

Case C-708/19

Request for a preliminary ruling

Date lodged:

25 September 2019

Referring court:

Finanzgericht Düsseldorf (Germany)

Date of the decision to refer:

21 August 2019

Applicant:

Von Aschenbach & Voss GmbH

Defendant:

Hauptzollamt Duisburg (Germany)

[...]

FINANZGERICHT DÜSSELDORF (FINANCE COURT, DÜSSELDORF)

ORDER

In the case of

Von Aschenbach & Voss GmbH, [...] Krefeld,

– Applicant –

[...]

[...]

v

Hauptzollamt Duisburg (Principal Customs Office,
Duisburg) [...]

– Defendant –

concerning

anti-dumping duty

the Fourth Chamber [...]

[...]

made the following order on the basis of the hearing of 21 August 2019:

The proceedings are stayed and the following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU: **[Or. 2]**

1. Is Article 1(1) of Commission Implementing Regulation (EU) 2017/271 of 16 February 2017 extending the definitive anti-dumping duty imposed by Council Regulation (EC) No 925/2009 on imports of certain aluminium foil originating in the People's Republic of China to imports of slightly modified certain aluminium foil invalid because it infringes Article 13(1) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, in that it extended to aluminium converter foil the definitive anti-dumping duty imposed in respect of aluminium household foil pursuant to Commission Implementing Regulation (EU) 2015/2384 of 17 December 2015 imposing a definitive anti-dumping duty on imports of certain aluminium foils originating in the People's Republic of China and terminating the proceeding for imports of certain aluminium foils originating in Brazil following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009 and provides for exemption for aluminium converter foil from anti-dumping duty only under the conditions of Article 1(4) of Implementing Regulation 2017/271?

2. Is Article 1(1) of Implementing Regulation 2017/271 invalid because the Commission made a manifest error of assessment when adopting that regulation as adequate reasons are not stated for its assumption that 80% of the products under investigation were slightly modified products?

3. Is Article 1(1) of Implementing Regulation 2017/271 invalid because the Commission made a manifest error of assessment when adopting that regulation as it did not check the end use of the imported aluminium foil in the European Union?

[...]**[Or. 3]**

G r o u n d s :

I.

- 1 The applicant purchased from the People's Republic of China ('the PRC') aluminium foil, not backed, in the form of aluminium household foil (AHF) of a thickness of not less than 0.008 mm and not more than 0.018 mm, in rolls of a width exceeding 650 mm and of a weight of 10 kg or more. It had the rolls slit

into the widths required for household foil before it sold them to its customers, called 'rewinders'.

- 2 Between 21 July and 15 September 2016, the applicant declared six consignments originating in the PRC to the defendant's Ruhrort customs office for release for free circulation. It declared them as 'rolls of aluminium foil, not further worked than rolled, of a thickness of not less than 0.008 mm and not more than 0.018 mm, in rolls of a width exceeding 650 mm' under TARIC code 7607 11 19 10. The customs office accepted the customs declarations and imposed only custom duty and import turnover tax by means of import duty assessment notices. In the commercial invoices, the products were described as 'Household Aluminium Foil' of lengths of between 80 and 220 m and a width of 116 and 120 cm with a thickness of 0.0103 and 0.0123 mm.
- 3 By import duty assessment notice of 5 May 2017, the defendant subsequently imposed on the applicant, after the event, anti-dumping duty of EUR 413 471.00 for the six imports, as it had not been imposed earlier. The objection raised against the assessment notice was unsuccessful.
- 4 As grounds for its action, the applicant argues, in summary, that the contested import duty assessment notice is unlawful because Implementing Regulation 2017/271 infringes Regulation 2016/1036 and is therefore invalid. The definition of the products under investigation is incorrect and infringes Articles 1(4) and 13(1) of Regulation 2016/1036, because they contain aluminium converter foil (ACF) in addition to AHF, even though ACF is not a like product and should therefore have been excluded from the investigation. This error is also not remedied by applying Article 254 of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (UCC), as provided for in Article 1(4) of Implementing Regulation (EU) 2017/271. In addition, there is a manifest error of assessment in the Commission's findings [Or. 4] regarding the change in the pattern of trade pursuant to the third subparagraph of Article 13(1) of Regulation 2016/1036. The Commission did not investigate the end use of the imported foil in the European Union and was therefore also unable to rule out that imports of ACF had also been taken into account. It cannot be inferred from the low level of cooperation that the non-cooperating companies in fact exported slightly modified products. The low level of cooperation can also be explained by the fact that the non-cooperating companies assumed that they were not obliged to cooperate on account of the export of ACF. The arbitrary assumption of an 80% proportion of slightly modified products also gives rise to a manifest error of assessment regarding the alleged undermining of the remedial effect of the duty pursuant to the third subparagraph of Article 13(1) Regulation 2016/1036. Neither circumvention nor injury could be established in the course of the previous investigation procedure. Nevertheless, the investigation period for the anti-dumping duties imposed by Implementing Regulation 2017/271 overlapped with the previous investigations.
- 5 The applicant requests that

