

Anonymised version

Translation

C-745/23 – 1

Case C-745/23 [Alenopik]ⁱ

Request for a preliminary ruling

Date lodged:

5 December 2023

Referring court:

Riigikohus (Estonia)

Date of the decision to refer:

4 December 2023

Appellant in cassation:

Maksu- ja Tolliamet

Respondent in cassation:

UT

ORDER

... [not translated]

Case – Administrative offence committed by UT, punishment under Paragraph 69(1) of the Tolliseadus (Law on Customs)

... [not translated]

OPERATIVE PART

- 1. The European Court of Justice is asked to give a preliminary ruling on the following question: How is the exchange rate to be used as the basis for establishing the value of cash within the meaning of Article 3(1) of**

ⁱ This case has been given a fictitious name which is not the real name of any of the parties.

Regulation 2018/1672 of the European Parliament and of the Council to be determined in a situation involving a currency the exchange rate for which is not published by the European Central Bank?

2. ... [not translated] [stay of proceedings]

FACTS AND COURSE OF THE PROCEEDINGS

Out-of-court proceedings

- 1 On 13 January 2023, the Maksu- ja Tolliamet (Tax and Customs Authority, Estonia) ('the MTA' or 'the administrative authority') drew up a report of an administrative offence in relation to UT. This stated that, on that same date, the person concerned, together with her daughter, MM, had walked across the border between the Russian Federation and the Republic of Estonia via the Narva border crossing point. She chose the green channel to cross the border, thereby indicating that she was not carrying any goods subject to an obligation to declare and that the quantity of those goods did not exceed the limits permitted by law. When the traveller was searched, she was found to have a total of 500 000 Ukrainian hryvnias in cash in her pockets, under the lining of her clothes and under the lining of the hood of her jacket.
- 2 In accordance with Article 3(1) of Regulation 2018/1672 of the European Parliament and of the Council of 23 October 2018 ... [not translated], carriers entering or leaving the Union and carrying cash of a value of EUR 10 000 or more must declare that cash to the competent authorities of the Member State through which they are entering or leaving the Union and make it available to them for control. In order to convert the 500 000 Ukrainian hryvnias which UT had on her into euros, the administrative authority relied on the exchange rate published on the website www.xe.com and concluded that, on the day of the border crossing, that cash had a value of approximately EUR 12 565. In accordance with Article 3(1) of Regulation 2018/1672, therefore, that money should have been declared.
- 3 In her appeal, the person concerned explained to the administrative authority that the cash found did not belong to her and that she had not been aware of the obligation to declare the amount of that cash. The cash belonged to RR, a Ukrainian national who resident in Estonia who, because of the war there, could not manage his own money. He had therefore asked the daughter of the person concerned to bring the cash into Estonia. On checking the exchange rate for the Ukrainian hryvnia on the website www.tavid.ee, RR found that there was no need to declare the cash because its value was below EUR 10 000. He had passed that information on to UT's daughter, who had informed the person concerned. The person concerned had not intended to bring the 500 000 Ukrainian hryvnias secretly into Estonia. She had hidden it under her clothes for fear of having it stolen.

- 4 By decision of 13 February 2013, the administrative authority imposed on UT a fine in the amount of 150 fine units, i.e. EUR 600, for failure to declare cash, in accordance with Paragraph 69(1) of the Tolliseadus (Law on Customs, ‘the TS’). The administrative authority also decided to confiscate the undeclared 500 000 Ukrainian hryvnias, on the basis of Paragraph 78(1) of the TS and Paragraph 83(2) and (6) of the Karistusseadustik (Criminal Code, ‘the KarS’). The administrative authority summarised the grounds for that decision as follows.
- 5 UT had deliberately committed an administrative offence under Paragraph 69(1) of the TS. She had neither declared the 500 000 hryvnias in cash when crossing the border nor, later, before the customs inspection began, informed customs officials that the cash to be declared was hidden in her clothing. This showed that the cash had been hidden in order to conceal it from customs inspection.
- 6 The person concerned had had every opportunity to obtain clarity on the rules governing cash declarations. This could have been done by telephone, by e-mail or by asking the customs official at the border crossing point. Information on declaring cash, also available in Russian, was published on the MTA website (www.emta.ee). It was quickly discernible from that website that the threshold for mandatory declaration was EUR 10 000. In cases where the European Central Bank did not set the exchange rate for a currency, that rate could be found on the website www.xe.com. Less frequently used exchange rates could also be searched for on the website of the central bank issuing the currency in question (for example, bank.gov.ua for Ukrainian hryvnias).

