

Case C-168/23**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:**

17 March 2023

Referring court:

Tribunalul Olt (Romania)

Date of the decision to refer:

1 March 2023

Appellant:

Prysmian Cabluri și Sisteme SA

Respondents:

Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice Craiova – Direcția Regională Vamală Craiova

Autoritatea Vamală Română

Agenția Națională de Administrare Fiscală – Direcția Generală de Administrare a Marilor Contribuabili

Subject matter of the main proceedings

Administrative action between the appellant, Prysmian Cabluri și Sisteme SA ('Prysmian' or 'the appellant'), on the one hand, and the respondents, Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice Craiova – Direcția Regională Vamală Craiova (National Tax Administration Agency – Regional Directorate-General of Public Finances, Craiova – Regional Customs Directorate, Craiova, Romania) (DRVC), Autoritatea Vamală Română (the Romanian customs authority) (AVR) and Agenția Națională de Administrare Fiscală – Direcția Generală de Administrare a Marilor Contribuabili (National Tax Administration Agency – Directorate-General for the Administration of Major taxpayers, Romania) (DGAMC) (together, 'the

respondents’), seeking the annulment of the decision made by the DGAMC on 17 November 2021 dismissing a complaint against the decision of DRVC of 29 June 2021 on the imposition of additional tax liabilities on Prysmian, as well as the annulment of the latter decision.

Subject matter and legal basis of the request for a preliminary ruling

Under Article 267 TFEU, interpretation is sought of the Combined Nomenclature (‘the CN’) set out in Annex I to Regulation (EEC) No 2658/87, and in particular, of tariff heading 8544 70 00, in the light of the Explanatory Notes to the Combined Nomenclature of the European Communities (2007/C 296/02), in the version in force prior to the information provided by the Commission on the Explanatory Notes to the Combined Nomenclature of the European Union (2019/C 179/05) (OJ 2019 C 179, p. 4), and read in conjunction with the principle of uniform application of tariff classification under Article 28 TFEU and the principles of legal certainty and the protection of legitimate expectations.

Questions referred for a preliminary ruling

1. When interpreting the CN 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, with reference to the Explanatory Notes to the [Combined Nomenclature of the European Communities], in the version in force since the date of the European Commission communication [on the Explanatory Notes to the Combined Nomenclature of the European Communities (2007/C 296/02) (OJ 2007 C 296, p. 4)], may a product consisting of an optical core and optical cladding, covered with a first soft inner acrylate coating and a second coloured hard outer acrylate sheathing, a sheathing system (known as ColorLock), be classified under heading 8544 70 00 of that nomenclature?
2. If the answer to the first question is in the negative, may the national customs authorities, when interpreting the principles of legal certainty and the protection of legitimate expectations, disregard the existence of decisions of the customs authority of that State that have not brought the classification of that product under heading 8544 70 00 into question, and also of BTI decisions (guaranteeing exemption from customs duties and VAT) issued by other customs authorities or by courts of other Member States of the European Union in favour of such a tariff classification, without such conduct infringing the principles of uniform application of tariff classification under Article 28 [TFEU], read in conjunction with the principles of legal certainty and the protection of legitimate expectations recognised by the [Court], relevant to the application of EU law?
3. If the answer to the second question is in the negative, when interpreting Article 114 of Regulation (EU) No 952/2013 of the European Parliament and of the Council, having regard to the principles of legal certainty and the protection of legitimate expectations, is it possible that a lack of clarity in the Explanatory

Notes to the [Combined Nomenclature of the European Communities], in the version in force since the date of the Commission communication on the [Explanatory Notes to the Combined Nomenclature of the [European Communities] (2007/C 296/02) (OJ 2007 C 296, p. 4)], followed by a subsequent clarification which entered into force, imposes an additional tax liability on a taxpayer in a Member State, especially where, over time, decisions have been made by the customs authority of that State that have not brought the classification of that product under heading 8544 70 00 into question, and BTI decisions have also been issued by other customs authorities or by courts of other Member States of the European Union in favour of such a tariff classification?

Provisions of European Union law and case-law of the Court of Justice relied on

Articles 2 TEU and 19 TEU

Article 28 TFEU

Treaty concerning the accession of the Republic of Bulgaria and of Romania to the European Union, Articles 1, 2, 3 and 4

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, Article 5, points (12) and (18), Article 15, Article 22(6), Article 23, Article 44(1), Article 46(1), Articles 48 and 56, Article 57(1), Article 77(1)(a) and (2), Article 87(1), Article 103(1) and (3), Article 108(1), Article 114 (1) and (2), Article 163(1), Article 172(2), Article 201(2)(a) and (b)

Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff

Explanatory Notes to the Combined Nomenclature of the European Communities (2007/C 296/02) (OJ C 296, p. 4) ('the 2007 explanatory notes')

Explanatory Notes to the Combined Nomenclature of the European Union (2015/C 076/01) (OJ C 76, p. 1) ('the 2015 explanatory notes').