the defendant's import duty assessment notice of 5 May 2017 in the form of the decision of 2 February 2018 on the objection be annulled;

in the alternative, leave to appeal on a point of law be granted.

The defendant requests that

the action be dismissed,

and, as its grounds, refers to its decision on the objection. **[Or. 5]**

II.

Question 1:

- 6 According to the wording of the first subparagraph of Article 13(1) of Regulation 2016/1036, anti-dumping duties already imposed may be extended to imports of slightly modified like products from the country concerned. Pursuant to Article 1(4) of Regulation 2016/1036, like products are products which are identical to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration.
- 7 The anti-dumping duty already imposed resulted from Implementing Regulation 2015/2384. Pursuant to Article 1(1) of that regulation, the latter covers aluminium foil of a thickness of not less than 0.008 mm and not more than 0.018 mm, not backed, not further worked than rolled, in rolls of a width not exceeding 650 mm and of a weight exceeding 10 kg, and originating in the People's Republic of China. The product thus covered is commonly known as AHF (recital 29 of Implementing Regulation 2015/2384) and is further rewound into smaller rolls by downstream processors, called 'rewinders', following importation. The obtained product, consumer rolls, is used in multi-purpose short-life wrapping, mostly in households, catering, and food and floristry retail business (recital 31 of Implementing Regulation 2015/2384).
- 8 By contrast, Article 1(1) of Implementing Regulation 2017/271 extends the anti-dumping duty pursuant to Implementing Regulation 2015/2384 not only to slightly modified AHF but also to ACF by simply extending the anti-dumping duty to aluminium foil with the technical characteristics mentioned therein. As a result, both AHF and ACF are covered. ACF is aluminium foil intended for further processing. Converter industries laminate, coat, lacquer and otherwise process and integrate it into products that serve as packaging for food, medicine, cosmetics and tobacco or are used in insulation materials for the construction sector (recital 28 of Implementing Regulation 2017/271).
- 9 Due to the different type of further processing required for ACF and a different use, it is clear that ACF and AHF cannot be **[Or. 6]** like products within the meaning of Article 1(4) of Regulation 2016/1036 and, even assuming slight

modifications within the meaning of the first and third subparagraphs and point (a) of the fourth subparagraph of Article 13(1) of Regulation 2016/1036, ACF cannot justify an extension. The Commission also proceeded on this basis when adopting Implementing Regulation 2017/271 in that it made provision under Article 1(4) of Implementing Regulation 2017/271 for a procedure by which the import of ACF having the technical characteristics of a product covered by Article 1(1) of Implementing Regulation 2017/271 could be exempted from anti-dumping duty.

