

Case C-631/23

Request for a preliminary ruling

Date lodged:

18 October 2023

Referring court:

Finanzgericht Düsseldorf (Germany)

Date of the decision to refer:

4 October 2023

Applicant:

Servoprax GmbH

Defendant:

Hauptzollamt Duisburg

[...]

FINANZGERICHT DÜSSELDORF

(Finance Court, Düsseldorf)

ORDER

In the case of

Servoprax GmbH, [...]
Wesel,

– applicant –

[...]

v

Hauptzollamt Duisburg (Principal Customs Office, Duisburg) [...]

– defendant –

in the matter of customs duties

the 4th Chamber [...]

[...]

ordered as follows on 4 October 2023:

The proceedings are stayed.

The following questions are to be referred to the Court of Justice of the European Union ('the Court') for a preliminary ruling pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union:

1. Is the Combined Nomenclature set out in Annex I of Council Regulation (EEC) No 2658/87 of 23 July 1987 (OJ EU L 256/1), in the version of Commission Implementing Regulation (EU) 2016/1821 of 6 October 2016 (OJ EU L 294/1), in the version of Commission Implementing Regulation (EU) 2017/1925 of 12 October 2017 (OJ EU L 282/1), as well as in the version of Commission Implementing Regulation (EU) 2018/1602 of 11 October 2018 (OJ EU L 273/1), to be interpreted as meaning that tourniquets, of the type described more precisely in the Order, are to be classified under subheading 9018 90 84 of the Combined Nomenclature?

2. If the first question referred is answered in the affirmative: Is the second sentence of Article 252 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 valid?

[...]

Grounds

I.

- 1 The applicant trades in medical products. In 13 cases during the period from 22 August 2017 to 9 December 2019, it declared tourniquets imported from the People's Republic of China to the Hauptzollamt (Principal Customs Office) under subheading 6307 90 98 of the Combined Nomenclature (CN). In response to its request of 11 March 2016, the Hauptzollamt Hanover issued it with a binding tariff information dated 15 April 2016. In doing so, the Hauptzollamt Hannover had classified the tourniquets under subheading 6307 90 98 CN, instead of under subheading 9018 90 84, as indicated by the applicant in its request.
- 2 The tourniquets were single-coloured bands made of an elastic textile-fibre fabric measuring approximately 38 cm in length, approximately 2.5 cm in width and

approximately 2.2 mm in thickness. At their ends there was a plastic cap and a plastic snap fastener consisting of a snap-in component at the other end of the band. In addition, they featured a receiving component that could be freely guided over the band, with a fixing mechanism for clamping the section of band that could be guided through. The tourniquets were intended to be placed around the arm of a patient. They served to produce a vascular congestion in a vein.

- 3 Based on the applicant's customs declarations, the defendant Hauptzollamt imposed customs duties on the applicant at a duty rate of 6.3%. On 8 July 2020, the applicant applied for reimbursement of the duty collected, in the amount of EUR 8,703.71. It claimed that the tourniquets were to be classified under subheading 9018 90 84 CN. In that respect, it referred to legal proceedings pending before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) – case reference 4 K 943/19 Z – in which it also sought the reimbursement of customs duties on the grounds of the classification assigned to the tourniquets vis-à-vis the customs declarations that it had submitted up until September 2015. In those legal proceedings, the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) classified the tourniquets under subheading 9018 90 84 CN and, by judgment of 11 March 2022, ordered the defendant Hauptzollamt to reimburse the customs duties to the applicant.
- 4 In view of the fact that the defendant Hauptzollamt had not, despite the applicant's reminder, issued a decision on the applicant's request for reimbursement of the customs duties of 8 July 2020, the applicant lodged an objection and ultimately commenced an action.
- 5 In its application, the applicant submits that: The tourniquets should be classified under subheading 9018 90 84 CN because, according to the applicant, they are used by doctors for the purposes of making a diagnosis. In so far as the Commission had excluded tourniquets from subheading 9018 90 84 CN in its Explanatory Notes to the CN of 31 October 2017 (OJ EU C 370/2), that ran contrary to the wording of heading 9018 CN.
- 6 According to the applicant, the binding tariff information issued to it on 15 April 2016 does not preclude classification of the tourniquets under subheading 9018 90 84 CN. It was true that – pursuant to the second sentence of Article 252 of Commission Delegated Regulation (EU) 2015/2446 (UCC-DR) 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 (OJ EU L 343/1) – binding tariff information issued before 1 May 2016 is, as of 1 May 2016, also binding on the holder of the decision. However, the applicant maintains that the Commission lacked the power to adopt such far-reaching, retroactive and burdensome rules. After receiving the binding tariff information, the applicant decided not to contest it because – according to the applicant – it was not binding on the applicant by virtue of Article 12 of Council Regulation (EEC) No 2913/92 (Customs Code, 'CC') of 12 October 1992

establishing the Community Customs Code (OJ EU L 302/1). The legitimate expectation stemming from that legal situation should be protected.

