Case C-259/24

Request for a preliminary ruling

Date lodged:

12 April 2024

Referring court:

Tribunal judiciaire de Marseille (France)

Date of the decision to refer:

8 April 2024

Applicant:

SAS Ténergie Développement

Defendant:

Directeur Régional des Douanes de Marseille

Direction Interrégionale des douanes Provence – Alpes – Côte d'Azur – Corse

Direction Régionale des Douanes de Marseille

[…]

INTERLOCUTORY ORDER

[…]

CASE: SAS TENERGIE DEVELOPPEMENT v DIRECTEUR REGIONAL DES DOUANES DE MARSEILLE (REGIONAL CUSTOMS DIRECTOR, MARSEILLE) Établissement public Direction interrégionale des douanes Provence-Alpes-Côte d'Azur-Corse (Interregional Customs Directorate, Provence-Alpes-Côte d'Azur-Corse, public body), Établissement public Direction Régionale des Douanes de Marseille (Interregional Customs Directorate Marseille, public body)

[…] in proceedings between:

APPLICANT IN THE MAIN PROCEEDINGS AND THE INTERLOCUTORY PROCEEDINGS

SAS TENERGIE DEVELOPPEMENT, […]

[…] [contact details and representative of the applicant]

DEFENDANTS IN THE MAIN PROCEEDINGS AND THE INTERLOCUTORY PROCEEDINGS

LE DIRECTEUR REGIONAL DES DOUANES DE MARSEILLE, […]

DIRECTION INTERREGIONALE DES DOUANES PROVENCE ALPES COTE D'AZUR CORSE, acting through its Director, […]

DIRECTION REGIONALE DES DOUANES DE MARSEILLE, acting through its Director, […]

[…] [contact details and representative of the defendants]

[…] [procedural elements]

SUMMARY OF THE DISPUTE:

The TENERGIE Group develops and operates electricity generating solar power plants in France.

The company TENERGIE DEVELOPPEMENT purchases the materials needed to build the power plants from suppliers in various countries. In 2013, it selected the company UPSOLAR to coordinate the manufacture of solar panels by a Taiwanese subcontractor, TYNSOLAR COP.

Starting in December 2013, photovoltaic solar panels were imported into Fos-sur-Mer for release into free circulation and home use through Gontrand Frères and Kuehne Nagel, the customs representatives responsible for Ténergie Développement's declarations.

Following an international investigation conducted by OLAF (the European Anti-Fraud Office) in 2014 in order to verify the customs origins of photovoltaic panels consigned from Taiwan and imported into Europe, the French Customs Administration carried out controls on imports by TENERGIE DEVELOPPEMENT.

On 15 October 2015, it notified TENERGIE DEVELOPPEMENT of the outcome of the investigation, alleging that it had breached European anti-dumping regulations; on 15 December 2015, it issued an infringement notice relating to false declarations of origin in respect of the panels imported between 18 December 2013 and 27 February 2014.

An initial recovery notice was issued to the company on 2 March 2016.

On 21 November 2019, the Customs Directorate, following a summons to appear in annulment proceedings initiated by TENERGIE DEVELOPPEMENT, revoked the recovery notice of 2 March 2016 on the ground that the right to be heard had not been applied.

Subsequently, on 11 December 2019, it issued to the company another notice concerning the outcome of the investigation.

On 26 August 2020, it notified the company of a breach for failure to comply with customs regulations.

A further recovery notice … was issued on 16 September 2020 in the sum of EUR 2 405 887 (EUR 1 979 575 in anti-dumping duty and EUR 426 321 in countervailing duty).

The challenge issued by the person liable was rejected by the Regional Customs Director on 4 March 2021.

By registered letter with acknowledgment of receipt dated 12 April 2021, TENERGIE DEVELOPPEMENT requested remission of the anti-dumping duties and countervailing duties that had been notified to it by recovery notice … of 16 September 2020, in the sum of EUR 2 405 887.

By registered letter with acknowledgment of receipt, dated 19 October 2021 the Regional Customs Director issued an unfavourable opinion.

TENERGIE DEVELOPPEMENT brought proceedings against the Interregional Customs Directorate and the Office of the Interregional Collector of Customs Revenue before the Tribunal judiciaire de Marseille (Court of Marseille) by summons of 4 May 2021 for annulment of the recovery notice.

