

Case C-197/20

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:

7 May 2020

Referring court:

Finanzgericht Hamburg (Germany)

Date of the decision to refer:

14 April 2020

Applicant:

KAHL GmbH & Co. KG

Defendant:

Hauptzollamt Hannover

Subject matter of the main proceedings

(Common Customs Tariff — Tariff classification — Combined Nomenclature — Subheadings 1521 9091 and 1521 9099 — Melted beeswax — Divergence between language versions in Union legislation)

Subject matter and legal basis of the reference

Interpretation and validity of EU law; first sentence of Article 267(b) TFEU

Questions referred

1. Are the Explanatory Notes to subheading 1521 9099 of the Combined Nomenclature applicable in so far as the word '*geschmolzen*' [melted] is used?
2. If the first question referred is answered in the negative, is the term 'raw' within the meaning of subheading 1521 9091 of the Combined Nomenclature to be interpreted as meaning that beeswax which has been melted down in the

exporting country and from which foreign bodies have been mechanically separated during the process of melting it down, whereby some foreign bodies still remain in beeswax, must be classified under that subheading?

Provisions of EU law cited

Combined Nomenclature set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), in particular subheadings 1521 9091 and 1521 9099

Explanatory Notes to the Combined Nomenclature of the European Union (most recently in OJ 2019, C 119, p. 1)

Commission Decision 2007/275/EC of 17 April 2007 concerning lists of animals and products to be subject to controls at border inspection posts under Council Directives 91/496/EEC and 97/78/EC (notified under document number C(2007) 1547) (OJ 2007 L 116, p. 9), in particular Annex I

Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation (EC) No 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive Text with EEA relevance (OJ 2011 L 54, p. 1), in particular Article 25(1)(c) and point (a)(ii) of point 10 of Section 1 of Chapter II of Annex XIV and Chapter III of Annex IV, processing methods 1 to 5 or 7

Provisions of national law cited

none

Brief summary of the facts and procedure

- 1 The product in question has the following properties: it is a beeswax that has been melted down in the exporting country and exported after solidification ('melted wax'). The product is not presented in a form suitable for the end user and consists of melted, honey-yellow, cut-resistant pieces (approx. 15 x 5 cm) and fragments (approx. 7 x 4 cm), which smell like beeswax, with cracks and structures that are created when melted wax solidifies. It has a small number of dark impurities that adhere to the exterior. When the customs administration melted down part of the product sample, it turned into a slightly cloudy, orange-yellow melt. The foreign matter that had sunk to the bottom during the period in which the beeswax was in liquid form consists primarily of sand and part of an insect leg.

- 2 The product in question undergoes the following treatment in the exporting country: after the honey has been extracted from the combs, the combs are melted down, usually by the beekeepers or by intermediaries, in order to make the wax easier to transport by reducing its volume compared with the comb structure and to remove foreign bodies. The process of melting the wax causes foreign bodies trapped in the wax, which have a greater density than the wax, to sink to the bottom. Depending on the melting process used, the foreign matter is separated off to varying degrees, but never completely. The wax cools down to form blocks or slabs. This wax, which has already been melted once, is melted down again by the applicant's suppliers. To that end, it is heated at a temperature of up to 120 °C in order to meet the veterinary requirements laid down in point (a)(ii) of point 10 of Section 1 of Chapter II of Annex XIV in conjunction with Chapter III of Annex IV to Regulation (EU) No 142/2011, processing methods 1 to 5 or 7. Without this thermal treatment, importation of the product into the EU would not be permitted. When this treatment is carried out, the liquid wax is passed through sieves, simple cotton cloths or mosquito nets, or it flows straight through them. No auxiliary agents are used for this and the wax does not undergo any further processing. Depending on the degree of original contamination of the comb and the coarse filter tools used, impurities will always remain in the wax, which remains unchanged in terms of colour, cloudiness, odour and taste. The wax cools down in the form of blocks or slabs.
- 3 Following importation, the applicant carries out extensive work to prepare the product in question for its customers in the cosmetic, pharmaceutical and food industries. Without this preparation, the wax could not be used in those industries. Aside from candle production, there are various other possible uses for beeswax. At the applicant's premises, the wax is melted down again and finely filtered by means of special presses and using filtering agents. Depending on the intended use, it is coloured or bleached. It is then filtered again so that the wax no longer contains any foreign matter. Wax of this quality is referred to as double-refined wax. Finally, the wax is shaped into the form desired by the end customer (e.g. pellets).
- 4 By letter of 11 December 2015, the applicant, which trades and processes waxes, applied for binding tariff information (BTI) for a product referred to by it as 'beeswax, raw' ('the product' or 'the product in question').
- 5 Contrary to the applicant's proposal for the product to be classified as raw beeswax under CN subheading 1521 9091, the defendant, by BTI of 10 February 2016, classified it as 'other' beeswax under CN subheading 1521 9099.
- 6 The applicant's objection of 22 February 2016 was rejected by objection decision of 28 July 2017.
- 7 By the action brought on 30 August 2017, the applicant is pursuing the form of order sought by it. It requests that a new BTI classifying the product under CN