Explanatory Notes to the Combined Nomenclature of the European Union (2019/C 179/05) (OJ 2019 C 179, p. 4) ('the 2019 explanatory notes')

Judgment of 7 April 2011, Sony Supply Chain Solutions (Europe) (C-153/10)

Judgment of 15 September 2011, DP Group (C-138/10)

Order of 19 January 2012, DHL Danzas Air & Ocean (Netherlands) BV (C-227/11)

Judgment of 23 April 2015, ALKA (C-635/13)

Order of 22 October 2014, Mineralquelle Zurzach (C-139/14).

Opinion of Advocate General Kokott delivered on 4 February 2016 in Schenker Nemzetközi Szállítmányozási és Logisztikai kft (C-409/14)

Judgment of 9 July 2015, Cabinet Medical Veterinar Dr. Tomoiagă Andrei (C-144/14)

Judgment of 2 May 2019, Onlineshop (C-268/18)

Provisions of national law relied on

Article 100 of Legea nr. 86/2006 privind Codul Vamal al României (Law No 86/2006 on the Romanian Customs Code), according to which the customs authority is entitled, within 5 years of release of the goods, to amend the customs declaration and may take measures to regularise the situation where it appears, after a new examination of the declaration or after a post-release control, that the provisions regulating the customs procedure concerned have been applied on the basis of incorrect or incomplete information. That article also states that, where a customs debt has been incurred, the customs authorities shall take measures to recover unpaid duties, in accordance with legal provisions.

Article 285 of Legea nr. 227/2015 privind Codul Fiscal (Law No 227/2015 establishing the Romanian Tax Code), which regulates the chargeable event and establishes when value added tax (VAT) becomes chargeable on the importation of goods, and Article 289 of that law, which concerns the taxable amount for VAT on importation.

Provisions of Legea nr. 207/2015 privind Codul de procedură fiscală (Law No 207/2015 establishing the Tax Procedure Code), relating to the legal basis and method of calculation of interest and penalties in the event of non-payment by the deadline for the settlement of tax due

Succinct presentation of the facts and procedure in the main proceedings

- 1 Prysman is a Romanian company, belonging to the Prysman group, which produces cables and is one of the largest producers for the electricity and telecommunications networks in Romania and Europe.
- 2 Prysman underwent a post-release customs control, carried out by the DRVC over the period 21.04.2021-29.06.2021, the aim of which was: (1) to verify the accuracy and completeness of the information provided to the Biroul Vamal Olt (Customs Office, Olt, Romania) (BVO) in 23 customs declarations for which the release of the goods had been obtained, concerning 23 imports made over the period 06.07.2018-21.12.2018, for which Prysman, as consignee and holder of the customs procedure, declared the tariff classification under TARIC commercial

code 8544 70 00 00 – optical fibre cables; (2) to verify whether it was correct to classify the goods under TARIC commercial code 8544 70 00 00 – Optical fibre cables (customs duty 0%), as declared by the company, or under TARIC commercial code 9001 10 90 90 – optical fibres (customs duty 2.9%).

- 3 The basis for this post-release customs control was a written communication received by the DRVC from the BVO, alleging that there was a risk of incorrect tariff classification following a notification received from Prysmian on 1 July 2019. In that notification, Prysmian stated that, in the light of the 2019 Explanatory Notes, with effect from 24 May 2019 onwards, the imported goods previously declared under CN Code 8544 70 00: optical fibre cables (customs duty 0%), would subsequently be declared under CN Code 9001 10 90: optical fibres, optical fibre bundles and cables; optical fibre cables other than those of heading 8544 (customs duty 2.9%). The BVO considered it necessary to recheck and recalculate customs duties for all imports of goods declared as ‘optical fibre cables’ under CN code 8544 70 00.
- 4 Following the notification of 1 July 2019 sent by Prysmian, the DRVC asked the Direcția Reglementări Vamale din cadrul Direcției Generale a Vămilelor București (Customs Regulations Directorate of the Bucharest Customs Directorate, Romania), in its capacity as methodological coordinator, for an opinion on the tariff classification of the goods under CN code 8544 70 00 – Optical fibre cables. The Customs Regulations Directorate stated that the new text introduced in the 2019 Explanatory Notes did not contain any information to imply that products that were classified under heading 8544 prior to 24 May 2019, should be classified under heading 9001 from that date onwards. In addition, according to the opinion of the technical experts, the goods imported by Prysmian were, until 24 May 2019, covered by code 8544 of the 2007 Explanatory Notes, a code for which no customs duty is payable.
- 5 The post-release customs control was completed on 29 June 2021 when a control report was issued and a decision made regarding the regularisation of the situation, establishing that additional charges totalling 992,430 Romanian lei (RON) were due, representing additional customs duties and additional VAT.
- 6 The principal grounds on which the customs inspectors based their decision regarding the regularisation of the situation are as follows:
 - (1) as far as the goods description is concerned, the imported products are optical fibres. After decoding the description of the goods in the supporting documents, it was found that the goods registered constituted a single-mode optical fibre, individually coated with a dual layer of acrylate (plastic), the outer sheath having a diameter of 250 microns, coloured (blue, yellow, pink), and it was established that they were individually coated optical fibres classified under TARIC code 9001 10 90 90, subject to customs duty of 2.9%;

(2) there is a discrepancy between the description of the goods declared in the customs declarations and those stated in the sales invoices;

(3) the imported goods are used as components to obtain the finished product, and therefore it is only after completion of the production process that optical fibre cables capable of being classified under heading 8544 come into being, as it is the protective casing itself (the ‘loose’ tube) that confers the character of a cable;

(4) the protective casing is the fundamental element that distinguishes the individually coated optical fibre from the optical fibre cable made up of individually coated fibres, and the layers of acrylate polymer cannot in themselves substitute the ‘protective casing’. Only products which have the same cross-section as that shown in the diagram set out in the 2019 Explanatory Notes and which have the protective casing giving the component the character of a cable are classified under tariff heading 8544.