By judgment dated 9 May 2023, the Court of Marseille dismissed the claims brought by TENERGIE DEVELOPPEMENT; the latter brought an appeal against that decision.

On 18 May 2021, the Customs Administration registered a further request for remission from TENERGIE DEVELOPPEMENT.

On 16 September 2021, the Regional Customs Directorate issued an unfavourable opinion in respect of that request for remission.

By letter notified on 29 November 2021, it issued to the company a final refusal to remit the duties.

Following the issuing of a writ dated 25 February 2022, TENERGIE DEVELOPPEMENT was successful in obtaining a summons for the Interregional Customs Directorate, Provence-Alpes-Côte d'Azur-Corse, the Regional Customs

Directorate, Marseille, and the Regional Director of Customs and Indirect Taxes, Marseille to appear before the Court of Marseille, claiming that the court should:

– order the annulment of the decision rejecting the request for remission of duties received by the Administration on 19 April 2021;

– order the remission in full of the anti-dumping duties, the countervailing duties and the default interest;

– failing that, order the re-examination of the file by the Customs Administration and its transmission to the European Commission for examination;

– order the Interregional Customs Directorate, Provence-Alpes-Côte d'Azur-Corse, the Regional Customs Directorate, Marseille, and the Regional Director of Customs and Indirect Taxes jointly and severally to pay it the sum of EUR 50 000 in compensation for its losses.

It also claims that they should be ordered *in solidum* to pay it the sum of EUR 10 000 under Article 700 of the Code of Civil Procedure and should be ordered jointly and severally to pay the costs.

It contends that the French, European and Taiwanese customs authorities committed an error and that it could not reasonably detect that error and had acted in good faith.

It concludes therefrom that the conditions for the remission of duties are met.

It claims that the administration erred in so far as the European Commission, through OLAF (European Anti-Fraud Office), which had evidence that could establish that the solar panels supplied came from CHINA, did not carry out more thorough controls and did not warn the companies that had ordered those panels. Furthermore, it submits that the Customs Administration, which had carried out controls on the products the company had ordered and had evidence in that respect, should have conducted more thorough controls, or at least informed the company of its suspicions as to the true origin of the panels at the time of the initial checks in 2014.

It claims that failure to raise any objections following a control constitutes an active error on the part of the Administration for the purposes of Article 119 of the European Customs Code; that the Taiwanese certificates of origin were not invalidated and were still available on the website of the Taiwanese Chamber of Commerce after the customs control; that the defendants had failed to provide evidence that the error on the part of the Taiwanese authorities resulted from the declarations by the subcontractor and UPSOLAR.

It points out the error on the part of the Taiwanese authorities, which have the means to conduct on the spot checks of the place of manufacture of the materials and which did not invalidate the certificates of origin despite the on-the-spot

investigation by OLAF and the information received after the adoption of the European regulation of 2014.

It alleges force majeure on the ground that the error was not detectable by the operator since it does not have the means of investigation or control available to the French customs authorities and the Taiwanese authorities.

With regard to the difficulty of detecting the error, it observes that the rules that apply are particularly complex in an international context that is difficult for an SME to understand; that it is not a specialist in customs matters and could not carry out an in-depth analysis in order to discover the true origin of the panels [checked] by the Community authorities.

It notes that before entering into a contractual relationship with UPSOLAR it arranged for an independent company to check the conditions in which the solar panels were manufactured by the Taiwanese subcontractor. It states that UPSOLAR informed it of the results of the on-the-spot checks carried out by the audit companies.

It submits that the burden of proving that it could have detected the true origin of the panels lies with the Customs Administration making that claim. It argues that the OLAF report of November 2014 does not contain any evidence of conduct on its part intended to evade the payment of customs duties.

It claims that it acted in good faith, as acknowledged in the infringement notice of 15 December 2015.

In the alternative, it seeks remission of duties on the ground of equity (Article 120 of the Community Customs Code). It submits that it was in a special situation and was not guilty of any deception or obvious negligence and that the conditions for the remission of duties are met.

It states that it has taken all the necessary steps to manage the commercial risk associated with the operation by carrying out on-the-spot investigations and checks. It also alleges that the Taiwanese authorities erred in failing to exercise supervision.