subheading 1521 9091 be issued, and emphasised that the tax effects of the classification decision amounted to approximately EUR 800 000.

Principal arguments of the parties to the main proceedings

- 8 The applicant submits that the product in question should be classified as raw beeswax under CN subheading 1521 9091, since it was imported in its natural state. Otherwise, the subheading would be devoid of purpose, because the importation of wax in the form of honeycomb was prohibited pursuant to Article 25(1)(c) of Regulation (EU) No 142/2011. It was clear from the Explanatory Notes to HS subheading 1521 that raw waxes other than those in the form of honeycomb existed. Annex I to Commission Decision 2007/275 even mentioned, in relation to CN code 1521 9091, refining as a permitted form of treatment ('Raw beeswax and other insect waxes whether refined or not'). The distinction between raw and melted beeswax had to be made on the basis of the quality of the product. Although the German language version of the Explanatory Notes to CN subheading 1521 9099 also referred to melted wax ('geschmolzen'), this should be understood as a further manufacturing process involving the removal of undesirable constituents from the wax. This was not the primary purpose served by the process of heating the wax prior to export; it was mainly carried out to make the product suitable for importation. It also served to form larger batches. Except for its external appearance, the product in question was identical to beeswax in honeycomb form. It was clear from additional notes 1(a) and 1(b) to Chapter 15 of the CN that simple processing steps (decantation and centrifugation) were permitted. It was not compatible with the wording of CN subheading 1521 9091 for the defendant to make the property 'raw' dependent on the degree to which impurities were present in the product. Beeswax was a natural product obtained directly from the comb and always contained impurities, and the degree to which they were present varied greatly according to the age and origin of the combs. The product in question still contained parts of the original impurities. It constituted nothing other than the wax from the comb in a different form. Heating and cooling did not change the composition of the wax itself. Only some of the foreign matter had been removed. The removal of impurities had no influence on the properties of the beeswax.
- 9 In response, the defendant states that the product in question was not raw beeswax, but other beeswax under CN subheading 1521 9099. The term 'raw' was not defined in the Combined Nomenclature. According to the Explanatory Notes to CN subheading 1521 9091, beeswax in natural combs was regarded as raw wax. If the product in question, which was not in the form of natural combs (and this was not disputed), should likewise be classified as raw beeswax, it must have properties similar to those of wax in natural combs. This similarity could relate to the degree of purity, for example. However, the product in question simply did not contain the impurities typical of beeswax in natural combs. Beeswax that had merely been thermally treated pursuant to Regulation (EU) No 142/2011 could be classified as raw wax. It still contained all the impurities of wax in natural combs.

This was certainly not the case with the product in question. It contained very few impurities. In addition, it had shaped edges like those of a melt mould. This allowed the conclusion that purification and remelting had already taken place. The product in question therefore had to be classified as melted wax. CN subheading 1521 9091 was not devoid of purpose. There were also other insect waxes that could fall under this subheading. The reference to the Explanatory Notes to HS heading 1521 came to nothing, as they did not concern the distinction between CN subheadings 1521 9091 and 1521 9099. The veterinary legislation did not have any bearing on classification. The reference to Commission Decision 2007/275/EC also came to nothing. In Annex I to that decision, it was expressly stated in the preliminary remark that the descriptions did not affect classification.