- 7 On 11 August 2021, Prysmian lodged a complaint with the DGAMC against the decision to regularise the situation. The DGAMC rejected the complaint in a decision of 17 November 2021.

The essential arguments of the parties in the main proceedings

Arguments of the appellant

- 8 The appellant relies on the case-law of the Court of Justice according to which, in the interests of legal certainty and ease of verification, the decisive criterion for the tariff classification of goods is in general to be sought in their objective characteristics and properties, as defined in the wording of the relevant CN heading and of the notes to the sections or chapters (see judgment of 2 May 2019, *Onlineshop v Commission*, C-268/18, EU:C:2019:353, paragraph 28).
- 9 It also refers to the case-law of the Court of Justice which provides detailed clarification of the procedure to be adopted in the classification of goods in the CN, citing point 47 of the Opinion of Advocate General Kokott delivered on 4 February 2016 in *Schenker Nemzetközi Szállítmányozási és Logisztikai kft* (C-409/14). It also refers to paragraph 30 of the order of the Court of Justice of 22 October 2014, in Case C-139/14, *Mineralquelle Zurzach AG*.

The customs classification of goods imported by Prysmian before and after 24 May 2019

- 10 Until 24 May 2019, the optical fibre cables imported by Prysmian from the United States of America were classified, on the basis of the applicable regulations, under CN subheading 8544 70 00. The 2019 Explanatory Notes substantially modify CN code 8544 70 00 and also give a specific example of the ‘structure of an

individually sheathed optical fibre’, which should be classified under CN heading 9001 from 24 May 2019 onwards.

- 11 The appellant took the view that this amendment to the 2007 Explanatory Notes required products classified prior to 24 May 2019 under heading 8544 to be classified after that date under heading 9001 and informed the customs authorities of the change in tariff classification; it also requested that the import duties be recalculated as from 24 May 2019.

The non-retroactive application of the 2019 Explanatory Notes

- 12 As a preliminary point, the appellant claims that the customs authorities cannot apply the provisions and explanations contained in the 2019 Explanatory Notes retroactively; to that end, it submits that retroactive application of the new interpretation, which creates a measure unfavourable to the taxpayer by the imposition of higher customs duties, undermines the principle of legal certainty and foreseeability. The appellant points out that the case-law of the Court of Justice precludes the retroactive application of the explanatory notes prior to the date of their implementation and refers to paragraphs 42 and 43 of the order of 19 January 2012 in DHL Danzas Air -Ocean (Netherlands) BV (Case C-227/11).

The technical specifications of the product and the basis for classification under heading 8544

- 13 As regards the imported product, the appellant maintains that the composition of the optical fibre cable, from the inside outwards, is as follows: the element conducting the light is situated in the core of the optical fibre cable. The glass fibre itself is described as the ‘optical core’. The core is made of silicon and its diameter varies from 9 to 10 microns. The next layer making up the product is the ‘optical cladding’ which, like the ‘core’, is made of silicon. The optical cladding has a diameter of 125 microns (which also includes the diameter of the core referred to above). The top layer of the ‘optical cladding’ is the ‘soft inner acrylate coating’, which can be characterised as the lining of the glass fibre cable. The coating in question provides a soft screen to protect the surface of the fibre against any microbending and has a diameter of between 185 and 190 microns (which also includes the diameter of the core and the optical cladding referred to above).
- 14 In addition to the first coating, the core of the optical fibre is sheathed in a second layer, ‘coloured hard outer acrylate sheathing’. This provides a resistant outer screen and gives the fibre flexibility, at the same time helping to provide mechanical and environmental protection. This coloured outer layer distinguishes Prysmian’s products from those of other optical fibre cable manufacturers. The outer cable sheathing protects the internal parts of the cable against wear and tear. In addition, the colour attributed to the optical fibre cable makes it easy to distinguish one cable from another. The diameter of the sheathing in question is between 200 and 250 microns (which also includes the diameter of the core, that of the optical cladding and of the inner coating in soft acrylate mentioned above).