In the further alternative, it claims that the French customs authorities infringed Article 41 of the Charter of Fundamental Rights and Article 22 of the Union Customs Code in that it was not afforded the right to be heard. It states that the final remission refusal was issued before the expiry of the 30-day period under the right to be heard and was notified to it on 21 September 2019, the very day on which its observations were submitted.

It adds that it suffered loss as a result of the unfavourable decision of the Customs Administration.

The French Customs Administration contends that the claims should be dismissed. It further contends that TENERGIE DEVELOPPEMENT should be ordered to pay it the sum of EUR 3 000 in respect of irrecoverable costs.

It submits that the certificate issued by the Taiwanese authorities does not provide proof of the customs origin of the goods under anti-dumping legislation. It states that the physical inspection in TAÏWAN that is mentioned related to panels that had been imported previously.

It adds that the infringement notice of 15 December 2015 does not acknowledge there was an undetectable error but only that there was no evidence of bad faith on the part of TENERGIE DEVELOPPEMENT.

It denies any error on the part of the customs services themselves by active conduct on its own part. It states that it has never supported the operator's view as to the origin of the imported goods. It replies that the goods themselves and the documents that accompanied them gave no reason to question their origin from December 2013 until May 2014. It states that it had no evidence capable of establishing the erroneous origin of the goods before it received OLAF's findings after its mission in November 2014; that the authorities of a third country are not entitled to express a view on the non-preferential origin of goods in the context of the anti-dumping policy of the European authorities and that no cooperation agreement exists between the Taiwanese and European authorities in this regard. It concludes therefrom that the error by the Taiwanese authorities cannot be accepted as a condition for the remission of duties. It adds that the OLAF investigation revealed fraud with regard to the issuing of certificates of origin; that a passive error cannot be accepted since it did not accept the declarations although it had evidence enabling it to detect reporting errors and that, since the error on the part of the authorities is not serious, it is unnecessary to examine the condition relating to its undetectable nature or the one concerning the good faith of the operator.

In the alternative regarding equity, it replies that bad faith on the part of a supplier is not a special circumstance for the operator but an inherent business risk in respect of which the supplier may be covered. It adds that the failure of its supplier, UPSOLAR does not constitute an exceptional situation that the European Union should bear.

In the further alternative, it relies on an error in the date of the administration's letter of reply, which was sent by registered post with acknowledgment of receipt on 26 November 2021. It states that TENERGIE DEVELOPPEMENT did not provide any new evidence in relation to that provided previously.

An order terminating the proceedings was issued on 27 March 2023 and the case was scheduled for a hearing on 11 September 2023.

In its submissions lodged on 29 August 2023, the Customs Administration sought a repeal of the terminating order so as to be able to rely on the judgment delivered on 9 May 2023.

This case was sent for preparation for the hearing on 23 October 2023.

In its submissions lodged on 22 October 2023, TENERGIE DEVELOPPEMENT sought a reference to the European Court of Justice for a preliminary ruling and a stay of proceedings.

In its latest submissions in the interlocutory proceedings, lodged on 10 February 2024, TENERGIE DEVELOPPEMENT claims that the judge preparing the case for the hearing should:

– declare its action admissible and well-founded;

– consequently, order relief and/or remission of the duties assessed in the sum of EUR 2 405 887 together with default interest and penalties,

– refer, as appropriate, to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU the following question:

  […] [questions set out in the operative part]

– stay the proceedings in respect of the application pending the decision of the Court of Justice of the European Union.

It states that it used numerous external resources by conducting audits through independent companies; that the European Commission initiated an international investigation by OLAF; that the Customs Administration should have made it aware of the body of evidence which could suggest that the panels might have come from China; that the Customs Administration failed in its duty of care; that it carried out documentary checks and a physical inspection on 24 February 2014 without finding any anomaly regarding the origin of the goods; and that the Customs Administration accepted and validated importation of the goods for release into free circulation and home use.

It submits that it sought the benefit of remission both on the ground of the error of the competent authorities and on the ground of the equity clause; that the French Customs Administration, which has no discretion in the matter, was required to transmit the file to the European Commission for it to take a decision.

