in sturgeon products, that:

...

e) Parties consider the harmonisation of their national legislation related to personal exemptions for caviar, to allow for the personal effects exemption under Article VII, paragraph 3, of the Convention and consider limiting this exemption to no more than 125 grams of caviar per person;

...

Conf. 13.7 (Rev. CoP17) — Control of trade in personal and household effects

...

The conference of the parties to the convention

...

3. Agrees that parties shall:

a) ...

b) not require export permits or re-export certificates, for personal or household effects which are dead specimens, parts or derivatives of Appendix-II species except:

...

(iv) for the following, where the quantity exceeds the specified limits:

- caviar of sturgeon species (*Acipenseriformes spp.*) — up to a maximum of 125 grams per person whereby the container has to be labelled in accordance [Or. 7] with Resolution Conf. 12.7 (Rev. CoP17);

...

21 Annex 1 — Guidelines for interpretation of personal and household effects ...

Definition of ‘personal and household effects’

8. Specimens must be personally owned or possessed for non-commercial purposes. This excludes use for commercial gain, sale, and display for commercial purposes, keeping for sale, offering for sale or transport for sale.

...

22 **Applicable national law:**

23 The first sentence of Paragraph 51(2) of the BNatSchG:

If, in customs controls, it is determined that import, transit or export of animals or plants is being carried out without the prescribed permits or other documents, the animals or plants involved shall be confiscated by the customs authority.

#### IV.

24 There is uncertainty as to the correct legal appraisal of the case under EU law.

25 1. The decision on the appeal on a point of law lodged by the Principal Customs Office depends on whether the quantity specified in Article 57(5)(a) of Regulation No 865/2006 is an allowance or a quantitative exemption. If it is interpreted as an allowance, the Principal Customs Office rightly confiscated the full quantity of six

containers of caviar introduced. However, if it is a quantitative exemption, it should have confiscated only four containers of caviar. The applicant should have been allowed to keep the remaining two 50 g containers of caviar, provided that they qualify as personal or household effects. According to information provided by the Principal Customs Office, Article 57(5)(a) of Regulation No 865/2006 is interpreted differently in the Member States.

- 26 (a) Sturgeon species (*Acipenseriformes spp.*) are protected under Appendix II to CITES (Article 3(2)(a), read in conjunction with Article 2(b), of Regulation No 338/97). They are therefore listed in Annex B to Regulation No 338/97. The protected specimens include bred animals and their eggs (Article 2(t) of Regulation No 338/97).
- 27 As a rule, when specimens of the species listed in Annex B are introduced into the Community, an import permit issued by a management authority of the Member State of destination must be presented at the border customs office at the point of introduction in accordance with the first subparagraph of Article 4(2) of Regulation No 338/97 [Or. 8]. However, according to the first sentence of Article 7(3) of Regulation No 338/97, this does not apply to dead specimens, parts and derivatives of species listed in Annexes A to D which are personal or household effects being introduced into the Community in compliance with provisions to be specified by the Commission. The Commission has, on that basis, laid down simplifications in respect of and derogations from the requirement to submit documents in Article 57 of Regulation No 865/2006. Thus, Article 57(5)(a), read in conjunction with the first subparagraph of Article 57(3), of Regulation No 865/2006 provides that caviar of sturgeon species (*Acipenseriformes spp.*) up to a maximum of 125 grams per person, in containers individually marked in accordance with Article 66(6) of Regulation No 865/2006, may be imported without either an import permit issued by the country of destination or a (re-)export document issued by the country of origin within the meaning of the first subparagraph of Article 57(3) of Regulation No 865/2006, provided that it is imported as personal or household effects by a person normally residing in the Community.
- 28 However, if the requirements of Article 57(5)(a) of Regulation No 865/2006 are not fulfilled and the importer does not have the import permit which is then required or, where applicable, an export document issued by the country of origin, the customs authority must confiscate the imported caviar in accordance with the first sentence of Paragraph 51(2) of the BNatSchG.
- 29 (b) Judgment in the case in question depends on whether and to what extent the applicant, who had neither an import permit nor an export document, can rely upon the derogation from the document requirements in accordance with Article 57(5)(a) of Regulation No 865/2006. In particular, the question arises as to the legal consequences of importing a total quantity of caviar (in this case 300 g of caviar of sturgeon species (*Huso Huso*)) that exceeds 125 g per person.

