

Case C-567/23

Request for a preliminary ruling

Date lodged:

13 September 2023

Referring court:

Krajský soud v Ostravě (Czech Republic)

Date of decision to refer:

31 August 2023

Applicant:

BG Technik cs, a.s.

Defendant:

Generální ředitelství cel

ORDER

The Krajský soud v Ostravě (Regional Court, Ostrava) has ruled [...] [composition of the court] in the case of

The applicant: **BG Technik cs, a.s.**,

[...]

v the defendant: **Generální ředitelství cel (General Directorate of Customs)**

[...]

Concerning an application challenging the decision of the defendant of 11 May 2022, file no 15217-2/2022-900000-311

As follows:

[...] The **following question** is hereby **submitted** to the Court of Justice of the European Union for a preliminary ruling:

May an electric carriage with the following properties:

- Two axels with rear-axle drive;
- Two sets of tyres, with the rear tyres being larger to prevent tipping over;
- The carriage is controlled with closed oval-shaped handlebars on a separate steering column fitted with control features and adapted for controlling the steering and speed with one hand;
- The carriage is fitted with an electromagnetic brake on the rear wheels;
- The dimensions of the carriage are 122 x 63 x 125 cm (l-w-h) – the height is measured with the seat in the operating position;
- Adjustable and rotating seat with supports;
- Horizontal platform connecting the front and rear sections of the carriage;
- Electric motor with an output of 800 W, enabling a speed of up to 15 km per hour and a range of up to 45 km;

be classified under heading 8713 90 00 of the Combined Nomenclature **despite Commission Implementing Regulation (EU 2021/1367) of 6 August 2021?**

[...] [stay of proceedings]

Grounds:

I.1

Background to the case

- 1 The applicant filed a customs declaration on 1 November 2021, proposing, among other items, that the following goods be placed in the customs regime of free circulation: 79 carriages for disabled persons DL24800-3 ('SELVO 4800') – a one-seat, four-wheel carriage for disabled persons/persons with disabilities or reduced motor skills, mechanically propelled electric carriage for disabled persons, declaring that the goods belong to the tariff classification for imported goods under subheading 8713 90 00 of the Combined Nomenclature ('CN'), with an import customs rate of 0%. The Celní úřad (customs authority) concluded that the proposed customs rate classification was incorrect and that the goods concerned are electric scooters that pertain to CN subheading 8703 10 18 in terms of rates, with an import duty of 10%. In view of that, the customs authority initiated proceedings concerning an additional assessment of import duty of 155,785 Czech koruny (CZK), issuing a subsequent payment assessment, against which the applicant appealed.
- 2 The defendant ruled on the appeal by issuing the contested decision of 11 May 2022 [...], dismissing the applicant's appeal and confirming the subsequent

assessment of import duty of 10%, as a consequence of the classification of the SELVO 4800 carriage under CN subheading 8703 10 18. Subsequently, the applicant brought the present administrative action in the case.

- 3 The applicant claimed during the administrative proceedings and now claims in the court proceedings that Commission Implementing Regulation (EU) 2021/1367 of 6 August 2021 [concerning the classification of certain goods in the Combined Nomenclature] ('Regulation 2021/1367'), pursuant to which the customs authority, as a first-instance administrative authority and the defendant, classified the goods, the SELVO 4800 carriage, under CN subheading 8703 10 18, is not binding and applicable to those goods, the SELVO 4800 carriage. The applicant states that the customs authorities themselves initiated the issuance of Regulation 2021/1367, which classified the imported SELVO 4800 carriages under CN subheading 8703 10 18, with goods classified therein being subject to an increased import duty rate of 10%. The applicant argues that the efforts of the customs authorities are unlawful, inasmuch as Regulation 2021/1367 contains a description of goods that is completely identical to the description of goods in the Basic Technical Description and Instruction Manual for the SELVO 4800 carriage, thereby the customs authority literally created a situation in which the applicant no longer has any scope for indicating any features or characteristics enabling the use of its carriages by persons with disabilities. In the drafting of Regulation 2021/1367, the characteristics of the SELVO 4800 carriage were taken up such that even those that explicitly establish the use of the goods for disabled people were set out in Regulation 2021/1367, thereby entirely excluding the classification of the SELVO 4800 carriage under CN subheading 8713 90 00. That exclusion of the use of the SELVO 4800 carriage does not correspond to reality, since, by decision of the Ministerstvo dopravy (Ministry of Transport) concerning approval of the technical classification of vehicle type No 9172, dated 24 April 2014, the SELVO 4800 carriage at issue was classified in the category of Other Vehicles – Wheelchairs; it is evident from the basic technical description, in the 'Other Records' section, that the SELVO 4800 carriage is intended exclusively for TP, ZTP, and ZTP/P [various degrees of disability] licence holders. Further evidence that the SELVO 4800 carriage is a wheelchair and should hence be classified under subheading 8713 90 00 is the certificate approving the technical capacity of the SELVO 4800 vehicle type, which specifies 'other vehicles – wheelchair' as the type, and the basic technical description of the vehicle, which in heading 2 states 'wheelchair'. Furthermore, the SELVO 4800 carriage complies with the conditions set by law for medical devices, which is shown by the decision of the Statni ustav pro kontrolu lečiv (State Authority for Drug Control) [...] of 22 November 2021. Those facts have been repeatedly confirmed by the administrative courts in their decisions. In the applicant's view, the defendant knowingly and incorrectly classifies the SELVO 4800 carriage under the CN subheading 8703 10 18, thus not respecting established case-law in the matter, and circumventing the very nature, purpose, and method of use of the goods, in that it refuses to take into account the technical specifics of the goods, namely, the fact that the SELVO 4800 carriage is fitted with special features to alleviate the disability and that its main function is use by disabled and handicapped persons.

