Case C-252/24

Request for a preliminary ruling

Date lodged:

9 April 2024

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

28 February 2024

Applicant:

Prisum Healthcare SRL

Defendant:

Autoritatea Vamală Română

[…]

CURTEA DE APEL BUCUREȘTI (COURT OF APPEAL, BUCHAREST)

SECȚIA A IX-A CONTENCIOS ADMINISTRATIV ȘI FISCAL (NINTH DIVISION FOR ADMINISTRATIVE AND TAX MATTERS)

ORDER

Public hearing of 28 February 2024

[…]

The application brought by Prisum Healthcare SRL, the applicant, against Autoritatea Vamală Română (‘the Romanian Customs Authority’), the defendant, in the case seeking *annulment of an administrative act (Decision No RO BTI 2023/004243),* is entered in the register.

[…]

THE COURT [OF APPEAL],

1. As regards the applicant's request for a reference to the Court of Justice of the European Union for a preliminary ruling:

I. SUBJECT MATTER OF THE DISPUTE. PROCEEDINGS BEFORE THE NATIONAL COURT

2. By an application registered before the Court of Appeal, Bucharest, on 11 October 2023 […], Prisum Healthcare SRL, the applicant, in its case against the Romanian Customs Authority, the defendant, sought the annulment of binding tariff information decision RO BTI 2023/004243 ('the BTI Decision'), issued by the Romanian Customs Authority, the annulment of reply No 28810/06.09.2023 of the Romanian Customs Authority to the prior complaint against the BTI Decision [and] an order that the defendant pay the costs of the proceedings.

3. In its grounds, [the applicant] submitted, in essence, that the product Feroglobin Liquid Plus is a food supplement in liquid form, [and that] the BTI Decision did not take into consideration the specific technical characteristics of food supplements [and the fact that that product] is not a common tonic beverage in a plastic container, contrary to Legea nr. 56/2021 (Law No 56/2021) transposing Directive 2002/46/EC. Furthermore, the defendant infringed the rules for the interpretation of tariff classifications and Combined Nomenclature headings and did not analyse the scope of tariff heading 2106, classifying the product under heading 2202 despite the technical characteristics of the product. The defendant infringed the criteria set out in the judgment [of the Court of Justice in Joined Cases] C-410/08 to C-412/08, [since] the mere form in which food supplements are presented does not constitute a well-founded ground for rejecting the prior complaint and the tariff classification of the product[; in those circumstances,] the defendant was required to analyse the classification of the food supplements mentioned in the Harmonised System Explanatory Notes (HSEN), at point 16, heading 2106, applying the reasoning [of the Court of Justice] in that judgment.

4. It also asserted that the judgment [of the Court in Case] 114/80 was irrelevant for the purposes of the tariff classification of the product, since it was delivered following the examination of products which do not have the same description and technical characteristics, [in that] the product at issue [in that case contained] [the statement that it was a] food supplement only on the label, without it being certified by the health authorities as a food supplement, and Directive 2002/46/EC was not in force.

5. In addition, the applicant claimed that the decision of the Harmonised System Committee during the 71st working session of the Harmonised System Committee under the auspices of the World Customs Organisation was not even complied with.

6. On 18 October 2023, the defendant […] lodged its defence in which it requested that the application be dismissed as unfounded.

7. […] The applicant **requested that** the following questions **be referred to the Court of Justice of the European Union** for a preliminary ruling […] [Seven questions proposed by the applicant. The referring court considered that only some of the points relied on by the applicant were relevant to the outcome of the dispute and decided to refer only one question for a preliminary ruling, as reproduced in the operative part].

8. […] [The] Romanian Customs Authority, the defendant, […] contended that the request for the matter to be referred to the Court of Justice of the European Union for a preliminary ruling should be rejected as it is devoid of purpose.

9. In its reasoning, [the defendant] asserted, in essence, that the present request is inadmissible in the light of the conditions laid down in Article 267 of the Treaty on the Functioning of the European Union, in view of the fact that the request concerns the interpretation of a matter on which the [Court] has already ruled [(Case 114/80)], and of the tariff classification provided for in the Combined Nomenclature established by Regulation (EEC) No 2658/87.