- 15 The system devised to sheath the fibre, composed of two specially designed acrylate coating layers, is called ColorLock. It is a specific technology developed by the Prysmian group and is protected by several trademarks named ‘ColorLock’.
- 16 Furthermore, the view that layers with colour codes may be regarded as sheathing for the purposes of heading 8544 is also supported by the Comitetul Codului Vamal (Customs Code Committee) in its document of 13 February 2008, in which it is stated that ‘it is logical to treat telecommunications cables consisting of individually sheathed fibres in the same way as the individually sheathed fibres themselves; the sheathing coats the fibre.’
- 17 The appellant further submits that, unlike heading 8544, tariff heading 9001 covers, inter alia, ‘optical fibre cables other than those of heading 8544’. Consequently, heading 9001 does not cover optical fibre cables made up of individually sheathed fibres.’ The difference relating to the casing is fundamental and the products cannot therefore be classified under heading 9001. As a result, since the optical fibre cables at issue fall under heading 8544 (as described above), they cannot be classified under tariff heading 9001. Tariff heading 9001 is a residual heading used exclusively for the classification of optical fibre cables ‘other than those of heading 8544’.
- 18 In addition, the 2015 Explanatory Notes state in heading 9001 that optical fibres under that heading have ‘a very thin coating of plastics, invisible to the naked eye, which renders the fibres less prone to fracture’. That description of tariff heading 9001 refers to plastics, while the explanatory notes to tariff heading 8544 refer to ‘acrylate’, applicable in the case of goods imported by Prysmian into Romania. It is clear that the description of tariff heading 9001 deviates from the objective characteristics of the imported goods, which have not only one but two layers of acrylate coating.
- 19 Moreover, the dual layer of acrylate coating and ‘ColorLock’ is certainly visible to the naked eye and is not ‘very thin’ with respect to the diameter of the core and the optical cladding. The dual layer coating provides the individual optical fibre with greater protection, rendering it ‘less prone to fracture’. These aspects are also confirmed by the independent analysis reports on the characteristics of the products.
- 20 The appellant claims that the goods that it imports therefore correspond to the characteristics of the product envisaged under tariff heading 8544, that the dimensions of the products are sufficient for it to be concluded that such an optical fibre cable is sufficiently protected from the interior and that there is no technical reason to cover the product with an additional layer.
- 21 The fact that the correct classification of the optical fibre cables imported by Prysmian was that of tariff heading 8544 was highlighted by the fact that, in the 2007 Explanatory Notes, reference was made, as is clear from the diagram relating to code 8544 in those notes, to optical fibre cables made using the ‘ColourLock’

technology. The construction of the product is therefore in line with the description for heading 8544, taking into account the sheathing patented by Prysmian (ColorLock).

- 22 Even if, for the sake of argument, the reference to the 'ColourLock' technology in the 2007 Explanatory Notes were to be ignored, the identical construction of the product to that given as an example in those notes corroborates the view that the imported goods are rightly classified under tariff heading 8544.
- 23 Thus, for tariff heading 8544, the 2007 Explanatory Notes include an image providing a description/example of a product classified under that heading. A comparison of this image with the products imported by Prysmian into Romania shows that the imported product is practically identical to the one described and illustrated in the 2007 Explanatory Notes.
- 24 Prysmian makes a number of improvements to the imported goods to meet the specific needs of its customers. However, these improvements do not affect the objective characteristics/specifications of the goods and hence the nature of an optical fibre cable. The dual acrylate layers, which cover the optical fibre, provide the cable with adequate protection to enable them to be installed/used without the need for an additional 'protective casing'. The products have the technical characteristics necessary for them to be utilised in the telecommunications sector without any additional coating.
- 25 In its notification, dated 1 July 2019, of the change in tariff classification, Prysmian does not declare that the imported goods are optical fibres, but rather individually coated optical fibre cables which, after 24 May 2019, can no longer be classified under heading 8544 because of the amendments made by the 2019 Explanatory Notes. Prysmian does not 'contradict' itself, as the inspection team wrongly claims, since the change in the tariff classification was made to comply with the legal provisions applicable from 24 May 2019.
- 26 Before the 2019 Explanatory Notes came into force, it could be considered that optical fibre cables used in the telecommunications sector, consisting of both a single individually sheathed optical fibre and several individually sheathed optical fibres, fell under CN heading 8544 70 00, and the existence of an additional casing was not decisive for classification. Following the introduction of the 2019 Explanatory Notes, the classification under heading 8544 70 00 is referred to as applying to optical fibre cables made up of a number of individually sheathed optical fibres and necessarily contained in an additional casing, differing from those in which each optical fibre is individually coated, which are classified under heading 9001 10 90.
- 27 For the avoidance of doubt, the appellant emphasised the fact that heading 9001 was not amended by the 2019 Explanatory Notes, but that heading 8544, on the other hand, was substantially modified, with the result that the optical fibre cables used in telecommunications imported from Prysmian were excluded from heading

8544. In those circumstances, even if the imported product remained unaltered, the change in the definition of commercial code 8544 (including the deletion of the term ColourLock – a registered trade mark of Prysmian) led to the reclassification of the imported product as from 24 May 2019 under the residual heading 9001.