- 4 The defendant observes that the subject of the dispute is the issue of the tariff classification of the goods concerned, namely, the SELVO 4800 carriage, which the applicant considers to be a wheelchair, that is, goods classified under CN subheading 8713 90 00; the customs authorities, however, classified it under CN subheading 8703 10 18, having taken account, in doing so, of the validity of Regulation 2021/1367, an annex to which contains a description of the goods concerned, their classification (CN code), and grounds for that classification. In terms of its properties, parameters, and features, the SELVO 4800 carriage fully corresponds to the product described in the first column of the annex to Regulation 2021/1367, which was included for tariff purposes under the CN subheading 8703 10 18. Those goods are absolutely identical, on which the applicant and the defendant agree. Regulation 2021/1367 is directly applicable to the goods corresponding to the SELVO 4800 carriage and is binding on the customs authorities and the defendant.

- 5 In its detailed grounds for the tariff classification under Regulation 2021/1367, the defendant states that classification of the vehicle under consideration (identical to the SELVO 4800 carriage) under CN subheading 8713 90 00 as a wheelchair is excluded, as the vehicle is not specially designed for disabled persons and has no special features to alleviate a disability. Regulation 2021/1367 explicitly states that, even though the vehicle under consideration is designed such that the steering can be controlled with one hand, features a comfortable rotating seat with supports and a non-slip surface for the feet (and may optionally be fitted with small anti-tipping wheels), such characteristics do not objectively constitute special features designed to alleviate a disability. Pursuant to Regulation 2021/1367, CN subheading 8713 90 00 excludes vehicles fitted with a separate adjustable steering column and vehicles reaching a maximum speed over 10 km per hour. The vehicle under consideration is used for transporting persons, is not recognisable as a vehicle designed solely for disabled persons, and it must therefore be classified under CN subheading 8703 10 18 as a motor vehicle principally designed for the transport of persons, similar to golf carts. It is apparent that, in issuing Regulation 2021/1367 and assessing the tariff classification of a product identical to the SELVO 4800 carriage, the Commission took into consideration and took note of all of its properties, parameters, and features, including all the features that the applicant has – in respect of the SELVO 4800 carriage – repeatedly identified as features alleviating disability and hence features that should, in the applicant’s view, support the tariff classification of the SELVO 4800 carriage under CN subheading 8713 90 00 of the customs tariff as a wheelchair, such as, for example, an adjustable rotating seat with supports, a non-slip platform for the feet, anti-tipping wheels, steering that can be controlled with one hand, and so forth. The Commission clearly concluded that those properties cannot be deemed to constitute features alleviating disability, for the purposes of CN subheading 8713 90 00 of the customs tariff. In view of the above, the first-instance administrative authority and the defendant had no other option but to classify the imported goods – the SELVO 4800 carriage – in CN subheading 8703 10 18, in accordance with Regulation 2021/1367, to assess import duty, and to issue the contested decision.