- 7 The defendant Hauptzollamt is contesting the action on the grounds that: According to the binding tariff information issued to the applicant, the tourniquets should be classified under subheading 6307 90 98 CN. That was already confirmed by the Commission’s Explanatory Notes to the CN of 31 October 2017 (OJ EU C 370/2).

II.

- 8 The following provisions of the Abgabenordnung (Fiscal Code of Germany, ‘the AO’) in the version promulgated on 1 October 2002 (Bundesgesetzblatt 2002 Part I, page 3866; 2003 Part I, page 61) are relevant for the decision on the second question referred for a preliminary ruling:

Paragraph 347 Permissibility of objections

(1) Objection to administrative acts

1. in fiscal matters to which this Code applies, [...] shall be permissible as a means of legal remedy.

Paragraph 355 Period for objection

Objection pursuant to section 347(1), first sentence, shall be lodged within one month of notice of the administrative act. [...]

III.

- 9 9. The Chamber stays the pending action [...] and refers the questions set out in the operative part of the present Order to the Court of Justice of the European Union (‘the Court’) for a preliminary ruling pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union (‘TFEU’). The decision on the action depends on whether the tourniquets are to be classified under subheading 9018 90 84 CN. If the tourniquets are to be classified under heading 9018 90 84 CN and not under subheading 6307 90 98 CN, the decision on the action depends on whether the second sentence of Article 252 of the UCC-DR is valid.
- 10 The Chamber has doubts as to whether the tourniquets are to be classified under subheading 6307 90 98 CN. In the case at issue, the CN is to be applied in the version of Commission Implementing Regulation (EU) 2016/1821 of 6 October 2016 (OJ EU L 294/1) for the year 2017; in the version of Commission Implementing Regulation (EU) 2017/1925 of 12 October 2017 (OJ EU L 282/1) for the year 2018; and in the version of Commission Implementing Regulation (EU) 2018/1602 of 11 October 2018 (OJ EU L 273/1) for the year 2019.

- 11 The decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the section or chapter notes (CJEU, judgments of 12 July 2012, C-291/11, EU:C:2012:459, paragraph 30; of 28 October 2021, C-197/20 and C-216/20, EU:C:2021:892, paragraph 31). In spite of the fact that they lack binding force, the World Customs Organisation's Explanatory Notes to the Harmonised System ('HS') and the Commission's Explanatory Notes to the CN may be regarded as useful aids to the interpretation of the HS and CN, in so far as their content is consistent with the provisions which they interpret (CJEU, judgment of 9 February 2023, C-788/21, EU:C:2023:86, paragraph 37).
- 12 The intended use of a product may also constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (CJEU, judgments of 22 September 2016, C-91/15, EU:C:2016:716, paragraph 56; of 28 October 2021, C-197/20 and C-216/20, EU:C:2021:892, paragraph 31).
- 13 Those principles indicate that the tourniquets should not be classified under subheading 6307 90 98 CN. Heading 6307 CN covers other made-up articles in general. By contrast, heading 9018 CN appears to be a more precise match since, inter alia, instruments and appliances used in medical sciences are to be classified to that heading (first sentence of point 3(a) of the General rules for the interpretation of the combined nomenclature). The tourniquets at issue are to be used solely by medical personnel for medical purposes. That is also the intended purpose of the tourniquets. That is not disputed by the parties to the present case. Moreover, it is also apparent from the description of the goods set out in the binding tariff information issued to the applicant on 15 April 2016. The tourniquets are therefore likely to fulfil the conditions for classification under heading 9018 CN (CJEU, judgment of 4 March 2015 C-547/13, EU:C:2015:139, paragraph 51 et seq.).
- 14 Classification of the tourniquets to heading 9018 CN is probably not precluded by the Commission's Explanatory Notes to the CN of 31 October 2017 (OJ EU C 370/2) and 29 March 2019 (OJ C 119/388). While it is true that, in those Explanatory Notes, the Commission adopted the view that so-called 'tourniquets', which are comparable to the tourniquets at issue, were not to be classified under subheading 9018 90 84 CN, that does not appear to be consistent, however, with the wording of heading 9018 CN and the Explanatory Notes (HS) relating to that heading. According to the first paragraph of those Explanatory Notes, heading 9018 HS covers a particularly large number of instruments and appliances made from any material, and characterised essentially by the fact that, in almost all cases, they normally require, inter alia, handling by doctors, midwives and so forth in their professional practice for the purposes of making a diagnosis. That is undoubtedly the case with regard to the tourniquets at issue.