- 30 (aa) The referring court tends towards the view that, if the quantity specified in Article 57(5)(a) of Regulation No 865/2006 is exceeded, the full quantity imported must be confiscated.
- 31 That view is supported by the objectives of CITES and of Regulation No 338/97 and Regulation No 865/2006 of protecting endangered species of fauna and flora (see recitals 1 and 2 of Regulation No 338/97), as it is a simple and effective way of enforcing compliance with the rules. Moreover, that interpretation reinforces the principle that documents are required as a rule and ensures that derogations from that rule actually **[Or. 9]** apply only where small quantities are imported. If the benefit is granted only where the maximum quantity is complied with or where the necessary documents are presented, it is possible to decide at the time of introduction, without obtaining further evidence, whether the goods are to be allowed through. Otherwise, evidence of importation for non-commercial purposes would have to be obtained in order to be able to decide whether a person who has failed to comply with the rules should be allowed to keep part of the goods nonetheless. If, where the quantity of caviar imported exceeds 125 g, part of the goods were allowed to pass without any documents being presented, imports of larger quantities of caviar might ultimately profit from the simplification at least in part.
- 32 A narrow interpretation of Article 57(5)(a) of Regulation No 865/2006 in the sense of an allowance is supported by the fact that Article 57(5)(a) of Regulation No 865/2006 does not provide for duty to be paid on quantities of caviar introduced in excess of the permissible quantity of 125 g. In the opinion of the referring court, that would also conflict with the objectives of the aforesaid legal bases. If it is an allowance, a person importing more than 125 g of caviar would have no prospect from the outset of being allowed to keep at least part of the quantity without presenting the necessary documents.
- 33 The fact that the quantity of 125 g applies ‘per person’ also suggests that the imported goods cannot be apportioned between goods that do not require documents and goods that do require documents and must therefore be confiscated. This situation cannot therefore be compared to a batch consignment containing parcels for several individual consignees, which the Court of Justice of the European Union has allowed to be treated as consignments of negligible value if each parcel has an individual value of less than EUR 22 (see [judgment of 2 July 2009, *Har Vaessen Douane Service*, C-7/08, EU:C:2009:417] [...] on Article 27 of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty [...], as amended by Council Regulation (EEC) No 3357/91 of 7 November 1991 amending Regulation (EEC) No 918/83 setting up a Community system of reliefs from customs duty).
- 34 A narrow interpretation of Article 57(5)(a) of Regulation No 865/2006 in the sense of an allowance is further supported by point 2(e) of Resolution 12.7 and point 3(b)(iv) of Resolution 13.7 of the CITES conference of parties (‘CoP’) **[Or. 10]** ‘limiting this exemption to no more than 125 grams of caviar per person’.

- 35 (bb) However, it might also be possible to interpret Article 57(5)(a) of Regulation No 865/2006 as meaning that a person who imports too large a quantity can be allowed to keep at least 125 g of caviar as a quantitative exemption. According to information provided by the Principal Customs Office, Article 57(5)(a) of Regulation No 865/2006 is interpreted and applied differently in the Member States, thereby exacerbating the doubts of the referring court.
- 36 It does not follow unequivocally either from the wording of that provision or from Resolutions 12.7 and 13.7 of the CoP that, if the quantity of caviar imported exceeds 125 g, documents are automatically required for the full quantity. Formulations similar to that of Article 57(5)(a) of Regulation No 865/2006 are to be found, for example, in Article 23(2) of Regulation (EC) No 1186/2009 ('Regulation No 1186/2009') on consignments of negligible value ('goods of negligible value' means goods the intrinsic value of which does not exceed a total of EUR 150 per consignment) and in Article 27 of Regulation No 1186/2009 on quantitative restrictions on consignments from one private individual to another ('maximum quantities'). However, the quantities stipulated in those regulations are treated as quantitative exemptions which the importer is always allowed to keep.
- 37 At the same time, were it to be interpreted as an allowance, Article 57(5)(a) of Regulation No 865/2006 would be a punitive provision, which does not follow at any rate from the wording of the provision. Article 57(5)(a) of Regulation No 865/2006 simply states that no documents are required in order to import a certain quantity of caviar. That notwithstanding, infringements of provisions to protect species can, if necessary, be punished under criminal law.
- 38 Furthermore, CITES and Article 57(5)(a) of Regulation No 865/2006 obviously consider that importing up to 125 g of caviar does not put the survival of sturgeon species at risk. That quantity is complied with both if a maximum of just 125 g of caviar is imported from the outset and if persons who import in excess of that quantity are allowed to keep 125 g of caviar.
- 39 2. If the answer to Question 1 is in the affirmative, judgment on the appeal on a point of law further depends on whether the imported species qualify as personal or household effects within the meaning of Article 7(3) of Regulation No 338/97 even where the importer declares at the time of introduction that he intends **[Or. 11]** to present the imported goods as a gift to other persons. If that is so, the applicant in this case should be allowed to keep two 50g tins of caviar.
- 40 The wording of Article 2(j) of Regulation No 338/97, which refers to the goods and chattels of 'that' person (das Hab und Gut 'dieser' Person) (in English, 'part of his normal goods and chattels'; in French, 'partie de ses biens et effets normaux'), suggests that a species qualifies as personal or household effects only if it is intended for the importer in person.

