Case C-67/23

Request for a preliminary ruling

Date lodged:

8 February 2023

Referring court:

Bundesgerichtshof (Federal Court of Justice, Germany)

Date of the order for reference:

17 November 2022

Accused and appellant in the appeal on a point of law:

S.Z.

Confiscation party and appellant in the appeal on a point of law:

W. GmbH

FEDERAL COURT OF JUSTICE

DECISION

[…]

in the criminal proceedings

against

S.Z.,

Confiscation party: W. GmbH.,

concerning commercial violation of an import prohibition laid down in a directly applicable legislative measure of the European Communities, as published in the Official Journal of the European Communities, which serves to implement an economic sanction adopted by the Council of the European Union in the field of the Common Foreign and Security Policy – 'the Myanmar embargo' –

Other party to the proceedings: The *Generalbundesanwalt* (Federal Public Prosecutor General) at the Federal Court of Justice, […]

On 17 November 2022, the 3rd Criminal Chamber of the Federal Court of Justice decided, pursuant to the third paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU), that:

I. The following questions are to be referred to the Court of Justice of the European Union ('CJEU') for a preliminary ruling on the interpretation of Council Regulation (EC) No 194/2008 of 25 February 2008 renewing and strengthening the restrictive measures in respect of Burma/Myanmar and repealing Regulation (EC) No 817/2006 (OJ L 66, 10 March 2008, p.1):

1. Is the term 'originate in Burma/Myanmar' under Article 2(2)(a)(i) of EC Regulation 194/2008 to be interpreted as meaning that none of the following processing operations performed in a third country (in the present case: Taiwan) on teak logs grown in Myanmar brought about a change of origin, to the effect that teak wood processed accordingly remained 'goods' that 'originate in Burma/Myanmar':

   – Debranching and debarking of teak logs;

   – Sawing teak logs into teak squares (debranched and debarked logs sawn into the shape of wooden cuboids);

   – Sawing teak logs into planks or boards (sawn wood)?

2. Is the term 'exported from Burma/Myanmar' under Article 2(2)(a)(ii) of EC Regulation 194/2008 to be interpreted as meaning that only goods imported into the European Union directly from Myanmar are covered, to the effect that goods initially exported to a third country (in the present case: Taiwan), and then transported onwards from there to the European Union, were not subject to the regulation, irrespective of whether they had undergone working or processing conferring origin in that third country?

3. Is Article 2(2)(a)(i) of EC Regulation No 194/2008 to be interpreted as meaning that a certificate of origin issued by a third country (in the present case: Taiwan) – which states that teak logs originating from Myanmar that have been sawn up or sawn to size have, as a result of that processing in the third country, acquired a status of origin in that State – is not binding for the purposes of assessing whether there has been an infringement of the import prohibition laid down in Article 2(2) of EC Regulation No 194/2008?

[…]

Grounds:

1 The 3rd Criminal Chamber of the Federal Court of Justice is hearing the appeals on a point of law lodged by an accused person and the confiscation party against a judgment of the Landgericht Hamburg (Hamburg Regional Court, Germany) dated 27 April 2021. The Regional Court sentenced the accused, for a commercial violation of an import prohibition laid down in a directly applicable legislative measure of the European Communities, as published in the Official Journal of the European Communities, which serves to implement an economic sanction adopted by the Council of the European Union in the field of the Common Foreign and Security Policy – 'the Myanmar Embargo' –, to a suspended custodial sentence of one year and nine months. […] In addition, the Regional Court issued an order against the confiscation party for the confiscation of three seized logs as well as for confiscation of the value of proceeds of crime in the amount of EUR 3,310,902.98.

I.

2 1. The proceedings in the appeal on a point of law are based – in so far as relevant for the purposes of the reference for a preliminary ruling – on the following facts, as established by the Regional Court:

3 The accused was the sole managing director of the legal predecessor of the confiscation party, […], which, among other things, traded in teak wood felled in Myanmar, which was used primarily in boat construction.

4 The company, under the management of the accused, continued to import, and trade in, teak wood from Myanmar even after the Council of the European Union had – for the purposes of implementing Council Common Position No. 2007/750/CFSP of 19 November 2007 – enacted Council Regulation (EC) No. 194/2008 of 25 February 2008 renewing and strengthening the restrictive measures in respect of Burma/Myanmar and repealing Regulation (EC) No 817/2006 ('the Myanmar Embargo Regulation'), which prohibited the import of teak wood originating in Myanmar as well as teak wood exported from Myanmar.

