

Case C-292/22**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:**

4 May 2022

Referring court:

Administrativen sad Varna (Bulgaria)

Date of the decision to refer:

19 April 2022

Appellant in the appeal on a point of law:

Teritorialna direksia Mitnitsa – Varna

Respondent in the appeal on a point of law:

NOVA TARGOVSKA KOMPANIA 2004 AD

Subject matter of the main proceedings

The proceedings were instituted by an appeal on a point of law brought by the Teritorialna direksia Mitnitsa – Varna (Territorial Directorate of the Varna Customs Office) against the judgment of the Rayonen sad Devnya (District Court, Devnya) annulling a decision imposing an administrative penalty by the Direktor na Teritorialna direksia ‘Severna Morska’ v Agentsia ‘Mitnitsi’ (Director of the ‘Northern Black Sea Coast’ Territorial Directorate of the Customs Agency), imposing a fine on NOVA TARGOVSKA KOMPANIA 2004 AD for infringement of the Zakon za mitnitsite (Law on Customs).

Subject matter and legal basis of the request

The parties are in dispute concerning the tariff classification of a product declared as ‘palm fat MP 36-39’. The questions referred seek to ascertain: (1) whether that product constitutes ‘palm shortening’ for the purposes of heading 1517 of the Explanatory Notes to the Harmonized Commodity Description and Coding System; (2) whether the test methods applied by the Tsentralna mitnicheska

laboratoria (Central Customs Laboratory) to determine whether the product had undergone a texturation process are permissible; and (3) in the event that they had undergone a texturation process and constitute ‘palm shortening’, the Combined Nomenclature code under which the products are to be classified – under code 1511, as declared at the time of importation, or under code 1517, as assumed by the customs authorities.

Questions referred for a preliminary ruling

1. According to what criteria must a product such as that in the main proceedings – namely refined, bleached and deodorised palm oil with the trade name PALM FAT MP 36-39, which has been ‘stirred, filtered, chilled, tempered and packaged’ in its technological production process using only physical processes which did not chemically modify it – be classified under heading 1511 or heading 1517 of Chapter 15 of the CN?
2. What is the meaning of the term ‘texturation’, which has been used to describe the process by which the products referred to as ‘shortenings’ in the Explanatory Notes to the Harmonized Commodity Description and Coding System for heading 1517 are obtained?
3. If ‘palm oil and its fractions, whether or not refined, but not chemically modified’ have undergone a ‘texturation’ process, is that sufficient reason to exclude classification of that product under heading 1511?
4. In the absence of standards, methods, criteria and indicators established in the CN, the Explanatory Notes to the CN and the Explanatory Notes to the Harmonized System for the purpose of testing the consistency of palm oil and proving that it has been processed by means of ‘texturation’, is it permissible for the competent customs authorities independently to develop and apply analytical working methods – such as RAP 66, version 02/17.11.2020, which was applied in the present case – in order to establish the texturation of fats by means of penetration, that method being based on the officially published method AOCS Cc 16-[60], for the purposes of the tariff classification of goods under heading 1511 or heading 1517?

If that is not permissible, according to what standards, methods, criteria and indicators may the product be tested in order to establish that it has undergone a ‘texturation’ process, that is to say, that it constitutes ‘palm shortening’?

5. Must the 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, as amended by Commission Implementing Regulation (EU) 2018/1602 of 11 October 2018, be interpreted as meaning that products described as ‘shortenings’, which have been obtained from refined palm oil by means of texturation, are to be

classified under heading 1517 of that nomenclature and, in particular, under subheading 1517 90 99 thereof?

International tariff classification

International Convention on the Harmonized Commodity Description and Coding System, signed in Brussels on 14 June 1983 and the Protocol of Amendment thereto, signed on 24 June 1986, approved on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987

Explanatory Notes to the Harmonized Commodity Description and Coding System

Explanatory Notes to the Combined Nomenclature

Provisions of European Union law and case-law relied on

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code – Articles 56 and 57

Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff – Articles 1 and 12

Commission Implementing Regulation (EU) 2018/1602 of 11 October 2018 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff – [Annex I], Part I, Section I, A and [Part II.] Section III, Chapter 15, headings 1511 and 1517

Judgment of 19 October 2017, *Lutz*, C-556/16, EU:C:2017:777, paragraph 40

Judgment of 17 March 2016, *Sonos Europe*, C-84/15, EU:C:2016:184, paragraph 33

Judgment of 18 May 2011, *Delphi*, C-423/10, EU:C:2011:315, paragraph 23

Judgment of 12 May 2016, *Toorank Productions*, Joined Cases C-532/14 and C-533/14, EU:C:2016:337, paragraphs 34 and 36

Judgment of 28 July 2011, *TDK-Lambda Germany*, C-559/18, EU:C:2019:667, paragraph 29

Provisions of national law relied on

Zakon za mitnitsite (Law on Customs) – Article 234.

Zakon za administrativnite narushenia i nakazania (Law on administrative offences and administrative penalties) – Articles 59 and 63c.