II. RELEVANT FACTS

10. By its binding tariff information decision RO BTI 2023/004243, the Romanian Customs Authority classified the food supplement 'Feroglobin liquid plus' under heading 2202 of the Combined Nomenclature (code 2202991919), and not under heading 2106 (code 210690985), which the applicant considers is consistent with the technical characteristics and intended use of the product; [the Romanian Customs Authority] listed the following grounds for the tariff classification under heading 2202: the general rules for the interpretation of the Combined Nomenclature No 1 and No 6; note 1(a) of Chapter 30 (exclusion) [and] note 3 of Chapter 22; [and] the explanatory notes to the combined nomenclature (ENCN) of heading 2202 and subheading 22029919.

11. In its reply to the prior complaint, the Romanian Customs Authority attempted to provide an explanation for the rejection of heading 2106, asserting, in essence, that: [(a)] there are no specific codes in the Combined Nomenclature for products which are marketed as food supplements; (b) heading 2106 includes 'foodstuffs that do not have the specific characteristics of other tariff headings of the Combined Nomenclature' […][;] a product used as a food supplement does not have any characteristic which would make that product necessarily classifiable under heading 2106; [(c)] by application of general rule of interpretation (GRI) 1, only products which cannot be classified under other specific headings must be classified [under that heading]; [(d)] the Combined Nomenclature does not contain any provision according to which products constituting food supplements must necessarily be classified only under heading 2016, irrespective of their characteristics, so 'food supplements may be classified under different headings of the Nomenclature'; [(e)] the product at issue is a preparation used as a food

supplement, in liquid form, and is consumed ‘as such’, so it must be classified under heading 2202.

12. The product ‘Feroglobin liquid plus’ was presented specifically as a food supplement, was notified as such to the Ministerul Sănătății (Ministry of Health), and meets the specific technical characteristics and purpose of food supplements, as defined in national and EU legislation.

13. ‘Feroglobin liquid plus’ is a food preparation in liquid form containing iron (in the form of ferrous sulphate), a vitamin complex, mineral salts, vegetable extracts, natural fruit extracts, other nutritive substances, honey, sugar and glucose syrup, which is consumed as such in doses of 2 teaspoons per day, is marketed in 200 ml plastic bottles, is intended for specific use in the formation of haemoglobin and red blood cells and has the function of a food supplement that contributes to the balance of health, the general well-being of the body and the normal functioning of the immune system.

III. RELEVANT PROVISIONS OF EUROPEAN UNION LAW

14. The Court of Appeal considers that the following provisions of EU law are applicable in the present case:

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) 2022/1998 of 20 September 2022 amending Annex I [to] Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff […].

Part One of the Combined Nomenclature contains ‘preliminary provisions’. In Section I of Part One, which contains general rules, subsection A, entitled ‘General rules for the interpretation of the [CN]’ (‘the general rules’), provides:

‘Classification of goods in the [CN] shall be governed by the following principles:

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

3. When, by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;

(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable;

(c) when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

[…]'

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section […] notes also apply [and […] Section IV of the Combined Nomenclature includes Chapter 21, entitled 'Miscellaneous edible preparations', and Chapter 22, entitled 'Beverages, spirits and vinegar'].

15. COMMUNICATIONS FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES. European Commission. EXPLANATORY NOTES TO THE COMBINED NOMENCLATURE OF THE EUROPEAN UNION (2019/C 119/01) […]

16. General, Chapter 21. Classification of 'food supplements' (as referred to in point (16) of the HS Explanatory Note to heading 2106), in particular other food

preparations presented in measured doses, such as capsules, tablets, pastilles and pills, and which are intended for use as food supplements, is also to be considered in the light of the criteria set out in the judgment of the Court of Justice of the European Union in Joined Cases C-410/08 to C-412/08 (‘Swiss Caps’).

17. General, Chapter 22. This chapter covers – in so far as they are not medicaments – tonic preparations which, even though they are taken in small quantities, for example, by the spoonful, are suitable for direct consumption as beverages. Non-alcoholic tonic preparations which require dilution before consumption do not fall in Chapter 22 (generally, heading 2106).