5 At the instigation of the accused, the timber trading company imported, inter alia, teak wood into the customs territory of the Community on 16 occasions, between October 2009 and May 2011 […]. The Taiwan-based supplier of the accused's timber trading company had first felled the teak trees in Myanmar, transported the logs to Taiwan and then processed them in sawmills located there. The Regional Court identified three different ways in which the logs underwent processing in Taiwan: In some cases, they were merely debranched and debarked, that is to say stripped of their branch stubs and tree bark. In other cases, they were sawn in such a way that 'teak squares' were created; these are logs that have been debranched and debarked and then sawn into wooden cuboids. Lastly, there were cases where

the logs were sawn into planks or boards, that is to say into teak sawn wood. Upon completion of this processing, the wood, bearing certificates of origin issued by the Taiwanese authorities, was transported by ship to Hamburg (Germany) in all cases, where delivery was accepted by the accused's company.

6 2. According to the legal assessment of the Regional Court, these imports were subject, at the time of the offence, to criminal penalties under German law, pursuant to Paragraph 34(4)(2) of the Außenwirtschaftsgesetz (Foreign Trade and Payments Act, 'the AWG') in the version of 27 May 2009 ('the AWG 2009') read in conjunction with Article 2(2)(a) of EC Regulation [No] 194/2008 ('the Myanmar Embargo Regulation').

7 Paragraph 34(4)(2) of the AWG 2009 states:

'(4) A person shall be liable to a custodial sentence of six months to five years if he (…)

2. infringes a directly applicable prohibition, published in the *Bundesanzeiger* [Federal Gazette], on exports, imports, transit, removal, sales, supply, making available, transmission, services, investment, support or circumvention provided for in a legislative measure of the European Communities which serves to implement an economic sanction adopted by the Council of the European Union in the field of the Common Foreign and Security Policy.'

8 With regard to Article 2(2)(a) of the Myanmar Embargo Regulation, which is relevant in the instant case, the Myanmar Embargo Regulation – which is directly applicable in the Federal Republic of Germany pursuant to the second paragraph of Article 288 of the Treaty on the Functioning of the European Union (TFEU) – was published in the *Bundesanzeiger* on 22 October 2009.

9 The Regional Court held that the teak wood had acquired the status of goods originating in Taiwan as a result of the processing it had undergone in that country. Hence, according to the Regional Court, there had been no infringement of Article 2(a)(i) of the Myanmar Embargo Regulation. However, the court concluded that the teak wood had, notwithstanding the shipment to Taiwan and the sawing work performed there, (still) been exported from Myanmar as contemplated under Article 2(2)(a)(ii) of the Myanmar Embargo Regulation and that, consequently, an infringement of Article 2(2)(a)(ii) of the Myanmar Embargo Regulation was to be affirmed.

10 […]

11 […]

12 […]

[…] [Applicability of the relevant criminal-law provisions governing *ratione temporis*; not relevant to the questions referred for a preliminary ruling].

13 3. With their appeals on a point of law, the accused is challenging his conviction and the confiscation party is challenging the confiscation orders. The appellants claim that there has been a violation of substantive law. While they are not challenging the findings made by the Regional Court in terms of the facts, they adopt the legal position that the importation of the teak wood processed in Taiwan in the manner described above had not infringed Article 2(2) of the Myanmar Embargo Regulation.

14 The appellants submit, firstly, that the logs from Myanmar had not only been shipped to Germany via Taiwan, but had also, in all cases, undergone working or processing that conferred upon them origin status in the third country, which is why the Taiwanese authorities had also issued certificates for the wood which identified Taiwan as the country of origin. It was thus Taiwanese timber products that had been imported into Germany and not wood originating in Myanmar; hence, there was no case of application of Article 2(2)(a)(i) of the Myanmar Embargo Regulation.

15 Secondly, the appellants submit that, contrary to the legal opinion of the Hamburg Regional Court, the teak wood imported into the territory of the European Union had not been exported from Myanmar, as contemplated under Article 2(2)(a)(ii) of the Myanmar Embargo Regulation. This is because the exports had taken place from Taiwan in all cases. According to the appellants' submissions, Article 2(2)(a)(ii) of the Myanmar Embargo Regulation covered only cases involving direct shipment of the goods in question from Myanmar into the territory of the European Communities.