Brief summary of the basis for the reference

- 10 CN subheadings 1521 9091 and 1521 9099 read as follows:

CN Code	Description
1521	Vegetable waxes (other than triglycerides), beeswax, other insect waxes and spermaceti, whether or not refined or coloured:
	– Vegetable waxes
	– Other
	...
	-- Beeswax and other insect waxes, whether or not refined or coloured:
1521 90 91	--- Raw
1521 90 99	--- Other

- 11 The German language version of the Explanatory Notes to CN subheading 1521 9091 reads: *‘Hierher gehören z. B. Wachse in Wabenform’* [This subheading includes waxes in natural combs]. These explanatory notes have the same meaning in all the language versions.
- 12 The German language version of the Explanatory Notes to CN subheading 1521 9099 reads (emphasis added): *‘Hierher gehören Wachse, die geschmolzen, gepresst oder raffiniert, auch gebleicht oder gefärbt sind’* [This subheading includes waxes, **melted**, pressed or refined, whether or not bleached or coloured]. This corresponds to the French, Spanish, Portuguese, Italian, Dutch and Romanian language versions. By contrast, there is no equivalent for the word *‘geschmolzen’* [melted] in the English, Danish, Swedish, Polish, Czech and Maltese language versions.
- 13 Likewise, the French language version of the Explanatory Notes to heading 1521 of the World Customs Organisation’s Harmonised Commodity Description and Coding System (HS) contains the word *‘fondues’* [melted], whereas there is no

equivalent in the English version. The history of the HS Explanatory Notes to heading 1521 shows that such an equivalent did exist in the English texts originally but was not incorporated into the final version. For example, the draft Explanatory Notes to the Brussels Nomenclature of 1951 of the Brussels Customs Council regarding heading 15.15 referred to ‘melted’ beeswax in both the English and French language versions. Although it is noted in the minutes of the meetings of the *Explanatory Notes Sub-Committee/Sous-Comité des Notes Explicatives* held in July 1953 that no amendments were made to the original text, the word ‘melted’ does not appear in the final English language version of the explanatory notes of 1955.

Question 1

- 14 The referring court considers that, with regard to classification, the interpretation of the term ‘*geschmolzen*’ [melted] in the explanatory notes to CN subheading 1521 9099 is relevant to the decision to be given. The Explanatory Notes to the CN do not have legally binding force but are nevertheless an important aid in interpreting the scope of the various tariff headings (CJEU, judgment of 11 April 2019, *X BV*, C-288/18, EU:C:2019:319, paragraph 28; judgment of 13 September 2018, *Vision Research Europe*, C-372/17, EU:C:2018:708, paragraph 23). Therefore, the referring court may not take a decision which is in clear contradiction with the Explanatory Notes to the CN.
- 15 The referring court has no reason to doubt that ‘*geschmolzen*’ [melted] means that something has been converted from a solid to a liquid physical state. However, the physical state of the product at the time of importation does not appear to be significant. The referring court is convinced that the reason for melting the wax is irrelevant from the point of view of the law on classification. If the word ‘*geschmolzen*’ in the Explanatory Notes to CN subheading 1521 9099 were to be applicable, the product in question would be classified as ‘other’ beeswax under that subheading, and not under CN subheading 1521 9091 — as requested by the applicant — because the product has been melted. On the other hand, if the Explanatory Notes to CN subheading 1521 9099 were not applicable in so far as they contain the word ‘*geschmolzen*’, the court would classify the product in question under CN subheading 1521 9091. This follows from the statements regarding the second question referred (see below). Were the Court of Justice to reach a different conclusion, it could answer the second question first and leave the first question unanswered.
- 16 The courts of the Member States may not automatically base their decision on the language version of EU law in which the court delivers its judgments. It is settled case-law of the Court of Justice that the wording used in one language version of a provision of European Union law cannot be made to override the other language versions. Such an approach would be incompatible with the requirement for uniform application of European Union law. Where there is a divergence between the language versions, the provision in question must thus be interpreted by reference to the general scheme and the purpose of the rules of which it forms part

(CJEU, judgment of 15 November 2012, *SIA Kurcums Metal*, C-558/11, EU:C:2012:721, paragraph 48; judgment of 3 March 2011, *Commission v the Netherlands*, C-41/09, EU:C:2011:108, paragraph 44 and the case-law cited).

