

**Case C-419/20**

**Request for a preliminary ruling**

**Date lodged:**

8 September 2020

**Referring court:**

Finanzgericht Hamburg (Germany)

**Date of the decision to refer:**

1 September 2020

**Applicant:**

F. Reyher Nchfg. GmbH & Co. KG

**Defendant:**

Hauptzollamt Hamburg

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[...]

**Finanzgericht Hamburg (Finance Court, Hamburg, Germany)**

**Order**

In the case of

F. REYHER Nchfg. GmbH & Co. KG

[...],

[...] Hamburg

- applicant -

[...]

v

Hauptzollamt Hamburg (Principal Customs Office, Hamburg, Germany)

[...] Hamburg

- defendant -

concerning interest

on 1 September 2020 the Joint Chamber of the Finance Court, Hamburg, having jurisdiction for the *Länder* Free and Hanseatic City of Hamburg, Lower Saxony and Schleswig-Holstein, Fourth Chamber [...]

[...] **[Or. 2]**

**ordered as follows:**

I. The proceedings are stayed pending the preliminary ruling of the Court of Justice of the European Union.

II. The following question on the interpretation of acts of the institutions of the European Union is referred to the Court of Justice of the European Union for a preliminary ruling:

Is there an infringement of EU law, which is a condition for entitlement to interest under EU law as developed by the Court of Justice of the European Union, where a Member State authority imposes a duty pursuant to EU law but a Member State court subsequently finds that the factual conditions for the imposition of the duty have not been met?

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

**Facts of the case:**

- 1 The parties are in dispute about the payment of interest on anti-dumping duties that have been unlawfully imposed and then reimbursed following a final and binding judgment of the Finance Court, Hamburg.
- 2 In 2010 and 2011, the applicant imported fasteners from a company located in Indonesia, a subsidiary of a major Chinese producer of fasteners. Imports of certain iron or steel fasteners originating in the People's Republic of China were subject to an anti-dumping duty pursuant to Regulation (EC) No 91/2009.<sup>1</sup> Since the defendant, based on investigations by the European Anti-Fraud Office (OLAF), took the view that the fasteners imported by the applicant originated in the People's Republic of China, it sought to recover anti-dumping duties on the applicant by way of several notices dating from 2013, which the applicant subsequently paid.
- 3 By judgment of 3 April 2019 [...], the Finance Court, Hamburg, upheld the applicant's action and set aside the anti-dumping duties imposed on it on the grounds that the defendant, which bore the burden of proof, had not proved that the imported fasteners had originated in the People's Republic of China; the judgment of 3 April 2019 is final and legally binding.
- 4 In May 2019, the defendant reimbursed the applicant for the anti-dumping duties it had paid; however, it rejected the applicant's claim for the payment of interest on the anti-dumping duties paid for the period from the date of payment until reimbursement.
- 5 Following an unsuccessful objection procedure, the applicant brought a legal action on 10 February 2020. It believes that it is owed the interest claimed [**Or. 4**] in accordance with the case-law of the Court of Justice of the European Union (CJEU, judgment of 18 January 2017, *Wortmann*, C-365/15). The applicant argues that the Court of Justice held that where import duties, which include anti-dumping duties, are levied in breach of EU law, the party who paid the duties in question is entitled not only to repayment of the amount levied but also to interest on it from the date of payment. That entitlement to interest under EU law does not only apply to cases in which the Court of Justice of the European Union has declared the anti-dumping regulation on which the additional imposition of duties is based to be invalid. Import duties have also been levied in breach of EU law, with the consequence that interest must be paid on those amounts, if the unlawfulness of the imposition of the duty – as is the case here – is the outcome of an individual case assessment by a court. The sole decisive factor for the obligation to pay interest is that the person concerned was ultimately wrongly made to pay duties.

<sup>1</sup> Council Regulation (EC) No 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (OJ 2009 L 29, p. 1)

- 6 The defendant contests the action first and foremost by arguing that, according to the case-law of the Court of Justice of the European Union, there is an obligation to pay interest only if the duties are repayable under an anti-dumping regulation annulled or declared invalid by the Court of Justice. That is not the case here, however. Recourse to national interest provisions – such as interest relating to judicial proceedings pursuant to Paragraph 236 of the Abgabenordnung (Tax Code) – is excluded in view of the clear provisions of Article 116(6) of the UCC. [Or. 5]

**Grounds:**

7 [...]