The use of the goods imported by Prysmian

- 28 The appellant also points out that, in order that products be classified under the appropriate heading, the intended use of the product may constitute an objective factor in the classification, provided that it is specific to the product concerned, and its inherent character must be capable of being assessed in relation to the objective characteristics and properties of that product.
- 29 Depending on the intended use of the imported goods, it is possible to distinguish clearly between goods classified under heading 8544 and those classified under heading 9001. Optical fibre cables classified under tariff heading 8544 ‘are used mainly in telecommunications because their capacity for the transmission of data is greater than that of electrical conductors’, unlike the optical fibre bundles and cables classified under tariff heading 9001, which ‘are used primarily in optical apparatus, particularly in endoscopes’.
- 30 In the present case, the goods are manufactured exclusively for telecommunications applications, in so far as they are designed and produced for the transmission of data signals over long distances, as is also explained by the diagram containing the description of an optical telecommunications system using fibre optic cables. The use of the products described under tariff heading 9001 is not consistent with the use of the goods imported by Prysmian. The cables used in endoscopes differ from those produced for high-speed telecommunications applications and require a specific design/structure. In addition, due to their use in telecommunications, the goods imported by Prysmian must have a number of distinctive features established by the telecommunications industry standards. Products used for endoscopes or other applications do not meet those standards.
- 31 The Comitetul Codului vamal – Secțiunea nomenclatură statistică și tarifară din cadrul Comisiei Europene, Direcția Generală [Impozitare și Uniune Vamală] (Customs Code Committee – Tariff and Statistical Nomenclature Section of the European Commission, Directorate-General [for Taxation and Customs Union]) (TAXUD), stated, in the document TAXUD 617/08/EN, which analysed the similarities and differences between codes 8544 70 00 and 9001 10 90 of the Explanatory Notes, as follows: ‘The optical fibre cables envisaged are clearly intended for telecommunications and may not be used for any other purpose. The function of these casings applied to the optical fibre used for telecommunications cables made of optical fibre is to protect the fibre. It is logical to treat telecommunications cables manufactured with individually sheathed optical fibres in the same way as the individually coated fibres themselves.’

The uniform application of the tariff classification

- 32 Article 28 TFEU explicitly provides for the adoption of ‘a common customs tariff in their relations with third countries’. In order to ensure uniform application of the tariff classification, customs authorities must take into account decisions made in other States, especially when they relate to the same products and concern the same group of companies. In view of the fact that the Prysmian group is a multinational company, the same products are marketed worldwide. Therefore, the classification of its products should be identical worldwide.
- 33 The classification of optical fibre cables under tariff heading 8544 is corroborated by the Binding Tariff Information (BTI) decisions made by the Netherlands in 2005 and 2011 in favour of a company in the Prysmian group, which ensured that the customs procedures were accurately applied to those products, which were identical to those imported by Prysmian into Romania. In those BTI decisions, optical fibre cables were classified under CN subheading 8544 70 00.
- 34 In Spain, the [Tribunal Superior de Justicia del País Vasco] (Supreme Court of Justice of the Basque Country) found against the customs authorities that reclassified the product under CN code 9001 and confirmed the applicability of CN code 8544.
- 35 In France, the French customs authorities confirmed the tariff classification under heading 8544 70 00 following an analysis of the characteristics of optical fibre cables on the basis of the technical file of the product ‘Brendbright XS ESMF’ and decided to cancel the notices of assessment in which the customs duties had been calculated. The product analysed (Brendbright XS ESMF) is an optical fibre cable also imported by Prysmian into Romania.
- 36 The European Court of Auditors drew up a report entitled ‘Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the [EU]’, in which it submitted, inter alia, that: ‘As a Customs Union the EU needs to apply the Common customs tariff and EU customs legislation in a uniform way, ensuring the protection of the EU’s financial interests and a level playing field for traders operating in the internal market. ... Member States’ customs authorities are supposed to act “as if they were one”. ... [The European Court of Auditors] found that there is no harmonised and standardised application of customs controls by the Member States, to ensure an equivalent level of customs control throughout the Union so as not to give rise to anti-competitive behaviour at the various Union entry and exit points’.
- 37 Under Article 33 of the Union Customs Code, the customs authorities are, upon request, to take decisions relating to binding tariff information (BTI decisions). BTI decisions are valid (and binding) throughout the EU, irrespective of the Member State that issued them. Although in the present case there is no BTI decision issued by the Romanian customs authority in favour of Prysmian, the

appellant takes the view that, during the customs control, account should have been taken of the BTI decisions issued by the Netherlands customs authorities, which established the classification of optical fibre cables under tariff heading 8544, since they represent the same goods as those imported by Prysmian into Romania. The appellant refers, in that regard, to paragraphs 40 and 41 of the judgment of 7 April 2011, *Sony Supply Chain Solutions (Europe)*, C-153/10.

- 38 The European Commission established that ‘given that some of the information contained in the [European Binding Tariff Information] is public, economic operators may rely on a BTI issued in favour of another operator in support of its tariff classification decision, provided that the goods in question are identical or similar’.
- 39 According to the appellant, a different approach on the part of the customs authorities infringes the principles of legal certainty and the protection of legitimate expectations. Seeing as documents/decisions/judgments exist that confirm the classification of optical fibre cables under tariff heading 8544, Prysmian had a legitimate expectation that the same customs treatment would be applied. In that regard, it relies on the principle of legitimate expectations and cites paragraphs 33 and 34 of the judgment of 9 July 2015, *Cabinet Medical Gonzáinar Dr Tomoiagă Andrei* (C-144/14).
- 40 The appellant further submits that the principle of tax certainty was infringed because, by deciding to regularise the situation, the customs authorities rejected the tariff classification applied by other EU authorities of the same types of goods imported by other companies in the Prysmian group and imposed additional tax liabilities on the company as a result of the reclassification of the imported products from heading 8744 to heading 9001.

