

Case C-800/23**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

28 December 2023

Referring court:Rechtbank van eerste aanleg Oost-Vlaanderen, Afdeling Gent
(Belgium)**Date of the decision to refer:**

15 December 2023

Accused persons:

DRINKS 52 BVBA

NZ

Other party to the proceedings:

Minister van Financiën

Subject matter of the main proceedings

The reference was made in the course of proceedings in which DRINK 52 BVBA and NZ ('the accused persons') are being prosecuted for infringement of criminal customs law for the unlawful holding and importation into Belgium, from Germany and the Netherlands, of products subject to excise duty for commercial purposes, without levying Belgian excise duties and packaging tax and without being in possession of an excise establishment authorisation for that purpose.

Subject matter and legal basis of the request

The request for a preliminary ruling under Article 267 TFEU concerns the interpretation of Article 42 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code ('the UCC'), in order to ascertain whether, in the event that it is not possible to produce the confiscated goods, an order to pay the equivalent value of the

excise goods 1) constitutes not a (criminal) penalty but a consequence in civil law of the criminal conviction; 2) may be combined with a criminal fine; and 3) may be reduced.

Questions referred for a preliminary ruling

(1) Can Article 42 of the UCC be interpreted as not precluding national legislation such as that laid down in Articles 220 and 221(1) of the Algemene wet inzake douane en accijnzen (General Law on customs and excise duty; ‘the AWDA’), Articles 1382 and 1383 of the Burgerlijk Wetboek (Civil Code) and Articles 44 and 50 of the Strafwetboek (Criminal Code), under which, in the event that it is not possible to produce the confiscated goods, an order to pay the equivalent value of the excise goods must, in the light of the general principles of EU law referred to in Article 6(3) of the Treaty on European Union (TEU), be classified not as a penalty of a criminal nature, or as a penalty at all, but as a consequence in civil law of the criminal conviction?

(2) Can Article 42 of the UCC be interpreted as not precluding, in the light of the general principles of EU law referred to in Article 6(3) TEU, in particular the requirement of proportionality, also set out in Article 49(3) of the Charter of Fundamental Rights of the European Union, national legislation such as that laid down in Articles 220 and 221(1) of the AWDA, Articles 1382 and 1383 of the Civil Code and Articles 44 and 50 of the Criminal Code, under which, in the event that it is not possible to produce the confiscated goods, an order to pay the equivalent value of the excise goods may be combined with an order to pay a criminal fine calculated by applying a multiplier of the duties evaded?

(3) Can Article 42 of the UCC be interpreted as not precluding, in the light of the general principles of EU law referred to in Article 6(3) TEU, in particular the requirement of proportionality, also set out in Article 49(3) of the Charter of Fundamental Rights of the European Union, national legislation such as that laid down in Articles 220 and 221(1) of the AWDA, Articles 1382 and 1383 of the Civil Code and Articles 44 and 50 of the Criminal Code, under which, in the event that it is not possible to produce the confiscated goods, an order to pay the equivalent value of the excise goods does not confer on the national court a power of mitigation to take account of the specific circumstances of the case, in particular the financial situation of the accused?

Provisions of European Union law relied on

Charter of Fundamental Rights of the European Union, Article 49(3);

Treaty on European Union (TEU), Article 6(3);

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, Article 42(1) and (2).

Provisions of national law relied on

General Law on customs and excise duty, Articles 220, 221(1) and 265;

Civil Code, Articles 1382, 1383 and 1384;

Criminal Code, Articles 44 and 50;

Ministerieel besluit betreffende het fiscaal stelsel van drankverpakkingen onderworpen aan verpakkingsheffing en producten onderworpen aan milieutaks (Ministerial Decree on the taxation of beverage packaging subject to the packaging tax and on products subject to the environmental tax), Article 5.