- 15 In the Chamber's view, the tourniquets are also unlikely to be comparable to goods which are actually only tools or cutlery products and which are described in the fourth paragraph of the Explanatory Notes (HS) to heading 9018. According to those Explanatory Notes, to which the Commission referred in support of its Explanatory Notes of 31 October 2017 and 29 March 2019, such tools or cutlery products are covered by heading 9018 only if their intended use for medical and surgical purposes is clearly identifiable. In the opinion of the Chamber, tourniquets cannot be regarded as goods for general use, such as tools or cutlery. On the contrary, it should be clear from the elastic material, the snap fastener, the snap-in component and the fixing mechanism that the tourniquets were intended to be placed around the arm of a patient in order to create a vascular congestion in a vein in the arm. Moreover, that is not disputed by the parties to the case.
- 16 In the event, therefore, that the tourniquets are to be classified under heading 9018 90 84 CN, it is necessary to clarify whether the second sentence of Article 252 of the UCC-DR is valid.
- 17 The binding tariff information of 15 April 2016 was issued to the applicant in accordance with the then still-in-effect Article 12(1) of the Customs Code. The Customs Code was repealed pursuant to Article 286(2) of Regulation (EU) No 952/2013 (Union Customs Code, 'UCC') of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ EU L 269/1) with effect only as of 1 May 2016 (Article 288(2) of the UCC). According to the first subparagraph of Article 12(2) of the CC, binding tariff information was to be binding only on the customs authorities vis-à-vis the respective beneficiary. From the applicant's point of view, it was thus immaterial, up until 30 April 2016, whether the binding tariff information issued to it on 15 April 2016, by which the tourniquets were classified under subheading 6307 90 98 CN, was correct. The applicant was not required to rely on that information. However, according to the second sentence of Article 252 of the UCC-DR, binding tariff information issued before 1 May 2016 is now also binding not only on the customs authorities but also on the holder.
- 18 The Chamber has doubts as to the validity of that Commission rule, which relates to binding tariff information issued under the then still-in-effect Article 12(1) of the Customs Code.
- 19 However, it is unlikely that the applicant can rely on the principle of protection of legitimate expectations in the present case. Specifically, the applicant could still have challenged the binding tariff information of 15 April 2016, even after 1 May 2016, by lodging an objection as an out-of-court remedy (Article 44(2)(a) of the UCC; point (1) of the first sentence of Paragraph 347(1) AO and first sentence of Paragraph 355(1) AO). Thus, in view of the provision laid down in the second sentence of Article 252 of the UCC-DR, it could not legitimately expect that the binding tariff information issued to it would remain non-binding for it even after 30 April 2016 (see, to that effect, CJEU, judgment of 3 June 2021, C-39/20, EU:C:2021:435, paragraph 48).

- 20 However, the Chamber doubts whether the Commission had a mandate to adopt the second sentence of Article 252 of the UCC-DR. According to the second subparagraph of Article 290(1) TFEU, a legislative act delegating to the Commission a power to adopt a non-legislative act of general application to supplement or amend certain non-essential elements must explicitly define the objectives, content, scope and duration of that delegation of power. The purpose of granting a delegated power can therefore serve only to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act (CJEU, judgment of 18 March 2014, C-427/12, EU:C:2014:170, paragraph 38). The definition of the power conferred must, in particular, be sufficiently precise, in that it must indicate clearly the limits of the power and must enable the Commission's use of the power to be reviewed by reference to objective criteria fixed by the EU legislature (CJEU, judgment of 26 July 2017, C-696/15 P, EU:C:2017:595, paragraph 49).
- 21 The Chamber is unable to identify a mandate that the Commission could have relied upon for the purposes of adopting the second sentence of Article 252 of the UCC-DR. Article 36 of the UCC does not contain any provision conferring on the Commission the power to provide, by way of derogation from Article 12(2) of the Customs Code, that binding tariff information issued before 1 May 2016 is nevertheless also to be binding on the holder as of 1 May 2016.

[...]