

Case C-388/23**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:**

27 June 2023

Referring court:

Rechtbank Noord-Holland (Netherlands)

Date of the decision to refer:

27 June 2023

Applicant:

Golden Omega, SA

Defendant:

Inspecteur van de Belastingdienst/Douane kantoor Rotterdam Rijnmond

Subject matter of the main proceedings

The applicant contests the enforcement of an order on the binding tariff information (BTI) issued by the defendant in respect of the applicant's product. The parties disagree as to the classification of the product in the Combined Nomenclature (CN).

Subject matter and legal basis of the request

The questions referred by the referring court for a preliminary ruling under Article 267 TFEU concern the CN heading or subheading under which the applicant's product should be classified. More specifically, it asks whether the method of esterification of animal oil, such as fish oil, affects classification under heading 1516. It also questions the validity of Implementing Regulation (EU) 2019/1661, which concerns products such as those of the applicant.

Questions referred for a preliminary ruling

1. Is heading 1516 of the CN to be interpreted as containing restrictions relating to the method and substance used for esterification of an animal oil and, if so, what are those restrictions?
2. In order to fall under heading 1516, must an animal oil, such as fish oil, be esterified with glycerol?
3. Is an animal oil, such as fish oil, that is esterified with ethanol to be excluded from classification under heading 1516?
4. In answering the above questions, is it relevant to assess the extent to which the product has undergone the processing mentioned in heading 1516 and, if so, on the basis of what criteria should that assessment be carried out?
5. Do the answers to the above questions affect the validity of Commission Implementing Regulation (EU) No 2019/1661 of 24 September 2019 and, if so, how?

Provisions of European Union law relied on

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), Chapters 15 and 21

Commission Implementing Regulation (EU) 2019/1661 of 24 September 2019 (OJ 2019 L 251, p. 1)

Provisions of international law relied on

Explanatory Notes to the Harmonised System of the World Customs Organisation, Chapter 15

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant sells two types of fractions of fish oil, the difference being in the type of alcohol that binds the fatty acids. Fish oil in the form of triglycerides has glycerol as the alcohol component and is classified under CN heading 1516. The parties are in agreement on this point. The product at issue is fish oil in the form of ethyl esters, with ethanol as the alcohol component.
- 2 On 12 April 2016, the defendant issued a BTI to the applicant classifying the product concerned under CN code 2106 90 92. In the application, the applicant had classified the product concerned under CN code 1516 10 90.

- 3 The applicant brought an appeal against the BTI of 12 April 2016 before the referring court. By decision of 3 December 2018, the referring court granted the form of order sought by the applicant and annulled that BTI. No appeal was brought against that judgment.
- 4 After consulting the European Commission, the defendant decided to bring the product concerned to the attention of the Customs Code Committee Tariff and Statistical Nomenclature (sub-section Agriculture/Chemistry). On 24 September 2019, Implementing Regulation (EU) 2019/1661 was adopted. It is common ground between the parties to the main proceedings that the characteristics of the product concerned correspond to the description of the product which, according to that implementing regulation, is classified under CN code 2106 90 92.
- 5 On 12 December 2019, the applicant in the main proceedings brought an action before the General Court against Implementing Regulation (EU) 2019/1661. By order of 10 June 2020 (*Golden Omega v Commission*, T-846/19, EU:T:2020:248), the General Court held that the action brought by the applicant in the main proceedings was inadmissible, since the contested implementing regulation was not of individual concern to the applicant.
- 6 Prior to the proceedings before the General Court, namely on 2 May 2019, the applicant submitted an application for a new BTI, the proposed classification for the product concerned again being heading 1516.
- 7 On 25 November 2019, the defendant issued a BTI once again classifying the product concerned under CN code 2106 90 92. The defendant rejected the applicant's objection and maintained that BTI. The applicant then brought an action before the referring court.

The essential arguments of the parties in the main proceedings

- 8 The **applicant** argues that the product concerned should be classified under heading 1516 rather than heading 2106. It relies on general classification rules 1 and 6 of the CN, as well as the fact that the animal fats and oils mentioned in heading 1516 correspond to those of the fish oil in question. The processing referred to in that heading, more specifically esterification, corresponds to the processing that the product concerned has undergone. It makes no difference in this respect that the product is esterified with ethanol and not with glycerol.
- 9 The applicant further argues that the product concerned cannot be classified under heading 2106 as it is not intended for human consumption. Furthermore, the wording of heading 2106, according to which products are 'not elsewhere specified or included', is not satisfied, since they should be classified under heading 1516.
- 10 As regards Implementing Regulation (EU) 2019/1661, it observes that the Commission exceeded its powers by unlawfully altering the scope of heading

1516 or heading 2106. An implementing regulation amending the classification of a product does not, for legal purposes, determine the classification within the meaning of the classification rules of the CN and is therefore invalid.

- 11 The **defendant** argues that the product concerned should be classified under heading 2106. It relies in this respect on Implementing Regulation (EU) 2019/1661 and states that, as an implementing organisation, it must comply with that regulation.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 12 The referring court states that, for legal purposes, CN classification is determined according to the terms of the headings and subheadings and the section and chapter notes, together with the general classification rules. According to the settled case-law of the Court of Justice in, inter alia, the judgments of 19 May 1994 (*Siemens Nixdorf v Hauptzollamt Augsburg*, C-11/93, EU:C:1994:206, paragraph 11), and of 18 December 1997 (*Techex Computer + Grafik Vertriebs GmbH v Hauptzollamt München*, C-382/95, EU:C:1997:626, paragraph 11), the decisive criterion for customs classification must be sought generally in objective characteristics and qualities, in the interests of legal certainty and ease of review. Those objective characteristics and qualities are reflected in the relevant CN headings and in the notes to the sections and chapters.
- 13 The referring court sees no reason, in this case, to deviate from the ruling in its decision of 3 December 2018, by which it granted the form of order sought by the applicant in the main proceedings and annulled a previous BTI classifying the product concerned under heading 2106. The product concerned is a result of the processing mentioned in CN heading 1516, the wording of which contains no restrictions regarding the method of esterification.
- 14 The referring court, while sharing the parties' view that Implementing Regulation (EU) 2019/1661 covers the product concerned, questions whether that implementing regulation complies with headings 1516 and 2106.
- 15 Part (B), point (2) of the Explanatory Notes to the Harmonised System relating to heading 1516 mentions only the possibility of compounding with glycerol but, in the referring court's view, that does not preclude the possibility that it could also include compounding with ethanol.
- 16 Since the explanatory notes are not legally binding but are merely a resource, the referring court does not consider it necessary to interpret the term 'inter-esterified' in heading 1516 as meaning that it can only include esterification with glycerol and not esterification with ethanol, solely on the basis of the explanatory notes to which the implementing regulation refers.

- 17 Since those explanatory notes are nevertheless part of the reasons behind Implementing Regulation (EU) 2019/1661, the referring court further questions the validity of that implementing regulation.

WORKING DOCUMENT