Arguments of the AVR

- 41 According to the AVR, the substitution, on 24 May 2019, of the text of the explanatory notes to CN subheading ‘8544 70 00: Optical fibre cables’ with the new text also containing ‘Example of the structure of an individually sheathed optical fibre of heading 9001 ...’ and ‘Examples of optical fibre cables of heading 8544 made up of individually sheathed fibres placed in a protective casing ...’ leads to the conclusion that the goods imported by Prysmian could, both before and after 24 May 2019, be classified under CN subheading 9001 because:
- the substituted text refers to ‘optical fibres individually coated with a dual layer of acrylate polymer placed in a protective casing’.
 - the new text replacing it provides ‘... The optical fibres are individually sheathed by the dual layer coating; they do not form an optical fibre cable of heading 8544 by themselves until placed in a protective casing.’

- 42 The difference between the tariff classification of optical fibre cables (heading 8544) and that of an individually coated optical fibre, which is also an optical fibre (heading 9001), is due to the ‘protective casing’ referred to in the wording of the 2015 Explanatory Notes, in force at the time of importation. In so far as the product imported by Prysmian has a structure (cross-section) identical to that shown in the diagram of CN subheading 8544 70 00 set out in the 2015 Explanatory Notes and corresponds to the description of the wording of that subheading, with the exception of the ‘protective casing’, the declaration classifying the optical fibre cable under CN subheading 8544 70 00 is not considered to be correct, as it does not appear to be consistent with the wording of the subheading.

The interplay between the information on the identification and description of the imported product and the applicable regulations, for the purposes of providing a basis for the tariff classification

- 43 The AVR submits that subheading 8544 70 00 was introduced in order to classify, in that context and that context alone, optical fibre cables made up of individually coated fibres, including those fitted with electric conductors or fitted with connectors, intended for use in telecommunications. The Explanatory Notes to the Harmonised System (HSEN), Section XVI – heading 8544 and Section XVIII – heading 9001 respectively, and the 2015 Explanatory Notes, Chapter 85 – heading 8544 and Chapter 90 – heading 9001, respectively, do not refer to the optical, geometric or mechanical characteristics or the dimensions of the products which they describe, the only criteria mentioned being the range of uses and the fundamental characteristic represented by the cross-section of an optical fibre individually enclosed in a ‘protective casing’.
- 44 The AVR takes the view that only products made up of optical fibres of which the cross-section is identical to that shown in the diagram set out in the 2015 Explanatory Notes and which also have the ‘protective casing’ mentioned in the text can be classified under heading 8544, whereas individually coated optical fibres, if not placed in a ‘protective casing’, can be classified under heading 9001: Optical fibres.
- 45 According to that authority, all types of fibre/optical fibres, including those that are individually coated, the cross-section of which is not identical to that indicated in the diagram set out in the 2015 Explanatory Notes to subheading 8544 70 00 and which do not correspond to the description of the subheading, should be classified under heading 9001, even if contained in a protective casing.
- 46 The substituted text of the [2015] explanatory notes refers to ‘optical fibres individually coated with a dual layer of acrylate polymer placed in a protective casing’, while the substitute text, that of the 2019 Explanatory Notes, provides that ‘optical fibres are individually sheathed by the dual layer coating; they do not form an optical fibre cable of heading 8544 by themselves until placed in a protective casing.’

- 47 The amendment introduced by the 2019 Explanatory Notes does not introduce a new subdivision of the CN under which goods subject to control can be classified. Furthermore, the introduction of a new subdivision of the CN is the only justification for switching from one subdivision to another subdivision of the CN.
- 48 As a result, the goods imported by Prysmian that were subject to control are classified under tariff code 9001 10 90 90 (customs duty 2.9%) as optical fibres.
- 49 The AVR considers that the customs authorities' finding is correct and legitimate, and is supported, for example, by the declaration of the goods after 24 May 2019, in accordance with the customs declaration for release for free circulation provided by Prysmian at the request of the inspection authorities, which contains, in box 31, the description: Optical fibre, and in box 33, goods code: 9001 10 90 90, and thus fixes the customs duty at 2.9%.
- 50 According to the documents made available by the appellant, namely 'Tehnologia Cablurilor cu Fibră Optică: MLT (optical fibre cable technology: MLT)', which describes in detail the technological process for the production of optical fibre cables, it may be observed that, in practice, its production process consisted of introducing one or more optical fibre wires (the imported product) into the 'loose tube' (in practice the 'protective casing'), and it was only after the completion of that technological flow that optical fibre cables were obtained, the finished products of the company [Prysmian], which, only in that state, correspond to the description of CN code 8544 70 00. It is in fact the protective casing (the 'loose tube') that confers the character of a cable.
- 51 That conclusion is also supported by the documentation relating to SAP traceability (management software) of the imported product, from its receipt to the final product obtained – cable, and the traceability process for the imported product commences with the producer's label being affixed to the reel bearing a 'Fiber ID' identification code for the product, and continues up until that product is used in the production process and the final cable product containing those optical fibres is created.
- 52 Once the alphanumeric codes included in the supporting documents had been decrypted/decoded, it was found that the full description of the imported goods is single-mode optical fibre, individually coated with a dual layer of acrylate (plastic), the outer sheath having a diameter of 250 microns, coloured (blue, yellow, pink), or, as far as the customs nomenclature is concerned, an individually coated optical fibre.
- 53 The customs authorities therefore noted a discrepancy between the description of the goods in 'box 31' of the customs declarations and that given in the supporting documents, and there were reasonable grounds to suspect that the tariff classification declaration (commercial code) was incorrect; this made it necessary to verify the accuracy and completeness of the information on the basis of which

commercial code 8544 70 00 00 was declared in 'box 33' of the customs declarations submitted for inspection.