Administrativnoprotsesualen kodeks (Code of Administrative Procedure) – Article 217(1) and Article 223.

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 8 April 2019, eight containers of goods arrived at Varna West Port Terminal, the consignee being NOVA TARGOVSKA KOMPANIA 2004 AD ('the company') and the exporter being Louis Dreyfus Company Asia Pte. Ltd, from Indonesia. The goods were declared as 'palm fat MP 36-39 in CA20 – 20 kg net in cartons'.
- 2 On 28 September 2020, five containers of goods arrived at the same port, once again from the same exporter and for the same consignee. The goods were declared as 'palm fat MP 36-39, 5250 cartons of 20 kg net'. On the same day, a sample was taken from one of the containers to check the tariff classification of the goods.
- 3 On 7 January 2021, the Central Customs Laboratory carried out an analysis on the sample taken, which showed that the goods were a plastic to solid mass of oil, with a homogeneous structure and a smooth and creamy texture, thermally stable, without disintegration.
- 4 On the basis of the results obtained and the expert evaluation, it was concluded that, in accordance with the terms used in Chapter 15 of the Combined Nomenclature ('the CN'), the sample tested constituted 'palm shortening' – a preparation consisting exclusively of palm oil or its fractions, not chemically modified and obtained by texturation, for use in various foodstuffs, such as doughs.
- 5 The examination was carried out according to the laboratory's own RAP 66 method, which is based on the official AOCS Cc 16-[60] method developed by the American Oil Chemists' Society (AOCS) for consistency tests using a penetrometer.
- 6 The Direktor na direksia 'Mitnicheska deynost i metodologia' (Director of the 'Customs Activities and Methodology' Directorate) of the Tsentralno mitnichesko upravlenie (Central Customs Administration) takes the view that, given their established objective characteristics, the goods should be classified under CN code 1517 90 99. According to that view, the declared code from heading 1511 was not correct, since that heading covered only palm oil and its fractions, whether or not refined, but not chemically modified. However, the goods under analysis were goods consisting of palm oil or its fractions which, in addition to refining, had undergone further irreversible processing to modify the crystalline structure, namely texturation – a process specifically and exclusively provided for in the Explanatory Notes to the Harmonized System for heading 1517 as a process that was permissible for goods of precisely that heading.

- 7 The customs authorities found that the goods declared on 8 April 2019 and 28 September 2020 respectively were demonstrably identical, since they had the same name, exporter, manufacturer and composition, as evidenced by the attached certificates. In view of that, and on the basis of Article 190(1) of Regulation (EU) No 952/2013, the customs authorities proceeded on the assumption that the results of the laboratory analysis of 7 January 2021 were also valid as regards the goods declared on 8 April 2019.
- 8 On 29 January 2021, the company challenged that opinion, but the customs authorities rejected its objection. They took the view that the company had committed customs fraud by classifying the goods under code 1511 90 99 00 instead of code 1517 90 99 90 in its customs declaration of 8 April 2019, in order partly to avoid the payment of receivables of the State, governed by public law, totalling 17 895.95 leva (BGN).
- 9 On 30 January 2021, a notice establishing an administrative offence was issued in respect of the company and, on 20 May 2021, a fine was imposed by a decision imposing an administrative penalty in the total amount of the receivables of the State that had been evaded.
- 10 The company challenged the decision imposing an administrative penalty before the Rayonen sad Devnya (District Court, Devnya). The court annulled that decision by judgment of 3 December 2021. That court took the view that the customs authorities' conclusion that the tariff classification was incorrect was unsubstantiated, since: (a) it was based on a laboratory analysis of goods imported and declared at a later date; (b) it was not specified where and how the sample tested had been stored; (c) it had not been demonstrated whether the laboratory methodology used complied with the US method for measuring the consistency of fats, AOCS Cc 16-60, and whether that methodology was sufficient to determine whether the product had undergone any 'texturation', and whether the methodology was even officially recognised; and (d) the customs authorities erred in relying on the Explanatory Notes to the Harmonized System to classify the product under heading 1517, since, according to settled case-law, those explanatory notes did not constitute a legislative act.
- 11 An appeal against the judgment of the District Court, Devnya has been brought before the referring court.

The essential arguments of the parties in the main proceedings

- 12 The Teritorialna direksia Mitnitsa – Varna (Territorial Directorate of the Varna Customs Office) claims that the conclusions drawn in the report of the customs laboratory and the laboratory's internal methodology that was applied, which was based on the US method for testing consistency, AOCS Cc 16-60, unquestionably demonstrated that the sample tested had values typical of plastic fats, shortenings and margarines. Following destruction of the sample's structure by means of melting (erasure of the crystallisation memory) and gradual cooling under static

conditions at a room temperature of 25°C, the consistency (texture) changed and did not return to its original form, thereby proving that the product had undergone final processing to modify the crystalline structure, or ‘texturation’, that is to say, that it constituted ‘palm shortening’ and, according to the Explanatory Notes to the Harmonized System, should be classified under heading 1517.