- 17 The different language versions are clearly attributable to the divergence between the English and French versions of the Explanatory Notes to HS heading 1521. However, the linguistic discrepancy has clearly not had any effect under international law, since HS heading 1521 does not distinguish between raw beeswax and other beeswax and no one disputes that beeswax in its melted form also belongs to HS heading 1521.
- 18 The discrepancy between the French and English versions of the Explanatory Notes to HS heading 1521 has been transferred to the English and French versions of the Explanatory Notes to CN subheading 1521 9099. From there, it was transferred to the respective language versions of the Explanatory Notes, which were translated from English and French. The linguistic differences have an impact on the EU's customs legislation, since EU law has created subheadings for both raw beeswax and other beeswax. They are subject to different rates of duty.
- 19 The term 'raw' within the meaning of CN subheading 1521 9091, for the interpretation of which the Explanatory Notes to CN subheading 1521 9099 can be used indirectly, does not allow any conclusions to be drawn as to whether or not the Commission intended to regard melted wax as raw beeswax. This is because, on the one hand, the term 'raw' may be understood as meaning that it only covers products that have not undergone any further treatment whatsoever. According to this understanding, melted beeswax would no longer be raw beeswax. On the other hand, based on the generally accepted standards in the trade, some products are still considered to be raw even if they have undergone certain treatment or processing steps. According to the investigations carried out by the referring court, this is the case with beeswax (see paragraph 25 below).
- 20 It is not clear to the referring court why the draft text from 1951 was amended in 1955 — omitting the term 'melted' — even though no amendments were documented in 1953 (see paragraph 13 above). The discrepancy between the language versions that arose in this connection indicates that this was an oversight. The referring Chamber takes the view that this is also supported by the fact that the questions of interpretation giving rise to the present dispute would not arise if the melting and simple pressing of wax were to be regarded as processes that do not preclude the classification of the product in question as raw beeswax.
- 21 The principle of the rule of law requires that a provision not be applied if its content cannot be determined by means of interpretation. The referring court would therefore disapply the Explanatory Notes to CN subheading 1521 9099 in so far as the word '*geschmolzen*' [melted] is used. However, as a court of a Member State, it does not itself have competence to declare acts of Union institutions, which include the Commission's Explanatory Notes to the CN, to be invalid (CJEU, judgment of 22 October 1987, *Foto-Frost*, 314/85,

EU:C:1987:452, [1987] ECR 4225, 4231 [paragraph 13]; confirmed by judgment of 6 December 2005, *Gaston Schul Douaneexpediteur BV*, C-461/03, EU:C:2005:742, paragraph 21; judgment of 10 January 2006, *International Air Transport Association*, C-344/04, EU:C:2006:10, paragraph 30) or to disapply them (Opinion of Advocate General Stix-Hackl of 12 April 2005, *Intermodal Transport*, C-495/03, EU:C:2005:215, point 46). The matter must therefore be referred to the Court of Justice, which has sole competence to rule on the disapplication of EU law.