18. CN Code 2106 – Food preparations not elsewhere specified or included

Additional notes to Chapter 21 (CN)

[…] 5. Other food preparations presented in measured doses, such as capsules, tablets, pastilles and pills, and which are intended for use as food supplements are to be classified under heading 2106, unless elsewhere specified or included.

Explanatory notes to the harmonised system. The heading includes in particular: […] (16) Preparations, often referred to as food supplements, based on extracts from plants, fruit concentrates, honey, fructose, etc., and containing added vitamins and sometimes minute quantities of iron compounds. These preparations are often put up in packagings with indications that they maintain general health or well-being. Similar preparations intended for the prevention or treatment of diseases or ailments are excluded (heading 30.03 or 30.04).

19. CN Code 2202 – Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit, [nut] or vegetable juices of heading 2009.

20. Additional notes to Chapter 22 (CN)

Subheading 2202 10 00 covers waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, providing they are for direct consumption as a beverage. Subheading 2202 99 19 includes ‘other’.

21. Explanatory notes to the harmonised system. This heading covers non-alcoholic beverages, as defined in Note 3 to this chapter, not classified under other headings, particularly heading 20.09 or 22.01.

(A) Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured.

This group includes, *inter alia*:

(1) Sweetened or flavoured mineral waters (natural or artificial).

(2) Beverages such as lemonade, orangeade, cola, consisting of ordinary drinking water, sweetened or not, flavoured with fruit juices or essences, or compound extracts, to which citric acid or tartaric acid are sometimes added. They are often aerated with carbon dioxide gas, and are generally presented in bottles or other airtight containers.

(B) Other non-alcoholic beverages, not including fruit or vegetable juices of heading 20.09.

This group includes, *inter alia*:

(1) Tamarind nectar rendered ready for consumption as a beverage by the addition of water and sugar and straining.

(2) Certain other beverages ready for consumption, such as those with a basis of milk and cocoa.

This heading does not include:

(a) Liquid yoghurt and other fermented or acidified milk and cream containing cocoa, fruit or flavourings (heading 04.03).

(b) Sugar syrups of heading 17.02 and flavoured sugar syrups of heading [missing text in the original].

(c) Fruit, nut or vegetable juices, whether or not used directly as beverages (heading 20.09).

(d) Medicaments of heading 30.03 and 30.04.

22. Explanatory notes to the Combined Nomenclature

2202 Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit, nut or vegetable juices of heading 20.09.

2202 99 19 ‘Other’. This subheading includes tonic preparations as described in the explanatory note to this chapter, general, second paragraph. These non-alcoholic beverages, often referred to as food supplements, may be based on extracts from plants (including herbs) and may contain added vitamins and/or minerals. In general, these preparations should maintain general health and well-being; therefore, they differ from the flavoured or sweetened waters and other soft drinks of subheading 2202 10 00, [referred to] in the HS Explanatory Note to heading 2202, paragraph (A).

IV. QUESTIONS REFERRED FOR A PRELIMINARY RULING. REASONS WHICH LED THE REFERRING COURT TO SUBMIT THE REQUEST FOR A PRELIMINARY RULING

23. The Court [of Appeal] notes, as a preliminary point, that the request for a reference to be made [to the Court] for a preliminary ruling was made by the applicant and that the questions for a preliminary ruling raised [by it] were criticised and reformulated by the Court of Appeal, [which] considered the following question relevant to the outcome of the dispute:

24. […] [Text of the question referred, contained in the operative part].

25. The reference for a preliminary ruling submitted to the [Court] was considered necessary by the Court of Appeal, in order to decide on the application, on the basis of the differing arguments of the parties to the dispute as regards the classification of the product 'Feroglobin liquid plus'.

26. The referring court is not required to rule at this stage of the proceedings on those arguments of illegality and merely indicates the causal link between the interpretation of EU law and the present case as regards the applicant's pleas in defence.

27. The Court of Appeal has had regard to the settled case-law of the [Court] according to which it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (judgment in *Eon Asset Menidjmunt*, C-118/11, EU:C:2012:97, paragraph 76).

28. Furthermore, it considers that [the Court] only has jurisdiction to rule on the interpretation or validity of provisions of Community law, in the context indicated by the referring court, and that any aspect relating to the factual situation or the classification of the measures of domestic law falls within the exclusive jurisdiction of the national court. However, the Court may, where appropriate, provide clarification designed to give the national court guidance in the assessment of national measures (judgment of the Court of Justice of 7 September 2006, [*Marrosu and Sardino*], C-53/04, EU:C:2006:517, paragraph 54).