16 The appellants on a point of law contend that the Regional Court's interpretation of that provision – whereby Article 2(2)(a)(ii) of the Myanmar-Embargo Regulation prohibits also the importation into the Community of goods which, after having been exported from Myanmar, were first imported into one or more third States – would mean that Article 2(2)(a)(ii) of the Myanmar-Embargo Regulation precluded any possibilities for application of Article 2(2)(a)(i) of the Myanmar Embargo Regulation. This is because, in order to originate in Myanmar, goods would necessarily have to be either wholly obtained or produced there (Article 23 of Council Regulation (EEC) No 2913/92 of 12 October 1992, 'the Customs Code'), or have undergone substantial processing or working there (Article 24 of the Customs Code). For this to be the case, however, the goods would have to have been situated in Myanmar, and would subsequently – according to the Regional Court's legal interpretation – always remain goods exported from Myanmar, even if they had undergone working or processing in a third country that conferred upon them origin status in that country. If the Regional Court's legal interpretation is correct, the provision laid down in Article 2(2)(a)(i) of the Myanmar Embargo Regulation would be completely absorbed into Article 2(2)(a)(ii) of the Myanmar Embargo Regulation.

17 According to the appellants, the interpretation accorded to Article 2(2)(a) of the Myanmar Embargo Regulation by the Regional Court also contradicts the aim and purpose of that embargo regime, which is the same in terms of content as that contained in a large number of other embargo regulations of the European Union. Under that normal regime, goods that originate from the country subject to sanctions should be subject to an import ban, but not products manufactured in a third country using raw materials or intermediate products from the sanctioned country. This is because trade in products from third countries should not be restricted. As soon as goods exported from the sanctioned country (raw material or intermediate product) are worked or processed in a third country in such manner that they are to be legally classified as goods originating in that third country, they merge with the new goods; the new product should not therefore be subject to the sanctions regime. The regime provided for in Article 2(2)(a)(i) of the Myanmar Embargo Regulation (and, with identical content, in other embargo regulations) facilitates this differentiation. The appellants argue that the prohibition on importing goods exported from the sanctioned country (Article 2(2)(a)(ii) of the Myanmar Embargo Regulation) merely supplements that provision by dispensing with an examination of (local) origin in cases where goods are brought into the European Communities directly from the sanctioned country because, in that respect, no third country trading partner of the Communities – whose products that are imported into the territory of the Community should be exempt from the sanctions regime – would be involved.

18 4. In his application to the Federal Court of Justice, the *Generalbundesanwalt* (Federal Public Prosecutor General) agreed with the legal opinion of the Hamburg Regional Court, as outlined above, in so far as the interpretation of the relevant provisions of the Myanmar Embargo Regulation is concerned. He explained that the processing performed on the teak wood exported from Myanmar had the sole effect of bringing about a change of origin; the teak wood had not, however, become a different product. In that regard, the *Generalbundesanwalt* argues that the two prohibitions laid down in Article 2(2)(a) of the Myanmar Embargo Regulation each had an independent meaning, in that Article 2(2)(a)(i) relates to the formal determination of origin under the Customs Code, whereas Article 2(2)(a)(ii) addresses the actual act of exporting from Myanmar. Any overlaps between the individual prohibitions stemmed from the legislator's intention to lay down a comprehensive prohibition.

II.

19 The decision on the appeals on points of law hinges upon the answer to the disputed questions referred for a preliminary ruling; this means that the Chamber, as the court hearing the case at last instance, is required, under the third paragraph of Article 267 TFEU, to refer the questions to the Court of Justice of the European Union for a preliminary ruling.

20 According to the factual findings made by the Regional Court, which are generally binding on the Federal Court of Justice as a court of appeal on points of

law, the teak logs felled in Myanmar were sawn to size in Taiwan and were thus worked or processed. Under those circumstances, the importation of the teak wood would only lead to criminal penalties under Paragraph 34(4)(2) of the AWG 2009 or Paragraph 18(1)(1)(a) of the AWG, read in conjunction with Article 2(2)(a) of the Myanmar Embargo Regulation, if:

– either the working or processing that was performed in Taiwan was insufficient to bring about a change in the origin of the teak wood, to the effect that it continued to originate in Myanmar (infringement of Article 2(2)(a)(i) of the Myanmar Embargo Regulation).

– or, in the event that the sawing operations performed in Taiwan had led to a change of origin, importation into the territory of the European Union was prohibited because the logs had first been exported (as an intermediate product) from Myanmar (infringement of Article 2(2)(a)(ii) of the Myanmar-Embargo Regulation).

21 The question as to whether the accused is criminally liable – and thus whether an order for confiscation of the seized logs and a sum of money equivalent to the value of the teak wood obtained but not seized can be considered vis-à-vis the confiscation party – therefore depends on how Article 2(2)(a)(i) and (ii) of the Myanmar Embargo Regulation is to be interpreted.