I.2

Relevant national legislation and its interpretation by the national courts to date

- 6 On 17 August 2021, Commission Implementing Regulation (EU) 2021/1367 of 6 August 2021 was published in the *Official Journal of the European Union* (L 294). That is a binding piece of Community legislation that is directly applicable in all EU Member States, which took effect, in accordance with Article 3 thereof, on the twentieth day after its publication in the Official Journal, namely on 6 September 2021. The applicant submitted its customs declaration on 1 November 2021, thus, at the time of receipt of the customs declaration, it constituted valid and effective Community legislation.
- 7 It must be noted in the present case that, before Regulation 2021/1367 took effect, namely while [Commission] Regulation (EC) No 718/2009 [of 4 August 2009 concerning the classification of certain goods in the Combined Nomenclature] was in force, there were several sets of court proceedings involving the applicant and the defendant concerning the same legal issue, the outcome of which constitutes established case-law of the national courts. The disputed issue was whether the SELVO 4800 carriage concerned should be classified under subheading 8703 10 18 or subheading 8713 10 00 of the Combined Nomenclature (namely, 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). According to the explanatory note to CN code 8713 10 00, motorised vehicles specifically designed for disabled persons may be distinguished from vehicles classified under CN code 8703 10 18, mainly because their maximum speed is 10 km per hour, that is, a fast walking pace; a maximum width of 80 cm; two sets of wheels touching the ground; and special features to alleviate the disability (for example, footrests for stabilising the legs). Those vehicles may be fitted with an extra set of wheels (anti-tipping); steering and other controls (for example, a joystick) facilitating handling; such controls are usually attached to one of the armrests; they are never in the form of a separate adjustable steering column. Contrary to the note above, the SELVO 4800 carriage has a maximum speed of 16 km per hour and is fitted with a separate steering column. The customs authority, as the first-instance administrative authority and as defendant consequently repeatedly classified the SELVO 4800 carriage under CN heading 8703 10 18 and subsequently assessed customs duties. The applicant has on a repeated basis brought administrative actions against the decisions to assess customs duties [...] [information about the national proceedings].
- 8 In their decisions, the administrative courts took a uniform position, classifying the SELVO 4800 carriage under CN subheading 8713 10 00. In doing so, they took into account primarily the intended use of the carriage concerned, and its special features to alleviate the disability, which distinguish it significantly from ordinary vehicles for transporting persons. The courts' decisions were based on conclusions that follow from the judgement of the Court of Justice of the European Union of 26 May 2016, *Invamed Group and others*, C-198/15, and on

the fact that the decision of the Ministry of Transport approving the technical classification of vehicle type No 9172 of 24 April 2014 classified the carriage in question in the category of ‘Other Vehicles – Wheelchairs’; it is evident from the basic technical description that the carriage is designed exclusively for TP, ZTP, ZTP/P licence holders, namely persons with disabilities, to which its intended use also corresponds. Furthermore, the SELVO 4800 carriage complies with the conditions set by law for medical devices, which is demonstrated by the decision of the State Authority for Drug Control issued pursuant to zákon č. 268/2014 Sb., o zdravotnických prostředcích (Law No 268/2014 on medical devices). The courts acknowledged that, in terms of its appearance, the SELVO 4800 carriage differs from the general perception of the appearance of a wheelchair; nevertheless, the atypical nature of a product cannot result in the carriage being classified under a different heading. The criteria for the tariff classification of goods include the intended use of the product, consideration of which of its functions are principal and which are secondary from the consumer’s point of view, and also the method whereby manufacturers and dealers market the product. It is essential to carry out an objective assessment of the carriage in question, which has features to alleviate a disability, and whose primary purpose is to facilitate movement for persons with physical disabilities.

- 9 The case-law referred to above emerged while Commission Regulation (EC) No 718/2009 was in effect, and during that period, the issue of the tariff classification of products similar to the carriage concerned, the SELVO 4800, was addressed repeatedly, both by the Customs Code Committee and by the case-law of the EU Court of Justice. The Court of Justice dealt twice with the issue of the classification of goods under CN subheadings 8703 10 18 and 8713 10 00, and both cases concerned the tariff classification of electric carriages (the judgment in *Invamed Group and Others*, C-198/15, ECLI:EU:C:2016:362, and the judgment in *Lecson Elektromobile GmbH*, C-12/10, ECLI:EU:C:2010:823).

I.3

Relevant EU legislation

- 10 The relevant rules under European Union law are contained in Commission Implementing Regulation (EU) 2021/1367 of 6 August 2021, which took effect on 6 September 2021. It should be noted that the issue of the tariff classification of products similar to the carriage concerned, the SELVO 4800, is not new; on the contrary, it has been repeatedly addressed over the last 20 years by the Harmonized System Committee, which is concerned with work related to the Combined Nomenclature within the framework of the World Customs Organization. The adoption of Regulation 2021/1367 was preceded by discussions within the Customs Code Committee (197th session of the Customs Code Committee in Brussels between 20 and 22 February 2019, item 8.1; full minutes available at: <https://ec.europa.eu/transparency/comitology-register/screen/documents/061483/1/consult?lang=en>), where the inconsistent practice of Member States in the classification of the goods concerned under CN subheadings 8703 10 18 and 8713 10 00 was discussed. The Czech Republic

explicitly drew attention during those discussions to its national case-law, which obliged the customs authorities to classify the SELVO 4800 carriage under CN subheading 8713 as a wheelchair.