Proceedings before the court of first instance

- 7 Counsel for the defence challenged the administrative authority’s decision and asked the court of first instance to discontinue the administrative offence proceedings. In the alternative, counsel for the defence asked the court to reduce the penalty against UT, annul the confiscation and return the cash confiscated to the person concerned.
- 8 The Viru Maakohus (Court of First Instance, Viru, Estonia) partially upheld the action at law and, by judgment of 28 April 2023, annulled the administrative authority’s decision in so far as it related to the confiscation and the penalty. By a new decision, that court imposed on UT a fine in the amount of 100 fine units, i.e. EUR 400. The court of first instance annulled the confiscation of the 500 000 Ukrainian hryvnias taken as evidence and returned that money to UT. The court’s reasoning can be summarised as follows.
- 9 On 13 January 2023, UT had entered the Republic of Estonia from the Russian Federation without declaring 500 000 Ukrainian hryvnias with a value, at that time, of approximately EUR 12 565. It was not until after customs officials had started to search her that UT had verbally informed them that she wished to declare that cash, although it had by then been too late to do so because, in having selected the green channel when crossing the border, the person concerned had

already declared that she had no goods to declare. It was a matter of dispute whether UT had known that the amount of cash she was carrying should have been declared and whether the 500 000 hryvnias belonged to her.

- 10 UT's assertion that she had been entirely unaware of the obligation to declare the cash she was carrying was not credible. According to the search file, the cash found on her had been located in her pockets, under the lining of her clothes and under the lining of the hood of her jacket. The fact that she had concealed and hidden the cash to be declared before the customs inspection had taken place confirmed that UT had been aware of the obligation to declare the more than EUR 10 000 in cash which she had been carrying when crossing the border. UT had deliberately committed the administrative offence under Paragraph 69(1) of the TS.
- 11 The witness RR had told the court that he had asked UT and her daughter to bring the cash into Estonia and hand it over to him there, as he was unable to manage his money himself because of the war in Ukraine. He had earned that money as a business person while living in Ukraine. On checking the exchange rate for the hryvnias at currency exchanges, he had found that the 500 000 hryvnias did not have to be declared because it had been worth less than EUR 10 000. He had passed that information on to UT's daughter. The court held that it had no reason to doubt the witness's testimony and that the undeclared cash therefore belonged to RR.

Appeal in cassation

- 12 On appealing the decision of the court of first instance, the administrative authority claimed that that decision should be set aside and its own decision enforced, or, in the alternative, that the administrative offence case be referred back to the court of first instance for a new hearing.

Response to the appeal in cassation

- 13 Defence counsel for the person concerned contends that the decision of the court of first instance should be confirmed and the appeal in cassation dismissed.

Written question of the Riigikohus (Supreme Court, Estonia)

- 14 In accordance with Article 173¹(1) of the Väärteomenetluse seadustik (Law of procedure for administrative offences), the Riigikohus (Supreme Court) put the following questions to the administrative authority:

1. On what legal basis (please indicate the specific legal act and provision thereof) does the MTA use the exchange rate published on the website www.xe.com to convert the value of Ukrainian hryvnias into euros?
2. Where can a person crossing the border find information on the exchange rate which the MTA uses to convert the value of Ukrainian hryvnias into euros?

3. Does the MTA consider that the information to the effect that the conversion of the value of Ukrainian hryvnias into euros is based on the data available on the website www.xe.com is accessible to a reasonably aware person?

Administrative authority's answer

- 15 When converting a currency in order to determine a customs value, the MTA relies on Article 53 of Regulation No 952/2013 of the European Parliament and of the Council of 9 October 2013 (EU Customs Code) and Articles 48 and 146 of Commission Implementing Regulation 2015/2447 of 24 November 2015. In the case of currencies the exchange rates for which are not published by the European Central Bank, the administrative authority uses the website www.xe.com, which was selected on the basis of the practices and preferences of other Member States.
- 16 Persons bringing cash into Estonia from a non-EU country are obliged to familiarise themselves beforehand with the border-crossing customs procedures in place both in the country of origin and in the country of destination. Persons crossing the border have reasonable opportunities to do this. Information on the obligation to declare cash can be found, for example, on the MTA's website, in the Estonian- and Russian-language leaflets distributed at border-crossing points and on information boards. Anyone crossing the border who has neglected to check the details concerning the import and export of cash before crossing the border can choose the red channel at the border crossing point and decide there, in cooperation with the customs official, whether a cash declaration is necessary.