22 The preliminary ruling procedure is necessary because, on the one hand, the questions of law raised by the questions referred for a preliminary ruling have not already been decided upon by the Court of Justice of the European Union (‘*acte éclairé*’) and, on the other hand, the application of the Union law that is relevant to the concept of ‘origin’ and ‘export’ in the context of foreign trade is not so obvious as to leave no scope for reasonable doubt (‘*acte clair*’). The latter reason is also evident from the different legal opinions presented by the parties to the proceedings during the course of the prior proceedings.

23 In particular:

24 1. Article 2(2)(a) of the Myanmar Embargo Regulation prohibited the import of round logs, timber and timber products, as defined in Annex I to the Regulation, if such goods

‘(i) originate in Burma/Myanmar; or

(ii) have been exported from Burma/Myanmar;’

25 Article 2(3) of the Myanmar Embargo Regulation provided that the origin of the goods was to be:

‘determined in accordance with the relevant provisions of Regulation (EEC) No 2913/92’,

that is to say the Customs Code. Article 23 of that regulation states, inter alia:

> ‘1. Goods originating in a country shall be those wholly obtained or produced in that country.
>
> 2. The expression ‘goods wholly obtained in a country’ means:
>
> (…)
>
> (b) vegetable products harvested therein;’.

26 Article 24 of the Customs Code states:

> ‘Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.’

27 2. Since, based on the Regional Court’s findings, the teak wood felled in Myanmar and ultimately imported into the Federal Republic of Germany was further processed in Taiwan into (partially) debarked round logs, teak squares or teak sawn wood, there were two countries involved in its manufacture.

28 (a) The teak wood felled in Myanmar, and thus harvested there for the purposes of Article 23(1) and (2)(b) of the Customs Code, and which therefore, in any event, initially constituted goods originating in Myanmar, can have become goods originating in Taiwan only if the removal of knags and rough sawing from the round logs; the sawing of the logs thus stripped of knags and bark into square cross-sections (‘teak squares’); or the cutting into planks and boards (teak sawn wood), should be regarded as a last, substantial, economically justified processing or working of the teak wood in an undertaking equipped for that purpose that resulted in the manufacture of a new product or represented an important stage of manufacture.

29 As explained, both the Regional Court and the other parties to the proceedings made this assumption in the present case.

30 (b) However, it seems doubtful as to whether the processing that was performed in Taiwan on the teak wood felled in Myanmar was so substantial that it became goods originating in Taiwan according to Article 24 of the Customs Code. The Chamber is inclined to answer this question in the negative for all types of wood processing at issue in the present case.

31 This is because the Court of Justice of the European Union has already held that activities altering the presentation of a product for the purposes of its use, but which do not bring about a significant qualitative change in its properties, are not of such a nature as to determine its origin (see CJEU, judgments of 26 January

1977 – C-49/76, EU:C:1977:9, paragraph 6; of 23 February 1984 – C-93/83, EU:C:1984:78, paragraph 13). Against this background, the Court has held that the grinding of raw casein to various degrees of fineness cannot be considered as conferring origin status, because the only effect of doing so is to change the consistency of the product and its presentation for the purposes of its later use (CJEU, judgment of 26 January 1977 – C-49/76, EU:C:1977:9, paragraph 7). Moreover, the processing of bovine meat by boning, trimming, drawing the sinews, cutting into pieces and vacuum-packing is also not regarded as processing that can confer origin status because the Court held that their main effect would be to divide up the different parts of a carcase according to their quality and pre-existing characteristics and to alter their presentation for the purposes of sale (CJEU, judgment of 23 February 1984 – C-93/83, EU:C:1984:78, paragraphs 10 and 14).

32 Nevertheless, the application of Union law in the present case is not so obvious as to leave no scope for reasonable doubt in the sense of an '*acte clair*'. This is because the cutting of teak wood in the rough into teak sawn wood still leads to a change of tariff heading in the customs tariff nomenclature (wood in the rough: HS heading 4403; sawn wood with a thickness of more than six millimetres: HS heading 4407), whereas the presentation-modifying operations do not lead to such a change in the case of either meat of bovine animals (HS heading 0201 [fresh or chilled] or HS heading 0202 [frozen]) or in the case of casein (HS heading 3501).

33 Such a change in the customs tariff classification at the level of the four-digit HS heading could be an indication that goods are undergoing substantial treatment because the Harmonised System is structured in stages, from natural products and raw materials to goods of increasingly higher degrees of processing, and a change of heading therefore usually requires an input of labour and capital that is sufficient to confer origin status […].