- 10 It is true that an importer of ACF can be exempted from anti-dumping duty pursuant to Article 1(4) of Regulation 2017/271 if he requests that the ACF be placed under the end-use procedure pursuant to Article 254 of the UCC. However, even the use of this procedure does not represent an insignificant burden for an importer of ACF.
- 11 The end-use procedure pursuant to Article 254 of the UCC has to be requested by the respective importer pursuant to Article 158(1) of the UCC and must be authorised by the customs authorities pursuant to Article 211(1)(a) of the UCC and Article 239 of 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. In addition, it is also made conditional upon the provision of a guarantee pursuant to Article 211(3)(c) of the UCC, corresponding to the amount of anti-dumping duty which may be incurred (Article 90 of the UCC and Article 148(1) of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code). The obligation to provide a substantial guarantee constitutes significant detriment for an importer of a product that as such should not be encumbered by anti-dumping duty.
- 12 In the case in dispute, justification for this encumbrance could be based solely on the fact that ACF and AHF — in so far as they are covered by the provisions of Article 1(1) of Implementing Regulation 2017/271 — cannot be distinguished from one other on the basis of technical characteristics, but rather only on the basis of their [Or. 7] use. The applicant also acknowledged this particularity in the practical distinction between AHF and ACF at the hearing.

The subsequent questions:

- 13 In the realm of measures based on Regulation 2016/1036, the Commission enjoys a broad discretion by reason of the complexity of the economic, political and legal situations which it has to examine, such that the judicial review of such an appraisal is limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (see Court of Justice, judgments of 26 January 2017, C-247/15 P, C- 253/15 P and C-259/15 P, ECLI:EU:C:2017:61,

paragraph 54, and of 26 January 2017, C-248/15 P, C-254/15 P and C-260/15 P, ECLI:EU:C:2017:62, paragraph 56).

Taking this standard into account, the applicant has put forward a number of serious grounds for finding a manifest error of assessment in the adoption of Implementing Regulation 2017/271. It is for the Court of Justice alone to determine whether these grounds may justify the invalidity of Implementing Regulation 2017/271.

Question 2

- 14 Contrary to the view taken by the applicant, the General Disclosure Documents of 16 December 2016 and 12 January 2017 and footnote 1 of recital 36 of Implementing Regulation 2017/271 could show how the Commission reached its conclusion that 80% of the products under investigation were slightly modified products. The Commission deducted from the total amount of exports from the PRC to the European Union the amount of ACF that originated from the cooperating companies. As the export volume of the cooperating companies represented 22% of the total exports to the European Union, but one of those companies also exported slightly modified products, the assumption that at least 20% of the exports from the PRC were ACF gives no cause for objection. Regarding the remaining quantity, the Commission assumed, on the basis of [Or. 8] the low level of cooperation by the exporting companies in the PRC, that merely a slightly modified product was involved.
- 15 The Commission based this conclusion on Article 18(1) of Regulation 2016/1036. It is true that Article 18 of Regulation 2016/1036 does not establish a legal presumption whereby it is possible to infer the existence of circumvention directly from the non-cooperation of the parties interested or concerned, thereby exempting the EU institutions from any requirement to adduce proof. However, given that it is possible to make findings, even definitive findings, on the basis of the facts available and to treat a party which does not cooperate, or does not cooperate fully, less favourably than if it had cooperated, it is equally evident that the EU institutions are authorised to act on the basis of a body of consistent evidence showing the existence of circumvention for the purposes of Article 13(1) of Regulation 2016/1036 (Court of Justice, judgments of 26 January 2017, ECLI:EU:C:2017:61, paragraph 64, and of 26 January 2017, ECLI:EU:C:2017:62, paragraph 66).
- 16 The referring court is unable to ascertain whether, in the present case, such a body of consistent evidence exists on the basis of the information arising from Commission Implementing Regulation (EU) 2016/865 of 31 May 2016 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Implementing Regulation (EU) 2015/2384 on imports of certain aluminium foil originating in the People's Republic of China by imports of slightly modified certain aluminium foil from the People's Republic of China, and

making such imports subject to registration, and from Implementing Regulation 2017/271.