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 15 April 2020, a criminal investigation was initiated into a customs offence committed by the accused persons. They are being prosecuted for the offence of unlawfully importing into Belgium for commercial purposes, from Germany and the Netherlands, products subject to excise duty, namely 520 195.56 litres of drinking water, 750 082.06 litres of lemonade and 1 772.40 litres of syrup.
- 2 These imports did not take into account the Belgian excise duty and packaging tax due under the applicable national legislation and the accused persons did not hold an excise establishment authorisation. The evasion of excise duty and packaging tax resulted in a considerable financial advantage for the accused persons, estimated at EUR 210 523.69.
- 3 The Minister van Financiën (Minister of Finance) seeks the payment of a pecuniary charge and the duties evaded as well as the confiscation of the aforementioned quantity of beverages.
- 4 He also claims that the accused persons should be ordered to pay the equivalent value of the aforementioned beverages, estimated at a total of EUR 479 966.34, on the ground that those goods cannot be seized because the accused persons can no longer produce them.
- 5 The referring court decided to refer questions to the Court of Justice of the European Union ('the Court') for a preliminary ruling in order to ascertain whether, in the event that it is not possible to produce the confiscated goods, an order to pay the equivalent value of the excise goods 1) constitutes not a (criminal) penalty but a consequence in civil law of the criminal conviction; 2) may be combined with a criminal fine; and 3) may be reduced.

The essential arguments of the parties in the main proceedings

- 6 The accused persons argue, inter alia, that it is not permissible not only to impose on them a pecuniary charge but, in addition, to order them to pay the equivalent

value of the goods (that is to say a sum corresponding to the value of the goods removed from customs supervision) when such goods are not physically present.

- 7 The second accused person refers to a judgment of the Court of Justice, which, in a similar case, has already held that the obligation, for the person responsible for the offence, to pay, in addition to the pecuniary penalty, the equivalent value of the goods must be classified as a penalty (judgment of 4 March 2020, *Schenker*, C-655/18, EU:C:2020:157, paragraph 40).

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

- 8 The referring court notes that, although Belgian customs legislation does not contain any legal provision under which applicants may be ordered to pay the equivalent value of the confiscated goods, that method is generally accepted by the case-law of the highest courts in Belgium.
- 9 In their case-law, the Hof van Cassatie (Court of Cassation) and the Grondwettelijk Hof (Constitutional Court) have held, *inter alia*, that:
- (i) the order to pay the equivalent value of the confiscated goods does not constitute a penalty of a criminal nature, but a consequence in civil law of the criminal sentence of special confiscation;
 - (ii) the order to pay the equivalent value constitutes an application of Articles 1382 and 1383 of the Civil Code, Article 44 of the Criminal Code, which confers jurisdiction on the criminal court, and Article 50 of the Criminal Code on joint and several liability for damages between several perpetrators;
 - (iii) the confiscation of goods is a punishment expressly provided for in Article 221(1) of the AWDA and that it follows from the very nature of that punishment that, in the cases referred to in Article 220 of the AWDA, any perpetrator may reasonably expect that, if he or she fails to produce the confiscated goods, the criminal court will order payment of the monetary value of those goods;
 - (iv) the purpose of the order for payment of the equivalent value is not to compensate for the damage resulting from the offence itself, but to make good the damage caused by the absence of the goods to be removed; and
 - (v) it is not possible for the criminal court to reduce the amount corresponding to the equivalent value.
- 10 It follows from the foregoing that, if the confiscated goods are no longer available, the accused persons may be ordered, in Belgium, to pay the equivalent value of those goods together with a separate pecuniary charge and a claim for payment of the duties evaded under tax law.
- 11 According to the referring court, Belgian criminal customs law makes no distinction between the situation in which the seized goods are removed from circulation and the situation in which they are physically absent.

- 12 By contrast, in the judgment in *Schenker*, the Court of Justice does distinguish between the two scenarios. More specifically, the Court appears to accept an order to pay the equivalent value only in the event that the goods have been seized and removed from circulation. In paragraph 44 of that judgment, the Court held that, in the circumstances of that case, in which the goods had not been seized, the obligation to pay the equivalent value of the goods was not proportionate, irrespective of the fact that that penalty was in addition to the financial penalty already imposed separately.
- 13 In view of the above, it is uncertain whether Belgian legal practice complies with EU law. For this reason, the referring court submits to the Court the questions formulated above.

WORKING DOCUMENT