- 41 Nonetheless, the referring court considers that a specimen introduced may also qualify as personal effects if the importer intends to present the imported items to other persons (as travel souvenirs), provided there is no evidence of any commercial intention.
- 42 Article 2(j) of Regulation No 338/97 distinguishes between ‘household effects’ and ‘personal effects’. Household effects might be regarded as effects that belong to the personal domain of a private individual and are intended to remain permanently in his household, whereas ‘personal effects’ would appear to be effects which serve or are intended to serve personal needs. Use or consumption by that person is not a condition in either Article 2(j) of Regulation No 338/97 or in Article 57(5)(a) of Regulation No 865/2006. Nor does Article 57(5)(a) of Regulation (EEC) No 865/2006 mention the importer’s private intentions. Thus, the term ‘personal effects’ would not necessarily appear to depend upon the importer keeping the species.
- 43 The chamber has ruled, in connection with the exemption enacted in Article 8 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [...] and the corresponding national rule adopted in Paragraph 20(1) of the Tabaksteuergesetz (Law on Tobacco Tax), in the version in force in 2007, that products subject to excise duty are acquired for the requirements of the private purchaser even if they are to be presented as a gift to another private individual with whom he has a close personal connection. Accordingly, a person who, of his own volition, purchases gifts for family members is also covering his own requirements. That is because he is incurring expenditure that has not been commissioned and for which no reimbursement of expenses from third parties can be expected [...] **[Or. 12]** [...].
- 44 By those standards, the referring court in the case in question regards two 50 g tins of the caviar imported by the applicant as the applicant’s personal effects, even if she intended to present that part of the total quantity imported as gifts to her children and declared this at the time of introduction. There is no evidence in this case of commercial purpose within the meaning of Article 57(1) of Regulation No 865/2006.
- 45 Nor does that outcome conflict with point 8 of Annex 1 to Resolution 13.7 of the CoP, which states that specimens must be personally owned or possessed for non-commercial purposes. Whereas the first alternative assumes that the importer does not give away the specimens and keeps them himself, the second alternative (‘possessed for non-commercial purposes’) is more broadly worded, as the personal purpose is not bound up with personal possession.
- 46 Aside from these legal considerations, the referring court considers that it would also be questionable from a practical point of view to refuse the derogation from the need to present documents enacted in Article 57(5)(a) of Regulation No 865/2006 simply on the ground of the stated intention to present the caviar as a

gift. Any such interpretation raises the question as to how the importer's intentions are to be reliably verified during customs clearance procedures. Ultimately, an importer who declares his intention to present the goods as a gift would be disadvantaged compared to an importer who states that he wishes to keep the caviar himself or who says nothing at all, as he would be denied the derogation from the need to present documents. Furthermore, an intention initially declared during customs clearance may be abandoned following the introduction of the goods. Finally, it is unclear why it should be possible to import 125 g of caviar without any documents being presented if the importer consumes the caviar himself or invites friends or relatives to partake, whereas documents need to be presented if the importer wishes to present the imported caviar as a gift to those persons.

- 47 The referring court's doubts as to the interpretation of Article 57(5)(a) of Regulation No 865/2006 are exacerbated by the fact that, according to the Principal Customs Office, the question of whether goods carried as gifts can be treated as personal or household effects is answered differently by the Member States.

WORKING DOCUMENT