RELEVANT LEGISLATION

EU law

- 17 **Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EU) No 1889/2005:**

„...“

Article 1

Subject matter

This Regulation provides for a system of controls with respect to cash entering or leaving the Union to complement the legal framework for the prevention of money laundering and terrorist financing laid down in Directive (EU) 2015/849.

...

Article 3

Obligation to declare accompanied cash

(1) Carriers who carry cash of a value of EUR 10 000 or more shall declare that cash to the competent authorities of the Member State through which they are entering or leaving the Union and make it available to them for control. The obligation to declare cash shall not be deemed to be fulfilled if the information provided is incorrect or incomplete or if the cash is not made available for control.

...“

18 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code:

”...“

CHAPTER 3

Currency conversion and time limits

Article 53

Currency conversion

(1) The competent authorities shall publish and/or make available on the Internet the rate of exchange applicable where the conversion of currency is necessary for one of the following reasons:

- a) because factors used to determine the customs value of goods are expressed in a currency other than that of the Member State where the customs value is determined;
- b) because the value of the euro is required in national currencies for the purposes of determining the tariff classification of goods and the amount of import and export duty, including value thresholds in the Common Customs Tariff.

(2) Where the conversion of currency is necessary for reasons other than those referred to in paragraph 1, the value of the euro in national currencies to be applied within the framework of the customs legislation shall be fixed at least once a year.

...”

19 Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Community Customs Code:

”...“

CHAPTER 3

Currency conversion***Article 48*****Provisions on tariff exchange rate*****(Article 53 of the Code)***

(1) The value of the euro, where required in accordance with Article 53(1)(b) of the Code, shall be fixed once a month.

The exchange rate to be used shall be the most recent rate set by the European Central Bank prior to the penultimate day of the month and shall apply throughout the following month.

However, where the rate applicable at the start of the month differs by more than 5% from the rate set by the European Central Bank prior to the 15th of that same month, the latter rate shall apply from the 15th until the end of the month in question.

(2) Where the conversion of currency is necessary for any of the reasons referred to in Article 53(2) of the Code, the value of the euro in national currencies to be applied shall be the rate set by the European Central Bank on the first working day of October; this rate shall apply with effect from 1 January of the following year.

(3) Member States may maintain unchanged the value in national currency of the amount determined in euro if, at the time of the annual adjustment, the conversion of that amount, leads to an alteration of less than 5% in the value expressed in national currency. Member States may round upwards or downwards to the nearest decimal point the sum arrived at after conversion.

...

CHAPTER 3***Value of goods for customs purposes******Article 146*****Currency conversion for customs valuation purposes*****(Article 53(1)(a) of the Code)***

(1) In accordance with Article 53(1)(a) of the Code, the following rates of exchange shall be used for currency conversion for customs valuation purposes:

- a) the rate of exchange published by the European Central bank, for the Member States whose currency is the euro;

b) the rate of exchange published by the competent national authority or, where the national authority has designated a private bank for the purposes of publishing the rate of exchange, the rate published by that private bank, for the Member States whose currency is not the euro.

(2) The rate of exchange to be used in accordance with paragraph 1 shall be the rate of exchange published on the second last Wednesday of each month.

Where no rate of exchange has been published on that day, the most recently published rate shall apply.

(3) The rate of exchange shall apply for a month, beginning on the first day of the following month.

(4) Where a rate of exchange has not been published as referred to in paragraphs 1 and 2, the rate to be used for the application of Article 53(1)(a) of the Code shall be determined by the Member State concerned. This rate must reflect the value of the currency of the Member State concerned as closely as possible.

...’

Estonian law

20 Tsiviilseadustiku üldosa seadus (Law on the General Part of the Civil Code)

‘ ...

Paragraph 48 Definition of object

Object means things, rights and other assets that may form the subject of a right.

...

Paragraph 65 Value of an object

The value of an object is deemed to be its normal value, unless otherwise provided for by law or legal transaction. The normal value of an object shall be its average local selling price (market price).