29. The interpretation of the Court of Justice of the European Union is necessary in the present case in order to determine the tariff classification which best corresponds to the objective characteristics and properties of the product at issue in accordance with the General rules for the interpretation of the Combined Nomenclature ('the GRI'), as set out in Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, and whether there is the possibility of applying another tariff heading under which food supplements in liquid form may be classified, in view of the fact that there are no specific codes in the Combined Nomenclature for

products marketed as food supplements regardless of their form (liquid, solid, capsules, etc.).

30. The Romanian Customs Authority submits that, according to [the judgment of the Court of 26 March 1981, *Ritter* v *Oberfinanzdirektion Hamburg*, [Case] 114/80, EU:C:1981:79], all products put up in liquid form must necessarily be classified under tariff heading 2202, which covers 'non-alcoholic beverages' and 'tonic [beverages or] preparations', irrespective of whether they are labelled as food supplements and without taking into account the possibility of applying another tariff heading under which food supplements could be classified, regardless of the form in which they are put up (liquids, capsules, pastilles, etc.).

31. The Court of Appeal considers that the application to the present case of the interpretation adopted in [the judgment of the Court of Justice of 26 March 1981, *Ritter* v *Oberfinanzdirektion Hamburg*, [Case] 114/80, EU:C:1981:79] is unclear in so far as it was delivered prior to Regulation 2658/87 and that, in the particular context of the dispute in [Case 114/80], the product under consideration by the court was a tonic beverage, and not a food supplement notified and recognised as such under the abovementioned national and EU legislation. Furthermore, the lack of clarity is also highlighted by the fact that, at the 71st session of the Harmonised System Committee of the World Trade Organisation, a decision was adopted which classified under heading 2106 a product with similar characteristics to that at issue in the present decision, and that, in [Joined Cases] C-410/08 to C-412/08 (Swiss Caps), a food supplement in capsule form was classified under heading 2106.

32. [The Court], in its case-law concerning tariff classification, made the following observations, in Case C-198/15: '16. In that connection, it should be recalled that, when the Court is requested to give a preliminary ruling on a matter of tariff classification, its task is to provide the national court with guidance on the criteria the implementation of which will enable the latter to classify the products at issue correctly in the CN, rather than to effect that classification itself, a fortiori since the Court does not necessarily have available to it all the information which is essential in that regard. In any event, the national court is in a better position to do so (judgments of 7 November 2002 in *Lohmann and Medi Bayreuth*, C-260/00 to C-263/00, EU:C:2002:637, paragraph 26, and 16 February 2006 in *Proxxon*, C-500/04, EU:C:2006:111, paragraph 23). 17. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary (see judgment of 22 December 2010 in *Lecson Elektromobile*, C-12/10, EU:C:2010:823, paragraph 15 and the case-law cited)'.

33. The guidance of the Court of Justice of the European Union on the question referred to it for a preliminary ruling by the referring court is also necessary in order to clarify the other aspects set out by the applicant in its request for a preliminary reference to the Court of Justice which concern the application in the present case of the general rules and explanatory notes for the interpretation of the

Combined Nomenclature laid down in Annex 1 to Council Regulation (EEC) No 2658/87, the relevant case-law [of the Court] in the area, and the internal effects of the decision of the Harmonised System Committee adopted at its 71st working session in March 2023.

34. Directive 2002/46/EC[, relied on by the applicant,] is irrelevant for the purposes of the tariff classification of goods, but concerns the labelling of goods and, therefore, does not constitute the legal basis for the tariff classification. In addition, the [defendant] authority does not dispute the food supplement characteristics of the product; the aspect at issue in the proceedings concerns the form in which the food supplement is presented, that is to say, its liquid state, irrespective of the quantity that can be administered on a daily basis.

V. AS REGARDS THE NECESSARY CONDITIONS FOR THE REFERENCE [TO THE COURT]

35. The condition of the relevance of the question referred for a preliminary ruling to the resolution of the dispute has been set out in detail in the preceding point.

