

Case C-86/24**Request for a preliminary ruling****Date lodged:**

2 February 2024

Referring court:

Krajský soud v Ostravě – pobočka v Olomouci (Czech Republic)

Date of the decision to refer:

23 January 2024

Applicant:

CS STEEL a.s.

Defendant:

Generální ředitelství cel

ORDER

The Krajský soud v Ostravě – pobočka v Olomouci (Regional Court, Ostrava, Olomouc division) [...] has ruled in the case of the

applicant: **CS STEEL a. s.** [...]

v

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

[...]

with respect to an action challenging the defendant's decision of 22 February 2021, ref. no. 11323/2021-900000-314, 11326/2021-900000-314, and 11327/2021-900000-314, concerning a customs duty,

as follows:

[...] The court **requests** that the Court of Justice of the European Union deliver a preliminary ruling with respect to the following question:

Is the primary rule for determining origin set out in subheading 7304 41 of the Harmonised Commodity Description and Coding System, as laid down in Annex 22-01 to Delegated Regulation 2015/2446, valid, to the extent that it rules out that cold processing (by cold reduction) is sufficient to change the origin of hot-finished tubes under subheading 7304 11 complying with ASTM A312?

[...]

Grounds:

A. Details of the case

- 1 The applicant is a business operating on the market for metallurgical materials.
- 2 Between January 2016 and December 2017, the Customs Authority for the Olomouc Region received a total of six customs declarations from the applicant for the release of seamless stainless steel pipes with circular cross-section under the tariff subheading 7304 41 of the Harmonised Commodity Description and Coding System ('the HS'), for which non-preferential Indian origin was declared, and hence, no duty was assessed upon the release of the goods in any of the cases. Upon review, however, the customs administration authorities found that the pipes supplied were of Chinese origin, and hence, pursuant to Commission [Implementing] Regulation (EU) No 2018/330 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes of stainless steel originating in the People's Republic of China, subsequently imposed a duty on the applicant. According to the customs administration authorities, a change in origin could occur only upon a change in the tariff classification of the goods, which could come about if the pipes under 7304 41 were made of goods classified under different headings, for example, steel waste or scrap (heading 7204), or if the pipes were made of tubes under subheading 7304 49 (for more on the rules of establishing origin, see below).
- 3 In terms of the facts, it was established that the applicant's supplier, Maxim Tubes Company Pvt. Ltd, India ('Maxim Tubes') imported into India from the People's Republic of China hot-finished pipes under subheading 7304 11, which complied with the ASTM A312 standard. In India, those pipes were subsequently worked by cold reduction. In particular, that involved rolling, staining, passivation, annealing in a stove, straightening, and cutting. That process altered the dimensions of the pipes imported from the People's Republic of China. The pipes that had been thus processed, under tariff subheading 7304 41, were subsequently exported to the EU to the applicant.
- 4 The case took place while Council Regulation (EEC) No 2913/92 establishing the Community Customs Code ('the original Customs Code') and Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code ('the new Customs Code') were in force. Consequently, the customs administration authorities proceeded on the basis of those regulations

which set out the basic conditions for the determination of the origin of goods the production of which involves more than one country. They furthermore acted on the basis of Commission [Delegated] Regulation (EU) 2015/2446 [implementing] Regulation (EU) No 952/2013 of the European Parliament and of the Council ('the regulation implementing the new Customs Code') and the agreement between the EU and the WTO approved by Council Decision 94/800/EC ('the Agreement on the Rules of Origin').¹

- 5 It should be noted that the rules were identical under both legal regulations in effect, thus the court, for the sake of brevity, will proceed on the basis of the new Customs Code, however, the arguments put forward also apply to the original Customs Code. Furthermore, it should be noted that the customs administration authorities assessed the case in accordance with the legislation as it applied before the judgment of the Court of Justice of the European Union ('the Court of Justice') of 21 September 2023 in Case C-210/22, *Stappert*.
- 6 The Regional Court has concluded that it is necessary to assess the validity of the rule set out in Annex 22-01 to the regulation implementing the new Customs Code set out in subheading 7304 41, which, as will be explained below, rules out a change of origin in the event that pipes under subheading 7304 11 are processed by cold reduction.

B. International law

- 7 The HS was established by the International Convention on the Harmonised Commodity Description and Coding System, concluded in Brussels on 14 June 1983 (*United Nations Treaty Series*, Vol. 1503, p. 4, No 25910 (1988)) within the framework of the World Customs Organisation (WCO), and approved, with its Protocol of Amendment of 24 June 1986, on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1). The Explanatory Notes to the HS are drawn up by the WCO, in accordance with the provisions of that convention.
- 8 Chapter 72 of the HS, *Iron and steel*.