...“

POSITION OF THE CHAMBER

21 ... [not translated] The imposition of a penalty on UT in accordance with Article 69(1) of the TS presupposes that it is established that the cash value, within the meaning of Article 3(1) of Regulation 2018/1672 ... [not translated], of the 500 000 Ukrainian hryvnias which she imported from Russia into Estonia without declaring it amounted to at least EUR 10 000 at the time when the offence was committed. Whether or not that was the case depends on the exchange rate

used as the basis for converting hryvnias to euros. The European Central Bank does not publish the exchange rate for the Ukrainian hryvnia. In this administrative offence case, it is common ground that one of the few service providers which bought hryvnias from private individuals on the Estonian market (Tavid AS) did so at an exchange rate on the basis of which the value of 500 000 hryvnias was less than EUR 10 000. However, on the basis of the exchange rate that was published on the website www.xe.com, mentioned by the administrative authority, the person concerned crossed the border carrying hryvnias worth more than EUR 10 000.

- 22 Since neither the text of the relevant EU regulations nor the previous case-law of the Court of Justice allows clear conclusions to be drawn as to how the correct exchange rate is to be determined in this case, this Chamber considers it expedient to ask the Court of Justice for a preliminary ruling on this question. This Chamber draws the Court's attention to the following details.
- 23 Regulation 2018/1672 ... [not translated] concerns the monitoring of cash entering or leaving the European Union. Article 3 lays down the obligation to declare cash. According to paragraph 1 of that article, carriers who carry cash of a value of EUR 10 000 or more must declare that cash to the competent authorities of the Member State through which they are entering or leaving the Union and make it available to them for control. The obligation to declare cash is deemed not to be fulfilled if the information provided is incorrect or incomplete or the cash is not made available for control. In accordance with Article 14 of that regulation, each Member State is to introduce penalties applicable in the event of failure to comply with the obligation to declare accompanied cash laid down in Article 3. In Estonian law, such an infringement is punishable under Paragraph 69 of the TS, which provides for liability for the movement of goods or cash to be declared from a non-EU country or from Estonia to a non-EU country in the event of failure to declare the goods or cash concerned (if the value of the undeclared cash exceeds EUR 40 000, such an act may constitute a criminal offence under Paragraph 391 of the KarS).
- 24 However, neither Regulation 2018/1672 nor the regulation implementing it (Commission Implementing Regulation [EU] 2021/776 of 11 May 2021) specifies the legal basis on which the competent authority of a Member State must set the exchange rate for the foreign currency with which the carrier enters or leaves the territory of the European Union. The procedure for converting into euros foreign-currency cash carried across the EU customs border is not regulated either in the Law on Customs or in any other national law.
- 25 In this administrative offence case, the person concerned entered Estonia carrying 500 000 Ukrainian hryvnias in cash, which she did not declare to the competent authorities. On the basis of the exchange rate published on the website www.xe.com, the MTA estimated the value of the 500 000 Ukrainian hryvnias to be approximately EUR 12 565 on 13 January 2023. In answer to the question as to the legal basis on which the MTA uses the exchange rate published on the website

www.xe.com to convert the value of Ukrainian hryvnias to euros, the administrative authority stated that it uses the rates published on that website for currencies the exchange rates for which are not published by the European Central Bank. It had been guided in its choice of website by the practices and preferences of other Member States. The administrative authority has not mentioned any legal basis whereby the exchange rates published on the website www.xe.com could be regarded as being legally relevant.

- 26 The administrative authority noted that the determination of the customs value of foreign-currency cash is governed by Regulation No 952/2013 ... [not translated] laying down the Union Customs Code ('the CC') and Commission Implementing Regulation 2015/2447 ... [not translated] laying down detailed rules for implementing certain provisions of Regulation No 952/2013 ('the CCIR'). According to Article 1 of the CC, that regulation lays down the general rules and procedures applicable to goods brought into or taken out of the customs territory of the Union. Currency conversion is governed by Article 53, paragraph 1 of which provides that the competent authorities are to publish and/or make available on the Internet the rate of exchange applicable where the conversion currency is necessary a) because factors used to determine the customs value of goods are expressed in a currency other than that of the Member State where the customs value is determined, or b) because the value of the euro is required in national currencies for the purposes of determining the tariff classification of goods and the amount of import and export duty, including value thresholds in the Common Customs Tariff. In accordance with paragraph 2 of that article, where the conversion of currency is necessary for reasons other than those referred to in paragraph 1, the value of the euro in national currencies to be applied within the framework of the customs legislation is to be fixed at least once a year.
- 27 Since controls on cash entering or leaving the Union are governed by the separate Regulation 2018/1672, this Chamber is, first of all, not convinced that the general rules referred to in the preceding paragraph are an appropriate basis for determining the obligation laid down in Article 3(1) of Regulation 2018/1672. This approach is further militated against by the fact that Regulation 2018/1672 does not at any point refer to the application of the CC. It is also unclear whether cash is to be regarded as goods within the meaning of the CC. Whether cash constitutes goods will determine, inter alia, whether – in the event that the CC is found to be applicable – the conversion of foreign currencies into euros should be governed by Article 53(1)(a) or (2) of the CC. Article 53(1)(b) of the CC, which deals with currency conversion for the purposes of the tariff classification of goods and the determination of the amount of import or export duty, is probably not relevant. The applicability of Article 53(1)(a) or (2) of the CC will in turn determine which provisions of the CCIR may be regarded as relevant. Article 48(2) of the CCIR concerns the setting of the euro exchange rate for the purposes referred to in Article 53(2) of the CC and Article 146 concerns currency conversion for the purposes referred to in Article 53(1)(a) of the CC.