- 13 By contrast, the company asserts that the product which it imported was pure palm oil which had been refined but not chemically modified in the course of the manufacturing process, with the result that it should be classified under heading 1511. Since the product was not hydrogenated or chemically modified, it is not covered by heading 1517. In support of its assertions, the company submits a detailed presentation of the manufacturing process and a written statement from the manufacturer stating that the product is stirred, filtered, cooled, tempered and packaged exclusively by physical processes that do not chemically modify it.

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

- 14 In resolving the dispute, the referring court acts as a cassation court and rules on the merits of the case by a judgment which is not subject to appeal.
- 15 According to the CN, heading 1511 covers palm oil and its fractions, whether or not refined, but not chemically modified, while heading 1517 covers margarine, edible mixtures or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of Chapter 15, other than edible fats or oils or their fractions of heading No 1516. Since the Explanatory Notes to the Combined Nomenclature do not contain any explanations as to how the two headings are to be distinguished, the referring court seeks to ascertain *the criteria according to which the product at issue is to be classified under one or the other heading*.
- 16 The company claims that the product should be classified under heading 1511 since, in the course of the technological manufacturing process, it has been processed solely by physical processes which do not chemically modify it.
- 17 The customs authorities do not dispute that the product had not been chemically modified – the report of the customs office’s laboratory expressly states that the iodine value and fatty acid content prove that the palm oil had not undergone any chemical treatment – hydrogenation. However, they submit that the palm oil had been texturised, that is to say, it had undergone further processing to modify its crystalline structure and achieve a homogeneous, smooth and creamy texture. For that reason, the customs authorities claim that the product should be classified under heading 1517.
- 18 The term ‘texturation’ is used in the Explanatory Notes to the Harmonized System only in the description of the process for obtaining the products known as ‘shortenings’, which are covered by heading 1517. However, the Explanatory Notes to the Harmonized System do not constitute a legislative act, and the referring court seeks to ascertain *the meaning of the concept ‘texturation’*.

- 19 In the certificates for the product, the manufacturer describes the product as 'texturised palm fat from palm oil'. However, according to the company, the term 'texturation' is used in those certificates only to distinguish clearly between refined palm oil packaged in cartons, which is the product at issue in the present case, and both refined oil of the same type, which is not packaged but is a raw material for the production of special hydrogenated fats and margarines, and unrefined crude palm oil.
- 20 The company submits that any refined oil undergoes some of the texturation stages, which are an integral part of the refining and packaging process, but that does not mean that the product is textured within the meaning of heading 1517. The company takes the view that that heading clearly refers to further chemical processing for the purpose of obtaining certain additional structural characteristics.
- 21 According to the report of the customs laboratory, crude palm oil is refined by applying processes of neutralisation (to remove free fatty acids), bleaching (to remove carotenoids) and deodorisation (to remove unpleasant odours). When prepared as a hard-plastic texturised fat with a fine, smooth, paste-like consistency which is stable at room temperature, palm oil is referred to as 'shortening'. It is widely used in the production of bakery products and confectionery such as chocolate, filled chocolates and ice cream.
- 22 For that purpose, the refined, bleached and deodorised palm oil undergoes further technological processing steps, which may include fractionation, that is to say, separation of the solid ('stearin') and liquid ('olein') fractions of the palm oil, their subsequent blending in varying proportions and a final treatment for plasticisation (texturation) by crystallisation to modify the crystalline structure. In view of the above, the referring court seeks to ascertain *whether the fact that the palm oil – the fractions of which have been refined but not chemically modified – has undergone a texturation process constitutes sufficient reason to exclude it from classification under heading 1511.*
- 23 The report of the customs laboratory was established according to the laboratory's own RAP 66 method, which is based on the official AOCS Cc 16-60 method. The latter is a method for testing consistency with a penetrometer by measuring the distance that a certain weight with a predefined shape penetrates into the fat within a certain period of time.
- 24 The company argues that that method is not officially recognised and cannot be used for the purpose of customs controls in the European Union. It also states that the Central Customs Laboratory is not authorised to carry out examinations according to the method used, AOCS Cc 16-60, with the consequence that the results of its report do not constitute suitable evidence of the existence of additional processing to modify the crystalline structure, that is to say, texturation.

- 25 Since the CN, the Explanatory Notes to the CN and the Explanatory Notes to the Harmonized System do not lay down standards, methods, criteria and indicators for testing the consistency of palm oil, the referring court seeks to ascertain *whether the competent customs authorities may independently develop and apply analytical working methods for the purpose of classifying goods under heading 1511 or heading 1517. If that is not permissible, the referring court seeks to ascertain the standards, methods, criteria and indicators according to which the product may be tested in order to establish that it has undergone a 'texturation' process and therefore constitutes 'palm shortening'*.
- 26 In conclusion, and in the light of the answers to the previous questions referred, the referring court seeks to ascertain *whether the CN must be interpreted as meaning that products described as 'shortenings' obtained from refined palm oil by texturation are to be classified under heading 1517 of that nomenclature and, in particular, under subheading 1517 90 99 thereof.*