34 Even if Annex 22-03 of Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, and Annex 15 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, only lay down rules on preferential origin, it could be significant that the qualifying operation conferring origin status for wood is therein stated to be, in principle, 'manufacture from materials of any heading, except that of the product, or manufacture in which the value of all the materials used does not exceed 70% of the ex-works price of the product', with the exception that, in the case of wood under HS heading 4407, the required qualifying operation is 'planing, sanding or finger-jointing' or rather 'planing, sanding or end-jointing'.

35 The decision of the Federal Court of Justice on the appeals on a point of law in the present proceedings therefore depends on the answer to the first question referred for a preliminary ruling.

36 3. If the teak wood at issue in the present case – or at least teak wood whose tariff classification changed as a result of the sawing work in Taiwan – had become goods originating in Taiwan, to the effect that its importation into the Community did not infringe Article 2(2)(a)(i) of the Myanmar Embargo Regulation, the decision on the appeals on a point of law would depend on whether the importation of goods originating in a third country infringed Article 2(2)(a)(ii) of the Myanmar Embargo Regulation by virtue of the fact that a raw material or intermediate product from which the goods had been manufactured in the third country had been exported from Myanmar (to the third country) (second question referred for a preliminary ruling).

37 If, in line with the Chamber's inclination, the term 'exported from Burma/Myanmar' under Article 2(2)(a)(ii) of the Myanmar Embargo Regulation is, contrary to the legal opinion of the Hamburg Regional Court and the *Generalbundesanwalt*, to be interpreted as meaning that only goods imported directly from Myanmar into the European Union are covered, to the effect that goods initially exported to a third country (in the present case: Taiwan), and then transported from there to the European Union, were not subject to the regulation, irrespective of whether they had undergone processing or working in the third country that would confer upon them origin status in that third country, then the accused would not have contravened Article 2(2)(a)(ii) of the Myanmar Embargo Regulation. If the teak wood processing in Taiwan had conferred origin status and there had thus been no infringement of Article 2(2)(a)(i) of the Myanmar Embargo Regulation, he would not have subjected himself to criminal liability.

38 If, on the other hand, Article 2(2)(a)(ii) of the Myanmar Embargo Regulation is to be interpreted – in line with the legal opinion of the Hamburg Regional Court and the *Generalbundesanwalt* – as meaning that an export from Myanmar occurred also if goods imported into the territory of the European Union, or an intermediate product of those goods, came originally from Myanmar and those goods were either imported via a third country, or the intermediate product originating from Myanmar was delivered to a third country, processed there in a manner conferring origin status, and the new product was subsequently imported, then the accused would be criminally liable regardless of the regulatory content of Article 2(2)(a)(i) of the Myanmar Embargo Regulation.

39 Hence, the decision of the Chamber in the present appeal on a point of law depends on the answer to the second question referred for a preliminary ruling. In this regard also, a referral to the Court of Justice of the European Union cannot be dispensed with because the correct interpretation of Article 2(2)(a)(ii) of the Myanmar Embargo Regulation is not obvious and beyond doubt in the sense of an '*acte clair*'. This is already apparent from the outlined legal opinion of the Hamburg Regional Court and the *Generalbundesanwalt*. Militating against this legal opinion, however, is the fact that it would mean – as is correctly pointed out in the grounds for the appeal on a point of law lodged by the accused – that, firstly, Article 2(2)(a)(i) of the Myanmar Embargo Regulation would have had no independent scope of application and, secondly, products from third countries

manufactured using raw materials or intermediate products from Myanmar would have been subject to the import ban, which would appear to contradict the intention of the embargo regime.

40 4. In the importation cases underlying this request for a preliminary ruling, Taiwanese authorities had issued certificates of origin, which stated that the sawn or sawn-to-size teak logs from Myanmar had, as a result of the processing performed on them in Taiwan, acquired origin status in that State. Hence, the Chamber also refers the third question to the Court of Justice of the European Union for a preliminary ruling on whether those certificates of origin are binding for the purposes of determining whether the import ban laid down in Article 2(2) of the Myanmar-Embargo Regulation has been infringed, even though it is mindful of the Court's case-law, which provides that there is no general legal obligation to recognise certificates of origin issued by third countries (see CJEU, judgments of 25 July 2018 – C-574/17 P, EU:C:2018:598, paragraph 48 et seq.; of 25 February 2010 – C-386/08, EU:C:2010:91, paragraph 73).

[…]