Second question referred

- 22 If the word ‘*geschmolzen*’ [melted] in the Explanatory Notes to CN subheading 1521 9099 must be disappplied, the interpretation of the word ‘raw’ within the meaning of CN subheading 1521 9091 is of decisive importance.
- 23 The term ‘raw’ within the meaning of CN subheading 1521 9091 is not defined in the CN. On a general linguistic understanding, according to the Duden — the leading German dictionary — the German word ‘*roh*’ [raw] means, in its meaning relevant here, ‘not treated, not processed’. The Chamber is inclined to concur with the view taken by the applicant, that the imported product — beeswax — has not been treated or processed in the sense referred to above. Although the honeycombs were melted down and foreign matter was separated off, the product to be classified is the beeswax, not the combs. In terms of the substance, the imported wax is still the same as that found in the combs. It merely has a different shape and has been (partially) cleansed of foreign matter.
- 24 The examples of the use of the German word ‘*roh*’ [raw] given in the Duden indicate that the term has sector-specific differences in meaning. On the one hand, some products are only described as raw if they have not undergone any further treatment. On the other hand, there is a second category of products that are still referred to as raw even though they have undergone various processing steps. For the products in this category, the generally accepted standards in the trade determine which treatment or processing steps the product may undergo and still be classified as raw.
- 25 According to the definitions available to the referring court, melted wax from which impurities have been all but entirely removed is referred to as raw wax.
- 26 The fact that beeswax may be imported only in the melted state, because only thermally treated — and therefore, inevitably, melted — beeswax can satisfy the veterinary requirements of Regulation (EU) No 142/2011, is also irrelevant to the interpretation of CN subheading 1521 9091. This is because, in principle, the existence of trade restrictions does not affect tariff classification (CJEU, judgment of 28 April 2016, ‘*SIA “Oniors Bio”*’ (C-233/15, EU:C:2016:305, paragraph 52 et seq.). An exception to this cannot be made in the present case, for the simple reason that the prohibition on the importation of beeswax in the form of honeycomb pursuant to Article 25(1)(c) of Regulation (EU) No 142/2011 is

significantly more recent than CN subheading 1521 9091 or the Explanatory Notes to CN subheading 1521 9099. The prohibition on importation was first introduced by Article 1 in conjunction with point 4(e) of Annex I to Regulation (EC) No 829/2007 of 28 June 2007 amending Annexes I, II, VII, VIII, X and XI to Regulation (EC) No 1774/2002 (OJ 2007 L 191, p. 1).

- 27 As an interim conclusion, it appears to be possible, based on the wording of CN subheading 1521 9091, that the product in question here, which has merely been melted and from which foreign matter has been partially removed, can still be regarded as raw beeswax.
- 28 The Explanatory Notes to CN subheading 1521 9091 do not preclude — or require — a classification of the product in question as ‘raw’. It cannot necessarily be deduced from the reference to waxes in natural combs, which are mentioned by way of example, that beeswax must also occur in raw forms other than natural combs — such as melted, for instance. This is because the natural comb form may constitute the list of the only form of an insect wax listed by way of example — beeswax — that is recognised as a raw form. There are other insect waxes that occur in a raw form other than in natural combs. For example, shellac wax and Chinese wax are produced by insect deposits on trees without the lice that secrete the wax having formed combs.
- 29 If the term ‘raw’ beeswax within the meaning of CN subheading 1521 9091 is interpreted in the light of the Explanatory Notes to CN subheading 1521 9099 without the word ‘*fondue/geschmolzen*’ [melted], the product in question here should be classified as raw beeswax. This is because, with the exception of *fondue* [melted], the forms of treatment referred to in those Explanatory Notes bring about a change in the substance of beeswax due to the addition of bleaching, colouring or filtering agents. This is specifically not the case with the melting process and the mechanical separation of foreign matter carried out during that process.
- 30 Such an understanding of the term ‘raw’ within the meaning of CN subheading 1521 9091 would be consistent with a number of other provisions of the CN that contain definitions of the term ‘raw’. For instance, according to note 2 to Chapter 5 of the CN, human hair that is ‘sorted by length (provided the root ends and tip ends respectively are not arranged together)’ is also deemed to be raw. Note 4 to Chapter 27 defines the term ‘raw’ for certain mineral waxes. Additional notes 1(a) to (c) to Chapter 15 of the CN lay down certain treatments that do not preclude classification as raw (in this case ‘crude’) products. Although these definitions are not transferable to the product in question here, they show that it is not out of the ordinary for the CN to allow a product to undergo certain treatment without losing its status as a raw product.