The Explanatory Notes to the HS relating to Chapter 72, which apply *mutatis mutandis* to the products of Chapter 73 thereof, state, under the heading 'General':

' ...

(IV) Production of finished products

¹ Pipes under heading 7304 41 were not included in Annex 11 to Commission Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, hence it is necessary to use the agreement on the rules of origin as the foundation.

Semi-finished products and, in certain cases, ingots are subsequently converted into finished products. These are generally subdivided into flat products (“wide flats”, including “universal plates”, “wide coil”, sheets, plates and strip) and long products (bars and rods, hot-rolled, in irregularly wound coils, other bars and rods, angles, shapes, sections and wire). These products are obtained by plastic deformation, either hot, directly from ingots or semi-finished products (by hot-rolling, forging or hot-drawing) or cold, indirectly from hot finished products (by cold-rolling, extrusion, wire-drawing, bright-drawing), followed in some cases by finishing operations (e.g., cold-finished bars obtained by centreless grinding or by precision turning, or calibration).

... (A) Hot plastic deformation

(1) Hot rolling means rolling at a temperature between the point of rapid recrystallisation and that of the beginning of fusion. The temperature range depends on various factors, such as the composition of the steel. As a rule, the final temperature of the work-piece in hot-rolling is about 900°C.

... (B) Cold plastic deformation

(1) Cold-rolling is carried out at ambient temperatures, i.e., below the recrystallisation temperature.

...

Cold-worked products can be distinguished from hot-rolled or hot-drawn products by the following criteria:

- the surface of cold-worked products has a better appearance than that of products obtained by a hot process and never has a layer of scale;
- the dimensional tolerances are smaller for cold-worked products;
- thin-flat products (thin “wide coil”, sheets, plates and strip) are usually produced by cold-reduction;
- microscopic examination of cold-worked products reveals a marked deformation of the grains and grain orientation parallel to the direction of working. By contrast, products obtained by hot processes show almost regular grains, owing to recrystallisation.’

9 The Explanatory Note concerning heading 7304 of the HS states:

‘Tubes, pipes, and hollow profiles of this heading may be manufactured by the following processes:

(A) Hot-rolling of an intermediate product, which can be either an ingot, rolled and peeled, a billet, or a round obtained by rolling or continuous casting.

...

(B) Hot-extrusion in a press using glass (Ugine-Sejournet process) or another lubricant, of a round. This method actually includes the following operations: piercing, expansion or not, and extrusion.

The operations described above are followed by different finishing operations:

- hot-finishing: in this case, the blank, after reheating, passes through a sizing mill or a stretching mill and finally a straightening mill or
- cold-finishing on a mandrel, by cold-drawing on a bench or cold-rolling (cold-reducing) in a pilger mill (Mannesmann or Megaval process). These operations give the possibility to obtain from hot-rolled or extruded tubes, used as blanks, tubes of lesser wall thickness (it should be noted that the Transval process allows tubes of reduced wall thickness to be directly produced) or diameter, also tubes of tighter tolerances on diameter or wall thickness. Cold-working methods also cover honing and roller burnishing, to obtain polished surfaces (tubes with a low degree of roughness) required, e.g., for pneumatic jacks or hydraulic cylinders.'

C. European Union law

Legislation applicable at the time of the reference for a preliminary ruling

- 10 Article 60(2) of the new Customs Code states: *Goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture.*
- 11 Article 62 of the new Customs Code states: *The Commission shall be empowered to adopt delegated acts in accordance with Article 284, laying down the rules under which goods, whose determination of non-preferential origin is required for the purposes of applying the Union measures referred to in Article 59, are considered as wholly obtained in a single country or territory or to have undergone their last, substantial, economically justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture in a country or territory, in accordance with Article 60.*
- 12 Article 284 of that code, entitled *Exercise of the delegation*, sets out the detailed rules for that exercise.
- 13 Recital 20 of the regulation implementing the new Customs Code states that *by Decision 94/800/EC (of 22 December 1994 concerning the conclusion on behalf*

of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1)) the Council approved the Agreement on Rules of Origin (WTO-GATT 1994), annexed to the final act signed in Marrakesh on 15 April 1994. The Agreement on Rules of Origin states that specific rules for origin determination of some product sectors should first of all be based on the country where the production process has led to a change in tariff classification. Only where that criterion does not allow to determine the country of last substantial transformation can other criteria be used, such as a value added criterion or the determination of a specific processing operation. Considering that the Union is party to that Agreement it is appropriate to lay down provisions in the Union customs legislation reflecting those principles laid down in that Agreement for the determination of the country where goods underwent their last substantial transformation.