- 8 The Joint Chamber of the Finance Court stayed the proceedings [...] and, pursuant to the second subparagraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU), referred the question set out in the operative part of this order to the Court of Justice of the European Union (CJEU) for a preliminary ruling, because the legal assessment of the case is uncertain.

**I. Legal background**

- 9 The following provisions are relevant for the resolution of the dispute:

**1. National law**

- 10 Abgabenordnung (Tax Code, Germany) in the version published on 1 October 2002 (*Bundesgesetzblatt* I p. 3866):

**Paragraph 1: Scope**

(1) This Code shall apply to all taxes, including the tax rebates governed by German federal law or the law of the European Union in so far as these are administered by the revenue authorities of the Federation or of the *Länder*. It may only be applied subject to the law of the European Union.

...

(3) Subject to the law of the European Union, the provisions of this Code shall apply *mutatis mutandis* to ancillary tax payments ...

**Paragraph 3: Taxes, ancillary tax payments**

(1) ‘Taxes’ shall mean payments of money, other than payments made in consideration of the performance of a particular activity, which are collected by a public body for the purpose of raising revenue and imposed by the body on all

persons to whom the characteristics on which the law bases liability for payment apply; the raising of revenue may be a secondary objective.

...

(3) Import and export duties pursuant to Article 5 numbers 20 and 21 of the European Union Customs Code shall be taxes within the meaning of this Code ...  
**[Or. 6]**

(4) 'Ancillary tax payments' are ... interest pursuant to Paragraphs 233 to 237, ... interest on import and export duties pursuant to Article 5 numbers 20 and 21 of the European Union Customs Code ...

**Paragraph 37: Claims arising from the tax debtor-creditor relationship**

(1) Claims arising from the tax debtor-creditor relationship shall be the tax claim, the tax rebate claim, the liability claim, the claim to an ancillary tax payment, the refund claim pursuant to subsection (2) and the tax refund claims set out in individual tax laws.

(2) Where a tax, a tax rebate, a liability amount or an ancillary tax payment was paid or repaid in the absence of legal grounds, the person on whose account the payment was made shall be entitled to a refund from the recipient of the amount paid or repaid ...

**Paragraph 233: General**

Interest shall be charged on claims arising from the tax debtor-creditor relationship (Paragraph 37) only to the extent that this is legally prescribed ...

**Paragraph 236: Interest on refund amounts ordered in legal proceedings**

(1) Subject to the provisions of subsection (3) below, where an assessed tax is reduced or a tax rebate granted by final and binding judicial ruling or as a result of such a ruling, interest shall accrue on the amount to be refunded or rebated from the date proceedings commence to the date of payment ...

**2. Applicable provisions of EU law**

- 11 (a) **Customs Code (CC):** Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, as subsequently amended).

**Article 241**

Repayment by the competent authorities of amounts of import duties or export duties or of credit interest or interest on arrears collected on payment of such

duties shall not give rise to the payment of interest by those authorities. However, interest shall be paid:

- where a decision to grant a request for repayment is not implemented within three months of the date of adoption of that decision,
- where national provisions so stipulate.

...

- 12 **(b) European Union Customs Code (UCC):** Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the European Union Customs Code (OJ 2013 L 269, p. 1, as subsequently amended): **[Or. 7]**

#### **Article 116**

(1) Subject to the conditions laid down in this Section, amounts of import or export duty shall be repaid or remitted on any of the following grounds:

...

- (a) overcharged amounts of import or export duty;

...

(6) Repayment shall not give rise to the payment of interest by the customs authorities concerned.

...

## **II. The relevance of the question referred**

- 13 According to the Joint Chamber of the Finance Court, there is no doubt under EU law that the applicant can at least claim interest relating to the judicial proceedings on the basis of the national provision of the first sentence of Paragraph 236(1) of the Tax Code. On the basis of the final and legally binding decision of the Joint Chamber of 3 April 2019 [...], the defendant reimbursed the applicant in May 2019 for the anti-dumping duty paid by it; the conditions of the first sentence of Paragraph 236(1) of the Tax Code have been met in the present case. The Joint Chamber does not have any reasonable doubt that the applicability of the first sentence of Paragraph 236(1) of the Tax Code is not excluded by Article 116(6) of the UCC, according to which – in contrast to the previous provision of the second sentence of the first subparagraph of Article 241 of the CC – no interest is to be paid by the customs authorities concerned in the event of reimbursement.
- 14 It is in line with the settled case-law of the CJEU that procedural rules are generally applicable to all litigation pending at the time of their entry into force,