36. Given that [the Court] has unlimited jurisdiction with regard to the uniform interpretation of the Treaties, regulations and directives of the European Union, in accordance with Article 267 TFEU, and that in the present case the parties have differing positions as to the application of the EU provisions, the reference [to the Court], with a view to clarifying how the EU rules are to be applied, is imperative.

37. In addition, the Court of Appeal considers that the factual situation described in the present reference is specific and that the measure challenged by the applicant has actually been applied by the Romanian State, therefore the question formulated is not hypothetical.

38. In the light of the criteria laid down by the [Court] in its judgment in Case [283/81, *CILFIT* v *Ministero della Sanità*], the referring court considers that the issues raised have not already been the subject of a preliminary ruling in a similar case and that they have not been analysed in settled case-law [of the Court].

39. Similarly, the correct application of EU law is not so obvious in the present case as to leave no scope for any reasonable doubt as to how to resolve the issues raised.

40. The Court of Appeal reiterates that, in the present case, in order to decide on the case, a correct interpretation of the EU law relied on is necessary. The interpretative guidance provided by the [Court] will then be taken into consideration by the referring court in resolving the dispute; that guidance will not, however, verify whether, in the specific circumstances of the case, the parties' claims are well-founded or unfounded. Contrary to the defendant's assertions, the Court [of Appeal] considers that the general guidance provided by the [Court] will

be applied in the present case, without asking the EU Court [to resolve the specific dispute in the proceedings], the latter being an exclusive jurisdiction of the national court.

41. [The Court] has jurisdiction to rule only on the interpretation or validity of provisions of [EU] law, in the context indicated by the referring court, and any aspect relating to the factual situation or the classification of measures of national law falls within the exclusive jurisdiction of the national court. Moreover, according to settled case-law [of the Court], in order to provide a useful answer to the questions raised by the referring court, the Court may also have recourse to the interpretation of rules of [EU] law to which the national court has not referred in the text of the question referred for a preliminary ruling.

42. As is apparent from the formulation of the question referred [to the Court] for a preliminary ruling and from the grounds of the present order, that question does not seek from the European Court an interpretation of national law, but of the relevant [EU] law, which will then be applied, specifically, in the present case by the national court. The description of the factual circumstances in which the application of [EU] law is necessary, and an indication of the content of the national provisions applicable to the case, which create the context in which the lack of clarity on the application of [EU] law arises, are admissibility requirements for making a reference to the Court, in accordance with the Recommendations [of the Court] to national courts and tribunals in relation to the initiation of preliminary ruling proceedings […].

43. Moreover, the interpretations requested will have effects on the entire mechanism for applying the tariff heading, certainly going beyond the boundaries of a single case.

VI. Conclusions

44. In the light of all the foregoing considerations, the Court of Appeal grants the applicant's request in part, taking the view that a reference to the Court of Justice of the European Union for a preliminary ruling, under Article 267 of the Treaty on the Functioning of the European Union, is necessary in relation to the following question:

45. […] [Text of the question for a preliminary ruling, contained in the operative part].

46. […] [Provisions relating to the stay of proceedings]

FOR THOSE REASONS,

IN ACCORDANCE WITH THE LAW,

DECIDES AS FOLLOWS

Grants in part the request, made by the applicant **Prisum Healthcare S.R.L**, for a reference to be made to the Court of Justice of the European Union for a preliminary ruling. […].

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, refers the following question to the Court of Justice of the European Union for a preliminary ruling:

Is the Combined Nomenclature 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 last amended by Commission Regulation (EC) 2022/1998 of 20 September 2022, to be interpreted as meaning that

a food preparation in liquid form containing iron (in the form of ferrous sulphate), a vitamin complex, mineral salts, vegetable extracts, natural fruit extracts, other nutritive substances, honey, sugar and glucose syrup, which is consumed as such in doses of 2 teaspoons per day, is marketed in 200 ml plastic bottles, is intended for specific use in the formation of haemoglobin and red blood cells and has the function of a food supplement that contributes to the balance of health, the general well-being of the body and the normal functioning of the immune system falls within heading 2202 of the abovementioned Combined Nomenclature in so far as its liquid form has the effect of excluding it from the classification under heading 2106?

[…] [Aspects relating to the national procedure, signatures]