- 14 Article 32 of the regulation implementing the new Customs Code states: *Goods listed in Annex 22-01 shall be considered to have undergone their last substantial processing or working, resulting in the manufacture of a new product or representing an important stage of manufacture, in the country or territory in which the rules set out in that Annex are fulfilled or which is identified by those rules.*
- 15 Point 2 of the general part of Annex 22-01 to the regulation implementing the new Customs Code states: *The rules provided in this Annex are to be applied to goods on the basis of their classification in the Harmonised System, as well as on further criteria which may be provided for in addition to the Harmonised System headings or subheadings created specifically for the purposes of this Annex. A Harmonised System heading or subheading which is further subdivided using such criteria is referred to in this Annex as “split heading” or “split subheading” ... Classification of goods within headings and subheadings of the Harmonised System is governed by the General rules for the interpretation of the Harmonised System and any relative Section, Chapter and Subheading Notes to that System. Those rules and notes form part of the Combined Nomenclature, which is set out 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 (OJ 1987 L 256, p. 1) [“the CN”]). For the purposes of the identification of a correct split heading or subheading for certain goods in this Annex, the General rules for the interpretation of the Harmonised System and any relative Section, Chapter and Subheading notes to that System, are to apply mutatis mutandis, unless otherwise required in this Annex.*
- 16 It is evident from point 3 of the same part of the regulation implementing the new Customs Code that the abbreviation CTH stands for *change to the heading in question from any other heading.*

- 17 Chapter 73 contains a table setting out the primary rules to be applied for the purpose of determining the country or territory of origin of the goods referred to therein and identified according to their heading or subheading in the HS:

HS CODE	DESCRIPTION OF GOOD	PRIMARY RULES
7304	Tubes, pipes and hollow profiles, seamless, of iron (other than cast iron) or steel.	As specified for subheadings
	Line pipe of a kind used for oil or gas pipelines	
7304 11	Of stainless steel	CTH
7304 19	Other	CTH
	Casing, tubing and drill pipe, of a kind used in drilling for oil or gas	
7304 22	Drill pipe of stainless steel	CTH
7304 23	Other drill pipe	CTH
7304 24	Other, of stainless steel	CTH
7304 29	Other	CTH
	[...]	
	Other, of circular cross-section, of stainless steel	
7304 41	Cold-drawn or cold-rolled (cold-reduced)	CTH, or change from hollow profiles of subheading 7304 49
7304 49	Other	CTH

- 18 By its judgment in *Stappert*, the Court of Justice found that the primary rule for goods under subheading 7304 41 was invalid, on the ground of being contrary to Article 60(2) of the new Customs Code, in so far as it rules out that the origin of goods could be influenced by the cold-working of pipes and tubes in subheading 7304 49 that results in pipe and tubes falling under subheading 7304 41. The Court of Justice stated that the primary rule for the determination of origin that applies to hollow profiles of subheading 7304 49 must also be extended to pipes and tubes of subheading 7304 49.

Existing case-law on the interpretation of the rules for the change of origin of goods whose manufacture involves more than one country

- 19 According to Article 62 of the new Customs code, the Commission is empowered to adopt delegated acts laying down rules under which goods are deemed to have undergone 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 in a given country or territory, in accordance with Article 60 of the code. The purpose of those delegated acts is to specify how the abstract criteria set out in the latter provision must be interpreted and applied in specific situations (see, to that effect, judgment of 20 May 2021, *Rehesola UK*, C-209/20, EU:C:2021:400, paragraph 33).