- 54 This discrepancy was also confirmed by the physical inspection of the imported products, carried out using the method of direct observation in the appellant's warehouse, as indicated in the inspection documents (labels on reels with the Fiber ID marking), and on the basis of the documents submitted and made available during the inspection carried out at the appellant's tax domicile, for example the Analiza Structurală a Produsului Importat (structural analysis of the imported product), also cited in the control documentation, carried out on the basis of the diagram entitled 'Specificațiile cablurilor din optice ale Recmantei' ('specifications of the appellant's optical fibre cables'), and by the construction of the imported product lacking the protective casing, which is the fundamental element that confers the character of a cable for the purposes of tariff classification.
- 55 The goods imported by the appellant prior to 24 May 2019 ('intended exclusively for use in telecommunications'), declared under commercial code 8544 70 00 00 and described as 'Optical fibre cable', are identical to those imported after that date, but declared under commercial code 9001 10 90 90, the date from which the company modified its tariff classification, a modification which Prysmian claimed, even though the change in tariff classification is not justified when the company continues to maintain that the imported product is an individually coated optical fibre cable.
- 56 In other words, Prysmian contradicts itself when it claims that it imports individually coated optical fibre cables to 'be used exclusively in telecommunications', but, after 24 May 2019, declares these products under tariff heading 9001 10 90: Optical fibres and optical fibre bundles; optical fibre cables other than those of heading 8544, when cables under that heading 'are used primarily in optical apparatus, particularly in endoscopes of heading 90.18', together with the fact that, after 24 May 2019, optical fibre cables made up of individually coated optical fibres continue to be classified under heading 8544 70 00.
- 57 Classification under heading 8544 is precluded as the product is not 'placed in a protective casing'. Classification under TARIC code 9001 10 90 30 is precluded due to the composition of the core in poly methyl acrylate (plastic), differing from the 'silicon' (glass) found in the basic composition of the imported product. It follows, from the exclusion from the heading 9001 of the terms 'fibre bundles' and 'optical fibre cables other than those of heading 8544' (8544 – intended for use in telecommunications and not with 'optical apparatus, particularly in endoscopes of heading 90.18', as provided for in heading 9001), that the product can only be 'optical fibre'.
- 58 The AVR does not dispute that the product imported by Prysmian is used in the telecommunications sector after it is used, as a semi-processed

product/component, in the process of manufacturing cables, which contain individually coated optical fibres, but points out that the imported product is an individually coated optical fibre, that is, a product which is neither an optical fibre cable classified under heading 8544 nor an optical fibre cable classified under heading 9001, but an optical fibre classified under TARIC code 9001 10 90 90 (customs duty 2.9%).

- 59 The optical/geometric characteristics of the optical fibre cable are in fact the characteristics of the optical fibre of which the cable is composed, whereas the mechanical characteristics are those of the cable (of the ‘protective casing’); the tariff classification of these two separate products (optical fibre and optical fibre cable) was also made, with the same degree of clarity, in the 2015 Explanatory Notes. For that reason, the individually coated optical fibre cable is classified under heading 8544, whereas the individually coated optical fibre and the optical fibre cable that is not coated individually are classified in heading 9001. The construction of the imported product is in fact identical to the individually coated optical fibre classified under CN subheading 9001 10 90.
- 60 Since it is the ‘protective casing’ that gives the element its essential character as a cable, in the absence of the ‘protective casing’, the individually coated optical fibres are, as far as their tariff classification is concerned, optical fibres and fall under CN code 9001 10 90 or TARIC code 9001 10 90 90.
- 61 As regards the tariff classification of the goods imported by the appellant before and after 24 May 2019, the respondent [AVR] asked the court to note that the clarification provided by the explanatory note to CN subheading ‘8544 70 00: Optical fibre cables’ did not make any changes to the wording of the explanatory notes to CN subheading ‘9001 10 90: Optical fibres, optical fibre bundles and cables’.
- 62 As regards the grounds put forward by the appellant, that the different approach taken by the respondents violates the principles of legal certainty and the protection of legitimate expectations, the AVR refers to Article 3 of Regulation (EU) No 952/2013, which concerns the task assigned to the customs authorities and their active role in implementing measures.
- 63 The AVR claims that the customs authorities respected the appellant’s legitimate expectations, as is shown by Prysmian’s current relationship with the customs authority, in view of the fact that it has the benefit of a VAT deferral certificate, which is included in the White List, that most of the customs operations carried out by the appellant are sent to the green lane in the customs clearance procedure, that is, without documentary and physical inspection of the goods declared, and, at its request, the company benefits from the extension of the customs facility beyond normal working hours.
- 64 As regards the grounds put forward by the appellant, to the effect that the different approach taken by the customs authorities infringes the principle of tax security,

the AVR submits that the inspection team acted legitimately when it applied the customs legislation in force at the time of importation within the scope of the duties, powers and responsibilities provided for by the legislation in force.