whereas substantive rules must normally be interpreted in such a way that they do not, in principle, apply to situations arising before their entry into force (see CJEU, judgment of 23 February 2006, *Molenbergnatie*, C-201/04, operative part 1). In exceptional cases this may be different, for instance, where it follows clearly from the terms, objectives or general scheme of the rules of EU law that it is intended to have such retroactive effect (see CJEU, judgment of 19 March 2009, *Mitsui Co. Deutschland*, C-256/07, paragraph 32). Article 116(6) of the UCC constitutes a provision of substantive law that also contains procedural provisions (for example, time limits), which do not [Or. 8] have a bearing on the present decision because the parties are in dispute only as regards the question whether the applicant's claim for interest is excluded under the first subparagraph of Article 116(6) of the UCC. Given that neither the wording of Article 116 of the UCC nor the recitals of Regulation (EU) No 952/2013 contain any indication that the first subparagraph of Article 116(6) of the UCC has retroactive effect in contrast to Article 288(2) in conjunction with Article 288(1) of the UCC, the substantive provision of the first subparagraph of Article 116(6) of the UCC applies only to customs debts incurred since 1 May 2016 [...]. For customs debts – such as those in the present case – incurred prior to the entry into force of the UCC – namely in 2013 – the substantive provisions of the Customs Code and thus also the second indent of the second sentence of the first subparagraph of Article 241 of the CC continue to apply, according to which interest must be paid where national provisions so stipulate.

- 15 However, it is uncertain from the point of view of EU law whether the applicant is also entitled to interest for the period from the payment of the anti-dumping duty unlawfully imposed by the defendant. There is no legal basis in national law for such entitlement to interest. Rather, the success of the action brought by the applicant depends on whether it can base its claim for interest on the entitlement to interest under EU law developed by the CJEU. However, the Joint Chamber of the Finance Court is uncertain as to whether the conditions for entitlement to interest derived by the CJEU from the principle of effectiveness under EU law are also met in a situation – such as that in the present case – in which the Member State authority imposed the duty pursuant to EU law because it was convinced that the legal conditions (under EU law) for imposing the duty were met, but a Member State court subsequently finds that the factual conditions for imposing the duty have not been proven and the duty was therefore levied in breach of EU law. [Or. 9]

### III. Legal considerations of the Chamber

- 16 The CJEU recently ruled, by judgment of 18 January 2017 (*Wortmann*, C-365/15, operative part), that, where duties are levied in breach of EU law, there is an obligation on Member States, arising from EU law, to pay to individuals with a right to reimbursement the corresponding interest which runs from the date of payment by those individuals of the duties reimbursed. That judgment of the Court of Justice follows a series of decisions in which the Court of Justice

required Member States under EU law not only to reimburse duties unduly levied but also to reimburse individuals for losses suffered by the unavailability of sums of money (see CJEU, judgment of 27 September 2012, *Zuckerfabrik Jülich and Others*, Joined Cases C-113/10, C-147/10 and C-234/10, paragraph 65; judgment of 18 April 2013, *Irimie*, C-565/11, paragraph 28). The common feature of the above CJEU judgments is that the Court of Justice has declared invalid or annulled the legal basis for the imposition of the duty under national or EU law on account of an infringement of EU law; in each case the reimbursement of the duty was based on a legislative error.

- 17 In *Zuckerfabrik Jülich and Others* (Joined Cases C-113/10, C-147/10 and C-234/10), the Court of Justice declared Regulation No 1193/2009,<sup>2</sup> which formed the legal basis for the production levy imposed on sugar, invalid on the ground that it infringed EU law and held that individuals entitled to reimbursement of sums paid unduly in respect of production levies in the sugar sector determined on the basis of an invalid regulation are also entitled to payment of the interest on such sums (operative part 3). [Or. 10]
- 18 In *Irimie* (C-565/11), after another Chamber of the Court of Justice had found that the environmental tax levied by the Member State concerned infringed Article 110 TFEU (judgment of 7 April 2011, *Tatu*, C-402/09), the Court of Justice referred to the judgment in *Zuckerfabrik Jülich and Others* and confirmed that the Member States are obliged under EU law to repay with interest amounts of tax levied in breach of EU law (paragraph 22), with interest payable during the period between the date of the undue payment of the tax at issue and the date of repayment (paragraph 28).
- 19 The recent judgment of the CJEU in *Wortmann* was preceded by proceedings in which the Court of Justice annulled Regulation No 1472/2006 imposing a definitive anti-dumping duty on certain products originating in the People's Republic of China (judgment of 2 February 2012, *Brosmann Footwear*, C-249/10 P). In *Wortmann*, the CJEU then recognised – as already mentioned – that there is an obligation under EU law on Member States, where import duties have been levied in breach of EU law, to pay interest on the import duties repaid from the date of payment (operative part).
- 20 The case-law of the CJEU, according to which Member States are obliged to reimburse with interest any duties levied in breach of EU law seems to be based on the consideration that, if the Court of Justice declares invalid or annuls acts of the European Union or of the Member States on the grounds of an infringement of EU law, the effects of such acts should generally cease to apply (*argumentum e contrario* the second subparagraph of Article 264 TFEU). As a result of that consideration, individuals are entitled to reimbursement not only of the duties unduly levied, but also of amounts paid to or withheld by the Member State in direct connection with those duties, including losses incurred as a result of the