In its latest submissions, lodged on 9 January 2024, the French Customs Administration seeks a declaration that the conditions for remission under Article 119 and Article 120 of the Union Customs Code are not met; that the wording of Article 116 of the Union Customs Code is clear and requires no interpretation; that there is no need to transmit TENERGIE’s request for remission

to the European Commission and that consequently its claims should be dismissed; and that costs should be reserved.

It argues that there is no need for it to transmit the file to the Commission since in its view the conditions laid down in Article 116 of the Union Customs Code are not met; the Commission has not failed to fulfil its obligations; it has not committed any error within the meaning of Article 119 of the Union Customs Code; the circumstances in the present case are linked to the outcome of a European Union investigation; Customs did not support the operator's view as to the declared origin of the goods, either at the time of the import operations or at the time of the controls carried out subsequently by the Fos Customs Office and the Regional Investigation Service; the Administration cannot be criticised for accepting certificates of non-preferential origin since such documents were not required for imports; the French Customs Authorities did not commit any active error since it had no reason to doubt the origin declared and they did not misapply the relevant regulations.

Reference is made to the pleadings referred to above for a fuller account of the submissions and claims of the parties.

GROUNDS OF THE DECISION:

According to Article 49(2) of the Code of Civil Procedure, '*Where the resolution of a dispute depends on an issue giving rise to serious difficulty and falling within the jurisdiction of the administrative courts, the judicial court before which the matter has initially been brought shall refer that issue to the competent administrative court. … It shall stay the proceedings pending a decision on the question referred.*'

According to Article 378 of the Code of Civil Procedure, '*the decision to stay the proceedings shall suspend the [progress] of the proceedings for the duration [or] until the occurrence of the event it shall determine'*.

Article 267 of the Treaty on the Functioning of the European Union reads:

'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties,

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. …'

Article 116 of the Union Customs Code provides that:

'1. Subject to the conditions laid down in this Section, amounts of import or export duty shall be repaid or remitted on any of the following grounds:

(a) overcharged amounts of import or export duty:

(b) defective goods or goods not complying with the terms of the contract;

(c) error by the competent authorities;

(d) equity.

…

3. Where the customs authorities consider that repayment or remission should be granted on the basis of Article 119 or 120, the Member State concerned shall transmit the file to the Commission for decision in any of the following cases:

(a) where the customs authorities consider that the special circumstances are the result of the Commission failing in its obligations;

(b) where the customs authorities consider that the Commission committed an error within the meaning of Article 119;

(c) where the circumstances of the case relate to the findings of a Union investigation carried out under Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, or under any other Union legislation or any agreement concluded by the Union with countries or groups of countries in which provision is made for carrying out such Union investigations;

(d) where the amount for which the person concerned may be liable in respect of one or more import or export operations equals or exceeds EUR 500 000 as a result of an error or special circumstances.

Notwithstanding the first subparagraph, files shall not be transmitted in either of the following situations:

(a) where the Commission has already adopted a decision on a case involving comparable issues of fact and of law;

(b) where the Commission is already considering a case involving comparable issues of fact and of law.

4. Subject to the rules of competence for a decision, where the customs authorities themselves discover within the periods referred to in Article 121(1) that an amount of import or export duty is repayable or remissible pursuant to Articles 117, 119 or 120 they shall repay or remit on their own initiative.

5. No repayment or remission shall be granted when the situation which led to the notification of the customs debt results from deception by the debtor.

6. Repayment shall not give rise to the payment of interest by the customs authorities concerned.

However, interest shall be paid where a decision granting repayment is not implemented within three months of the date on which that decision was taken, unless the failure to meet the deadline was outside the control of the customs authorities.

In such cases, the interest shall be paid from the date of expiry of the three-month period until the date of repayment. The rate of interest shall be established in accordance with Article 112.

7. Where the customs authorities have granted repayment or remission in error, the original customs debt shall be reinstated in so far as it is not time-barred under Article 103.'

Article 119 – *Error by the competent authorities*

'1. In cases other than those referred to in the second subparagraph of Article 116(1) and in Articles 117, 118 and 120, an amount of import or export duty shall be repaid or remitted where, as a result of an error on the part of the competent authorities, the amount corresponding to the customs debt initially notified was lower than the amount payable, provided the following conditions are met:

(a) the debtor could not reasonably have detected that error; and

(b) the debtor was acting in good faith.