- 65 As regards the retroactive application of the new interpretation, the AVR observes that the inspection documents were drawn up in accordance with the customs rules in force at the time of each import. The goods imported by the appellant could have been classified, both before and after 24 May 2019, under CN subheading 9001 10 90, with the result that the findings of the inspection team refer only to the incorrect classification on importation and not to the retroactive application of clarifications, since the right of the customs authorities to carry out the post-release control of customs declarations is regulated by Article 100(1) to (3) of Law No 86/2006 on the Romanian customs code.

Arguments of the DGAMC

- 66 The DGAMC, the complaints board, considered that the imported products at issue in the present case are individually coated optical fibres having a dual polymer layer, the second layer of which is coloured and not placed in a protective casing. The imported product is therefore an optical fibre coated by a dual layer of acrylate polymer (individual coating) and the dual layer is not placed in a so-called protective casing, which would provide additional protection for the individually coated fibre; it is the protective casing that is the fundamental element that allows the product to be regarded as a cable covered by Chapter 8544.
- 67 The DGAMC does not dispute that the product imported by Prysmian is used in the telecommunications sector, but observes that the product in question is individually coated optical fibre, a product which is neither an optical fibre cable classified under heading 8544 nor an optical fibre cable classified under heading 9001, but is an optical fibre classified under TARIC code 9001 10 90 90.
- 68 The DGAMC claims, as does the AVR, that the 2019 Explanatory Notes did not alter the wording of the 2007 Explanatory Notes.
- 69 The new text introduced by the 2019 Explanatory Notes does not contain information on the goods which were classified under tariff heading 8544 before 24 May 2019, which should, from that date, be classified under tariff heading 9001 (written communication of 5 August 2019 from the Customs Directorate). The protective casing is what gives the individually coated optical fibre cable the character to be considered as such, a casing which is missing in the products imported by Prysmian. The phrase ‘the existence of an individual coating around the optical fibre is the only criterion for classifying the optical fibre under heading 8544’ must be interpreted as meaning that only an individually coated optical fibre may be considered to have the composition of a cable classified under heading 8544, and therefore, when the cable is made up of optical fibres that are not

individually coated, that cable is classified under heading 9001 as ‘optical fibre cables other than those of heading 8544’.

- 70 The DGAMC, like the AVR, is of the view that the goods imported by Prysmian should have been classified both before and after 24 May 2019 under CN subheading 9001 10 90 and that the observations made by the customs authorities refer only to the incorrect declaration of the goods on importation and not to the retroactive application of clarifications. The DGAMC relies, in this regard, on the right of the customs authorities to carry out a post-release control of customs declarations, as provided for in Article 48 of Regulation (EU) No 952/2013.
- 71 As regards the right of the customs authorities to check the information provided in the customs declaration and the framework for exercising that right to control, the complaints board cites paragraphs 34 to 40 of the judgment of 15 September 2011, DP Group (C-138/10, EU:C:2011:587).
- 72 Moreover, it is not apparent from the documents in the file that Prysmian applied for or is in possession of a binding tariff information (BTI) decision issued by the Romanian customs authorities, even though it was entitled to request such a decision.
- 73 The DGAMC does not consider that the BTI issued in the Netherlands to another member of the Prysmian group can be invoked against the Romanian customs authorities, as the holder of the decision is a different legal entity. However, it should be noted that the documents use different terms, giving them the same meaning, more specifically fibre as opposed to cable.

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

- 74 In order to determine whether the contested administrative documents were correctly drawn up, the referring court must determine whether or not there is an obligation to reclassify the goods imported under tariff heading 8544 under tariff heading 9001; it is also necessary to clarify whether the provisions of EU law under examination, the interpretation of which is sought, refer to the Combined Nomenclature set out in Annex I to Regulation (EEC) No 2058/87 with reference to the Explanatory Notes to the Combined Nomenclature of the European Communities (2007/C 296/02), in the version in force before the European Commission communication on the Explanatory Notes to the Combined Nomenclature of the European Union (2019/C 179/05).
- 75 The referring court takes the view that an interpretation of the provisions of the Combined Nomenclature set out in Annex I to Regulation (EEC) No 2058/87 with reference to the Explanatory Notes to the Combined Nomenclature of the European Union (2019/C 179/05), published on 24 May 2019, in order to clarify their content, is necessary, in order that EU law be applied in a uniform manner, with regard to the absence of clear rules of EU law applicable in the present case and also in the light of the facts of the situation under examination and the

absence of relevant case-law of the Court of Justice, taking into account the fact that the appellant was charged significant amounts as customs duties and VAT, as well as ancillary costs, as a result of the reclassification of the goods imported under tariff heading 8544 to tariff heading 9001 made following the amendment to the 2019 Explanatory Notes.

WORKING DOCUMENT