<sup>2</sup> Regulation (EC) No 1193/2009 of 3 November 2009 (OJ 2009 L 321, p. 1).



unavailability of funds (see [Or. 11] CJEU, judgment of 27 September 2012, *Zuckerfabrik Jülich and Others*, Joined Cases C-113/10, C-147/10 and C-234/10, paragraph 65; to that effect, CJEU, judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, paragraph 205). That is the only way of reinstating the situation which would have occurred if the act implementing the EU regulation that was subsequently declared invalid or annulled, or the act implementing the Member State's tax law in breach of EU law, had never been adopted (see, to that effect, Opinion of Advocate General Sanchez-Bordona, C-365/15, point 66).

- 21 The situation described above seems to differ significantly from that of the case in the main proceedings. While it is true that the aspect emphasised by the CJEU of compensating an individual for the pecuniary disadvantages suffered due to the lack of availability of funds (see CJEU, judgment of 27 September 2012, *Zuckerfabrik Jülich and Others*, Joined Cases C-113/10, C-147/10 and C-234/10, paragraph 65; judgment of 18 April 2013, *Irimie*, C-565/11, paragraph 21) applies equally to situations in which duties are unlawfully levied against an individual because the legal conditions (under EU law) for levying duties have not been met, it does not seem to make any difference to the person liable to pay the duty whether the duty was paid on the basis of a regulation or legal norm that breaches EU law or on the basis of – like here – a decision taken by customs authorities that is simply in breach of (EU) law because it was incorrect. In both situations, the individual does not have available the amount of money levied, which could have been used freely had the customs authorities complied with EU law. In the opinion of the Joint Chamber, however, it does seem to make a difference whether the legal basis for the imposition of the duty was declared invalid or annulled by the CJEU or whether the individual is entitled to reimbursement because the Member State authority misapplied the relevant and valid EU law in the individual case on the basis of an incorrect assessment of the facts. The latter case should only be a matter of correcting [Or. 12] an individual decision that is predominantly governed by the rules of the Member State concerned, whereas in the case of a regulation or legal norm that is declared invalid or annulled by the CJEU, the full effectiveness of EU law must be restored.
- 22 However, in *Littlewoods Retail and Others* (judgment of 19 July 2012, C-591/10), which concerned a case where a taxable person had overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation, the CJEU also held that Member States are obliged to repay with interest amounts of tax levied in breach of EU law (paragraph 26). In the main proceedings in *Littlewoods Retail and Others*, the infringement of EU law was neither based on a provision of national law nor a provision of EU law that was subsequently declared inapplicable or annulled by the Court of Justice. The infringement of EU law consisted in a taxable amount mistakenly being taken to be greater than it was (see Opinion of Advocate General Trstenjak of 12 January 2012 in Case C-591/10, point 6) and was also not established by the CJEU itself but was based solely on the findings of the Member State authority or Member State court. The CJEU also stressed in *Wortmann* that it is ‘a matter for the

referring court’ to determine whether duties have been levied in breach of EU law (see judgment of 18 January 2017, *Wortmann*, C-365/15, paragraph 39). That statement could be another argument in favour of the position that there is an infringement of EU law, which is a condition for entitlement to interest under EU law as developed by the CJEU, where the Member State authority imposes the duty in breach of legally valid provisions of EU law and the national court makes a finding of that infringement of EU law.

- 23 In view of the uncertainties expressed above as to the interpretation of the relevant EU law, the Joint Chamber decided to refer the **[Or. 13]** question set out in the operative part of this order to the CJEU for a preliminary ruling.

[...]

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