- 20 However, the exercise of that power of the Commission, as follows from settled case-law of the Court of Justice, is subject to compliance with certain requirements (see, to that effect, judgment of 20 May 2021, *Rehesola UK*, C-209/20, EU:C:2021:400, paragraph 34). The objectives pursued by a delegated regulation must be such as to justify its adoption, the regulation must satisfy the requirement to state reasons imposed on such an act, and the assessment by the Commission pertaining to the determination of the country of origin of the products to which that regulation applies must not be vitiated by an error of law or a manifest error of assessment in the light of Article 60(2) of the Customs Code (see, to that effect, judgment of 20 May 2021, *Rehesola UK*, C-209/20, EU:C:2021:400, paragraphs 40 and 42).
- 21 That origin must, in any event, be determined on the basis of the decisive criterion of the *last substantial processing or working* of the goods concerned. That term must itself be understood as referring to the stage in the production process during which the use to which the goods are to be put is established and they acquire specific properties and composition, which they did not possess previously and which are not required to undergo significant qualitative changes subsequently (judgment of 20 May 2021, *Rehesola UK*, C-209/20, EU:C:2021:400, paragraph 38 and the case-law cited).
- 22 Judicial review as to whether a provision of an act such as Annex 22-01 to Delegated Regulation 2015/2446 is well founded may relate to whether the Commission has, regardless of any error of law, committed a manifest error of assessment in implementing Article 60(2) of the Customs Code, in view of the specific situation concerned (see, to that effect, judgment of 20 May 2021, *Rehesola UK*, C-209/20, EU:C:2021:400, paragraph 39 and the case-law cited).
- 23 It follows that, although the Commission has a discretion in applying the general criteria of Article 60(2) of the Customs Code to specific working and processing, it cannot, in the absence of objective justification, adopt entirely different solutions for similar working and processing operations (see, by analogy, judgment of 23 March 1983, *Cousin and Others*, 162/82, EU:C:1983:93, paragraph 21).
- 24 As regards the criterion of a change of tariff heading provided for in the primary rule, the Court of Justice has already held that it is not sufficient to seek criteria defining the origin of goods in the tariff classification of processed products, since the Common Customs Tariff was conceived to fulfil special purposes and not in relation to the determination of the origin of the products (see, to that effect,

judgment of 11 February 2010, *Hoesch Metals and Alloys*, C-373/08, EU:C:2010:68, paragraph 42 and the case-law cited).

- 25 Although it is correct that a change in the tariff heading of a product, caused by a processing operation, constitutes an indication of the substantial nature of that processing or working, the fact remains that processing or working may be substantial in nature even if there is no such change of heading. The criterion of a change of tariff heading covers a majority of situations, but does not make it possible to identify all situations in which the processing or working of the goods is substantial (see, to that effect, judgment of 11 February 2010, *Hoesch Metals and Alloys*, C-373/08, EU:C:2010:68, paragraph 43 and the case-law cited).
- 26 The Court of Justice examined the primary rule set out in subheading 7304 41 in its judgment in *Stappert*, in which it stated that the Commission had not provided any convincing justification for the difference in treatment with respect to the rules for determining origin between tubes or pipes under subheading 7304 49, on the one hand, and hollow profiles under the same subheading, on the other. Both product categories undergo cold-working, which, according to the Court, substantially changes their physical, mechanical, and metallurgical properties. In addition, such changes are capable of determining the origin of a product. In that regard, the CJEU referred to the general considerations of the Explanatory Notes to Chapter 72 of the HS and to recital 33 of Commission [Implementing] Regulation (EU) 2017/2093.
- 27 According to the Court of Justice, the primary rule of origin of subheading 7304 41 essentially excludes given operations (cold working) from conferring on a product the status of a product originating in the country where those operations took place, whereas analogous operations determine the acquisition of origin for similar products. According to the Court of Justice, the only distinguishing criterion was thus, in fact, the geometric form of the cold-worked product. The Court of Justice found such an unjustified setting of the rules of origin to be discriminatory. Hence, the Court of Justice held that the primary rule contained in the implementing regulation applicable to goods of subheading 7304 41 was invalid, on the ground that it was contrary to Article 60(2) of the new Customs Code, in so far as it excluded the cold working of tubes and pipes of subheading 7304 49, which results in tubes and pipes falling within subheading 7304 41, from having an effect on the origin of the goods. In concluding, the Court of Justice stated that the primary rule for determining origin which applies to the hollow profiles of subheading 7304 49 must also be extended to the tubes and pipes of subheading 7304 49.

Specific reasoning of the referring court

- 28 The primary rule for a change of origin under subheading 7304 41 provides (after the intervention of the Court of Justice), that a change of origin occurs either by a change in tariff classification or by the cold-working of goods classified under subheading 7304 49. The change of tariff classification consists of the processing

of goods falling under other headings, for example, steel waste and scrap (heading 7204). According to the Explanatory Notes to the HS, that process, as a rule, is performed by the hot-working process. However, a change in the origin of the goods classified under subheading 7304 49 is also possible due to the cold-working process. That is a significantly more lenient criterion than the rule of tariff reclassification.