…'

Article 120 – *Equity*

'1. In cases other than those referred to in the second subparagraph of Article 116(1) and in Articles 117, 118 and 119 an amount of import or export duty shall be repaid or remitted in the interest of equity where a customs debt is incurred under special circumstances in which no deception or obvious negligence may be attributed to the debtor.

2. The special circumstances referred to in paragraph 1 shall be deemed to exist where it is clear from the circumstances of the case that the debtor is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he or she would not have suffered disadvantage by the collection of the amount of import or export duty.'

In the case of a dispute before a court of first instance against whose decision an appeal may be brought, a reference to the Court of Justice of the European Union for interpretation is optional.

In the present case, the resolution of this dispute concerns a question raising a serious difficulty.

TENERGIE DEVELOPPEMENT considers that, at the time the goods were presented to customs, it provided all the necessary documents, in particular the Taiwanese certificate of origin, and that the French Customs Authorities, despite the physical inspection of the goods in February 2014 and the questions raised by the customs representative, did not express the slightest reservation or point out any anomaly regarding the origin of the goods; and that it therefore accepted and validated the importation of the goods for release into free circulation and home use.

It therefore considers that acceptance of the customs declaration bearing an incorrect tariff classification of the goods concerned amounted to an error within the meaning of Article 119 of the Union Customs Code.

It also states, first, that from the time OLAF opened the investigation the EU and French authorities were aware of the risks associated with the imports and should have warned economic operators of the risks involved; secondly, the Customs Administration, whose control was based mainly on the findings of the international investigation carried out by OLAF, which complied precisely with the criteria laid down in Articles 2 and 20 of Council Regulation (EC) No 515/97 of 13 March 1997, should have transmitted its request for remission to the European Commission.

In that regard, it is important to note that the OLAF report states that on 24 November 2014, OLAF received information from the Taiwanese customs authorities concerning the transhipment via Taiwan to the EU of more than 1 200 containers containing solar panels originating in or dispatched from the People's Republic of China. That information concerned imports in the free zone (customs declaration F1) into Taiwan and reexports of [those] goods from Taiwan's free zones (customs declaration F5). An initial analysis of the information supplied by OLAF showed that a total of 925 individual containers containing solar panels could be matched to imports into the EU declared by Member States.

Thus, in order to comply with the objective of the mechanism designed to enable the Commission to ensure consistent Community case-law on this matter and avoid any obstacle to the consistent application of the Union Customs Code, it is

permissible for TENERGIE DEVELOPPEMENT to raise the question whether the Customs Administration should have ensured the file was transmitted to the European Commission.

Consequently, it is sound administration of justice to stay the proceedings and make a reference to the Court of Justice of the European Union, which has jurisdiction to give a preliminary ruling on the following questions raised by TENERGIE DEVELOPPEMENT:

[…] [statement of the questions referred for a preliminary ruling set out in the operative part]

[…] [national procedural matters]

ON THOSE GROUNDS:

[…] [national procedure]

I hereby order reference to be made to the Court of Justice of the European Union for a preliminary ruling on the following questions raised by TENERGIE DEVELOPPEMENT:

1. Where, as in the present case, the applicant company satisfies the conditions set out in Articles 119 and 120 of the Union Customs Code, must Article 116 of that code be interpreted as imposing an obligation on the competent national authorities to transmit to the European Commission the file requesting remission of the duties notified?

2. If the answer is that those national authorities have no discretion in such a case, will failure to comply with the obligation to transmit the file requesting remission to the European Commission lead to remission of the duties and penalties claimed?

3. If the answer is to the second question is in the negative, does the principle that a Member State is required to make reparation for loss or damage caused to individuals as a result of a breach of European Union law – provided that breach is entirely attributable to that State – apply in situations in which that Member State has misapplied Article 116 of the Union Customs Code, where the obligation to transmit the file requesting remission of the duties which it lays down is regarded as conferring rights on individuals, that breach is sufficiently serious and there is a direct causal link between that breach and the damage sustained by the injured party?

[…] [stay of proceedings]

[…] [national procedural matters]