- 28 If, however, it is assumed that the determination of whether an amount of cash reaches the threshold laid down in Article 3(1) of Regulation 2018/1672 is also a situation referred to in Article 53(1)(a) of the CC, the competent authority should publish the applicable exchange rate and/or make it available on the internet. In accordance with Article 146(1)(a) of the CCIR, which clarifies that provision, the exchange rate published by the European Central Bank is to be used for currency conversion for customs valuation purposes. In cases where the required exchange rate is not published by the European Central Bank, the first sentence of Article 146(4) of the CCIR may be relevant. This provides that, where a rate of exchange has not been published as referred to in paragraphs 1 and 2 of that article, the rate to be used for the application of Article 53(1)(a) of the CC is to be determined by the Member State concerned. The second sentence of Article 146(4) of the CCIR, according to which the rate to be determined by the Member State concerned must reflect the prevailing value of the currency of the *Member State concerned* as closely as possible, is, however, ambiguous. It casts doubt on whether the provision in question is intended to govern not the determination of the exchange rate required to convert a third-country currency into euros, but only the conversion into euros of the currency of a Member State which has not joined the euro zone.
- 29 In the event that it is appropriate for the obligation to declare cash to be determined by reference to Article 53(2) of the CC, meaning that this constitutes a currency conversion for a purpose other than that referred to in Article 53(1) of the CC, the wording of that provision, according to which the value of the euro in national currencies¹ to be applied within the framework of the customs legislation is to be fixed at least once a year, is confusing. The term ‘national currencies’ indicates that that provision too governs only the conversion into euros of the currency of a Member State which has not joined the euro zone, and that that rule does not apply in cases where a third-country currency is converted into euros. This is indirectly confirmed not least by the fact that Article 48(2) of the CCIR states that the exchange rates published by the European Central Bank are to form the basis for currency conversion in the cases referred to in Article 53(2).
- 30 Under Estonian law, that is to say Paragraph 48 of the *Tsiviilseadustiku üldosa seadus* (Law on the General Part of the Civil Code) (‘the TsÜS’), cash is an object the value of which, in accordance with Paragraph 65 thereof, is deemed to be its normal value, unless otherwise provided for by law or legal transaction. The normal value of an object is its average local selling price. For the purposes of determining the average local selling price in euros of a foreign currency, it is appropriate to take into account the exchange rate at which that foreign currency can be exchanged for euros, particularly on the local market. This is usually most

¹ [German] Translator’s Note: The wording of the Estonian-language version of Article 53(1) of the CC departs here from the wording of the German-language version of that provision. Whereas the Estonian-language version refers to ‘omavääring’ (‘national currency’), the German-language version refers to ‘Währungen der Mitgliedstaaten’ (‘currencies of the Member States’).

accurately reflected in the exchange rates published by currency exchanges for currency exchange purposes. According to the information on the website of Tavid AS, the buying rate for Ukrainian hryvnias on 13 January 2023 was 52.7. At that exchange rate, the value of 500 000 Ukrainian hryvnias on the day on which the person concerned crossed the border was EUR 9 487.67.

- 31 In the light of all the foregoing, this Chamber considers it necessary, in order to enable it to decide on the appeal in cassation brought by the administrative authority, to ask the Court of Justice of the European Union to give a preliminary under subparagraph (b) of the first paragraph, and the third paragraph, of Article 267 of the Treaty on the Functioning of the European Union. ... [not translated] [stay of proceedings]

... [not translated]

WORKING DOCUMENT