29 The referring court proceeds on the basis of the conclusions in the judgment in *Stappert*, in particular, the fact that, according to that judgment, cold-processing (cold-reduction) is capable of determining the origin of the product, within the meaning of Article 60(2) of the new Customs Code, in respect of hot-finished pipes. An important factor is that the Commission was unable to provide any convincing justification for the difference in treatment between tubes or pipes, on the one hand, and hollow profiles, on the other (all of which fall under subheading 7304 49), as the only criterion that was decisive for the determination of the change of origin was the geometric form of the cold-processed product.

30 Note should be taken in this context of what is included in the subheading *Other, of circular cross-section, of stainless steel* pursuant to Commission Regulation (EU) 2018/1602 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff:

EU tariff nomenclature code	Description
	Other, of circular cross-section, of stainless steel
7304 41 00	Cold-drawn or cold-rolled (cold-reduced)
7304 49 10	Unworked, straight and of uniform wall thickness, for use solely in the manufacture of tubes and pipes with other cross-sections and wall thicknesses
	Other
7304 49 93	Of an external diameter not exceeding 168.3 mm
7304 49 95	Of an external diameter exceeding 168.3 mm but not exceeding 406.4 mm
7304 49 99	Of an external diameter exceeding 406.4 mm

31 According to the Explanatory Notes to the Combined Nomenclature for subheading 7304 49 10 (referring to the Explanatory Notes to subheading 7304 39 10), goods classified under that subheading comprise *tubes, usually obtained by piercing and hot-rolling or by piercing and hot-drawing; they are usually called 'blanks'. They are intended to be transformed into tubes of other shapes and wall-thickness with more reduced dimensional tolerances. They are presented with the ends roughly cut off and deburred, but are otherwise unfinished. Their exterior and interior surfaces are rough and not descaled. They are not oiled, zinc-coated or painted.*

- 32 The above indicates that the category *Other, of circular cross-section, of stainless steel* is divided into tubes obtained by cold finishing (heading 7304 41) and tubes made solely by means of hot processes (7304 49). In the latter subheading, only goods from subheading 7304 49 10 may be designated as kinds of blanks intended for the production of other tubes. The goods in the other subheadings are likewise hot-worked, but they cannot be referred to as blanks intended exclusively for the production of pipes. The only thing that may be observed from the system (of both the HS and the Combined Nomenclature) is that these other subheadings differ from the tubes in other subheadings (7304 11, 7304 19, 7304 22, 7304 23, 7304 24, and 7304 29) only by their manner of use (they are intended for oil pipelines, gas pipelines, casing, tubing and drill pipe used in drilling for oil or gas), with no detailed explanation of the differences between them being given in the notes to the HS or to the Combined Nomenclature.
- 33 In the case of subheadings 7304 11, 7304 19, 7304 22, 7304 23, 7304 24, and 7304 29, no distinction is made between hot-worked and cold-worked goods. That follows both from the system of the HS and the Combined Nomenclature and from the explanatory notes thereto, which do not distinguish between hot-worked and cold-worked products under those subheadings.
- 34 It may therefore be concluded that the cold-processing of a hot-produced tube of subheading 7304 11 will not lead, according to the current text of the primary rule, to a change in origin, whereas the cold-processing of a tube classified under subheading 7304 49 (namely, also hot processed) will. Given that the only recognisable difference between subheading 7304 49 and subheading 7304 11, that is relevant to the dispute before the referring court, is the manner of use of the tubes, it appears that there is the same discriminatory distinction being made as in the case addressed by the judgment in *Stappert*. The difference is that in the aforesaid judgment, the only actual (given the absence of a proper explanation by the Commission) distinguishing criterion was the geometric form of the product; in this case, the distinguishing criterion is the manner of use of the product. In terms of the rules for the determination of origin, that criterion in itself should not be decisive. According to Article 60(2) of the new Customs Code, the decisive criterion should be the nature of the working or processing and its impact on the product's characteristics.
- 35 In view of the fact that cold-processing substantially alters the characteristics of the product (see above), the question arises whether the primary rule of subheading 7304 41 is valid to the extent that it excludes the cold-processing of a hot-finished tube under subheading 7304 11 from being sufficient for a change of origin. The fact that the tubes in the case before the referring court met the requirements of the ASTM A312 standard is not, in the court's view, decisive, since the requirements of that standard may also be achieved by hot treatment processes (see p. 28 OLAF Final Report, OF/2016/0680/B1 of 4 July 2019).
- 36 Given that the court had reasonable doubts as to the validity of the rule concerned for the determination of the origins of goods, it has decided to request a

preliminary ruling from the Court of Justice on the question set out in the operative part.

D. Stay of proceedings

[...]

Olomouc, 23 January 2024

[...]

WORKING DOCUMENT