- 11 At the same time, it is necessary to refer to the case-law of the Court of Justice of the European Union, which states, in the judgment in *Invamed Group and Others*, C-198/15, that the description of CN code 8713 must be interpreted as meaning that the words ‘for disabled persons’ mean that that product is designed solely for disabled persons. The fact that a vehicle may be used by non-disabled persons is irrelevant to its tariff classification (*Invamed*, paragraph 27). The words ‘disabled persons’ designate persons affected by a non-marginal limit on their ability to walk (*Invamed*, paragraph 34). It is for the referring court to determine whether the vehicle at issue is intended, with regard to its characteristics and objective properties, to be used specifically by disabled persons, and whether such use must be classified as ‘the main or logical use’ of that type of vehicle (*Invamed*, paragraph 23). The *Invamed* judgment emphasised that the term ‘disability’ is broad, meaning that those carriages may serve people with a greater or lesser degree of disability, for whom a traditional wheelchair is not the only option. The carriage is slow, may be used in shops and along pavements, where space is limited, and a small turning circle is required. The carriage has certain characteristics that make it suitable for use by persons affected by a non-marginal limit to their ability to walk. The fact that it may potentially be used by persons without such restrictions does not alter its tariff classification. The carriage does not offer healthy persons any advantage; its special characteristics do not make it any easier for them to move about, on the contrary, it makes them clumsier than if they were to move by walking around in normal fashion.

I.4

Reasons for the request for a preliminary ruling

- 12 The essence of the dispute concerning the interpretation of European Union law is the question whether a Member State is to apply Regulation 2021/1367, which classified the SELVO 4800 carriage under CN subheading 8703 10 18, in circumstances where national documents consider the SELVO 4800 carriage – on the basis of its characteristics and use – to be a wheelchair. Consistent national case-law has developed on the basis of its characteristics and purpose, which was based on the conclusions of the judgment of the Court of Justice of the European Union in *Invamed Group and Others*, Case C-198/15.
- 13 The referring court has doubts as to the applicability of Regulation 2021/1367 on the grounds that, by adopting the Regulation, the Customs Code Committee responded in very formalistic fashion to current case-law, assessing the SELVO 4800 carriage according to its intended use. The fact that, in the drafting of Regulation 2021/1367, a description of goods identical to the SELVO 4800 carriage was given, including all its characteristics, including those that explicitly determine the use of the goods for disabled persons, effectively precludes the application of the conclusions arising from the judgment of the Court of Justice of

the European Union in *Invamed Group and Others*, C-198/15. The regulation in question, No 2021/1367, directly lists the characteristics of the goods which cannot be considered as characteristics alleviating a disability within the meaning of subheading CN 8713 of the customs tariff, which is contrary to the assessment of goods according to their intended use.

- 14 The application of Regulation 2021/1367 results in a conflict with the United Nations Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities ('the Convention'), in particular with paragraph (e) of the Preamble to the Convention, in which the signatory states declare that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. In particular, there is conflict with Article 20 of the Convention, which states that States Parties are to take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by: (a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost; (b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost; (c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities; (d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities. The application of Regulation 2021/1367 restricts the rights of persons with disabilities since, by transferring the carriage concerned into the tariff classification under CN subheading 8703 10 18, its price is also increased and, effectively, the design and production of innovative carriage features that may increase the comfort of disabled persons is restricted inasmuch as that regulation directly lists the characteristics of goods that cannot be deemed to constitute characteristics that alleviate a disability within the meaning of CN subheading 8713 of the customs tariff, which runs entirely contrary to the requirement of motivating entities that manufacture mobility aids.
- 15 In view of the uncertainties in interpretation described above, the Regional Court has not concluded that an *acte clair* exists. Furthermore, the Regional Court is not aware that the issue in question has already been addressed by the Court of Justice, and would therefore constitute an *acte éclairé*.
- 16 The Regional Court thus deems it necessary to refer a question to the Court of Justice for a preliminary ruling pursuant to Article 19(3)(b) of the Treaty on the European Union and Article 267 of the Treaty on the Functioning of the European Union [...] [reference to the operative part of the order].

II.

- 17 [...]

18 [...] [stay of proceedings]

[...] [national proceedings]

Ostrava, 31 August 2023

[...]

[Name and signature

of the Chair of the Chamber]

WORKING DOCUMENT