- 17 The applicant asserted circumvention practices as early as in the request to investigate, as shown by the statements in recitals 10 to 14 of Implementing Regulation 2016/865. The existence of these circumvention practices was also established in the investigation on the basis of the activities of the cooperating companies in the PRC (recitals 44 to 49 of Implementing Regulation 2017/271). The applicant clearly also used one of these circumvention practices prior to the entry into force of Implementing Regulation 2017/271 by purchasing AHF in rolls of a width exceeding 650 mm. It slit these rolls which were then cut by rewinders to lengths **[Or. 9]** customary in the trade in order to be able to sell them to end consumers.
- 18 Nevertheless, the applicant's statements in its publicly accessible application militate against circumvention to the extent assumed by the Commission. According to the application, the imports of slightly modified aluminium foil exceeded those of ACF only in the years 2011 to 2015, but by no means reached 80%. Furthermore, according to the applicant, the consumption of AHF in the European Union was only around 55% of the consumption of ACF.
- 19 The specific reasons behind the low level of cooperation of the producers in the PRC could not be gathered from the documents submitted to the court. However, according to the questionnaire sent, the company that was asked to cooperate had to indicate that it did not engage in any circumvention practices within the meaning of Article 13(1) of Regulation 1225/2009 — this provision corresponding verbatim to Article 13(1) of Regulation 2016/1036 — in relation to the export of the products under investigation. If companies cooperated, they could either have admitted to the acts of circumvention or not made the declaration regarding circumvention, with the result that they would have filled in the questionnaire incompletely. Had they exported only ACF, however, as was the case with four of the cooperating companies, they could have received exemptions per se. As the non-cooperating companies did not avail themselves of this opportunity, however, the conclusion that they also exported slightly modified products is by no means implausible in any event.
- 20 If the quantity of slightly modified products has been determined incorrectly by a significant margin, the Commission may have committed a manifest error of assessment when adopting Implementing Regulation 2017/271 in so far as it assessed the undermining of the remedial effects of the anti-dumping duty.

Question 3

- 21 In the context of the investigation initiated by Implementing Regulation 2016/865, the Commission found that the technical criteria for distinguishing between AHF and ACF that were previously regarded as being decisive **[Or. 10]** were inadequate (recitals 68 and 69 of Implementing Regulation 2017/271). Following

discussions with the parties to the proceedings, the Commission ultimately decided that the most appropriate approach would be to take end use as the basis (recital 72 of Implementing Regulation 2017/271; General Disclosure Document of 12 January 2017, paragraph 70).

- 22 After this, the Commission did not further investigate the end use that takes place in the European Union. Thus, the applicant takes the view that the Commission has made a manifest error of assessment because it was only in the European Union that the end use could have been investigated. It was not possible to do this on the premises of the cooperating exporting producers in the PRC (see recital 80 of Implementing Regulation 2017/271). Due to this omission, there was also not a sufficient factual basis for finding a change in the pattern of trade (see recital 40 of Implementing Regulation 2017/271). The referring court finds these conclusions to be plausible. As the Commission's decision to distinguish between AHF and ACF on the basis of their use was not taken until towards the end of the nine-month investigation period (second subparagraph of Article 13(3) of Regulation 2016/1036), there was not actually enough time to investigate end use in the European Union.
- 23 The court also takes the view that the applicant is also directly affected with regard to the circumstances that may substantiate the invalidity of Implementing Regulation 2017/271. They have a direct effect on its legal situation, as Implementing Regulation 2017/271 is the legal basis for the anti-dumping duty imposed on it (cf. Court of Justice, judgment of 26 September 2000, T-80/97, paragraph 65, ECLI:EU:T:2000:216).

[...]