Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

30 June 2016*

(Reference for a preliminary ruling — Commercial policy — Regulation (EC) No 1225/2009 — Article 13 — Circumvention — Council Implementing Regulation (EU) No 791/2011 — Open mesh fabrics of glass fibres originating in the People's Republic of China — Anti-dumping duties — Council Implementing Regulation (EU) No 437/2012 — Consignment from Taiwan — Initiation of an investigation — Implementing Regulation (EU) No 21/2013 — Extension of the anti-dumping duty — Temporal scope — Principle of non-retroactivity — Community Customs Code — Post-clearance recovery of import or export duties)

In Case C-416/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Bucharest Court of Appeal, Romania), made by decision of 20 April 2015, received at the Court on 29 July 2015, in the proceedings

Selena România SRL,

v

Direcția Generală Regională a Finanțelor Publice (DGRFP) București,

THE COURT (Ninth Chamber),

composed of C. Lycourgos, President of the Chamber, C. Vajda and K. Jürimäe (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

— the Romanian Government, by R.-H. Radu and M. Bejenar, acting as Agents,

— the European Commission, by M. França and G.-D. Balan, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Romanian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) of Council Implementing Regulation (EU) No 21/2013 of 10 January 2013 extending the definitive anti-dumping duty imposed by Regulation (EU) No 791/2011 on imports of certain open mesh fabrics of glass fibres originating in the People's Republic of China to imports of certain open mesh fabrics of glass fibres consigned from Taiwan and Thailand, whether declared as originating in Taiwan and Thailand or not (OJ 2013 L 11, p. 1, 'the Extending Regulation') adopted in response to an investigation under Article 13 of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51, with corrigendum OJ 2010 L 7, p. 22; 'the Basic Regulation').

2 The request was made in proceedings between Selena România SRL and Direcția Generală Regională a Finanțelor Publice București (Bucharest Regional Directorate General of Public Finance, Romania) ('DGRFP') relating to a regularisation decision by the latter requiring Selena România to pay anti-dumping duties.

Legal context

Regulation (EEC) No 2913/92

3 Article 26 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 1186/2009 of the Council of 16 November 2009 (OJ 2009 L 324, p. 23) ('the Customs Code') provides:

'1. Customs legislation or other [Union] legislation governing specific fields may provide that a document must be produced as proof of the origin of goods.

2. Notwithstanding the production of that document, the customs authorities may, in the event of serious doubts, require any additional proof to ensure that the indication of origin does comply with the rules laid down by the relevant Community legislation.'

4 Chapter 3 of Title VII of the Customs Code is entitled 'Recovery of the amount of the customs debt'. It contains in particular Articles 217 to 221 of that Code.

The Basic Regulation

5 According to recital 22 of the Basic Regulation:

'… It is necessary that [Union] legislation should contain provisions to deal with practices, including mere assembly of goods in the [European Union] or a third country, which have as their main aim the circumvention of anti-dumping measures.'

6 Article 10(1) of that regulation provides:

'Provisional measures and definitive anti-dumping duties shall only be applied to products which enter free circulation after the time when the decision taken pursuant to Article 7(1) or 9(4), as the case may be, enters into force, subject to the exceptions set out in this Regulation.'

7 Article 13 of that regulation, entitled ‘Circumvention’, is worded as follows:

‘1. Anti-dumping duties imposed pursuant to this Regulation may be extended to imports from third countries, of the like product, whether slightly modified or not, or to imports of the slightly modified like product from the country subject to measures, or parts thereof, when circumvention of the measures in force is taking place. Anti-dumping duties not exceeding the residual anti-dumping duty imposed in accordance with Article 9(5) may be extended to imports from companies benefiting from individual duties in the countries subject to measures when circumvention of the measures in force is taking place. Circumvention shall be defined as a change in the pattern of trade between third countries and the [Union] or between individual companies in the country subject to measures and the [Union], which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2.

The practice, process or work referred to in the first subparagraph includes, inter alia, the slight modification of the product concerned to make it fall under customs codes which are normally not subject to the measures, provided that the modification does not alter its essential characteristics, the consignment of the product subject to measures via third countries, the reorganisation by exporters or producers of their patterns and channels of sales in the country subject to measures in order to eventually have their products exported to the [Union] through producers benefiting from an individual duty rate lower than that applicable to the products of the manufacturers, and, in the circumstances indicated in paragraph 2, the assembly of parts by an assembly operation in the [Union] or a third country.

…

3. Investigations shall be initiated pursuant to this Article on the initiative of the [European] Commission or at the request of a Member State or any interested party on the basis of sufficient evidence regarding the factors set out in paragraph 1. Initiations shall be made, after consultation of the Advisory Committee, by Commission Regulation which may also instruct the customs authorities to make imports subject to registration in accordance with Article 14(5) or to request guarantees. Investigations shall be carried out by the Commission, which may be assisted by customs authorities and shall be concluded within nine months. When the facts as finally ascertained justify the extension of measures, this shall be done by the Council [of the European Union], acting on a proposal submitted by the Commission, after consultation of the Advisory Committee. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission. The extension shall take effect from the date on which registration was imposed pursuant to Article 14(5) or on which guarantees were requested. The relevant procedural provisions of this Regulation with regard to initiations and the conduct of investigations shall apply pursuant to this Article.

…’

8 According to Article 14(5) of the Basic Regulation:

‘The Commission may, after consultation of the Advisory Committee, direct the customs authorities to take the appropriate steps to register imports, so that measures may subsequently be applied against those imports from the date of such registration. Imports may be made subject to registration following a request from the industry [of the Union] which contains sufficient evidence to justify such action. Registration shall be introduced by regulation which shall specify the purpose of the action and, if appropriate, the estimated amount of possible future liability. Imports shall not be made subject to registration for a period longer than nine months.’

Anti-dumping regulations on open mesh fabrics of glass fibres

9 Following a complaint lodged with the Commission by European producers of open mesh fabrics of glass fibres, Council Implementing Regulation (EU) No 791/2011 of 3 August 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain open mesh fabrics of glass fibres originating in the People's Republic of China (OJ 2011 L 204, p. 1, the 'Original Regulation') was adopted.

10 Under the terms of Article 1 of the Original Regulation, a definitive anti-dumping duty is imposed on imports of open mesh fabrics of glass fibres with a cell size of more than 1.8 mm in width and in length and weighing more than 35 g/m^2, falling within Codes ex 7019 51 00 and ex 7019 59 00 of the Combined Nomenclature contained in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1) (TARIC codes 7019 51 00 10 and 7019 59 00 10) and originating in the People's Republic of China.

11 Pursuant to Article 4, the Original Regulation came into force on 10 August 2011, that is to say, the day following its publication in the *Official Journal of the European Union*.

12 Further to a request lodged by four EU producers of certain open mesh fabrics of glass fibres, in accordance with Articles 13(3) and 14(5) of the Basic Regulation, the Commission adopted Regulation (EU) No 437/2012 of 23 May 2012 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Implementing Regulation No 791/2011 and making such imports subject to registration (OJ 2012 L 134, p. 12, 'the Initiating Regulation').

13 As provided in Article 1 of the Initiating Regulation, the investigation initiated by that regulation concerns the imports into the Union of open mesh fabrics of glass fibres with a cell size of more than 1.8 mm both in length and in width and weighing more than 35g/m^2, excluding fibreglass discs, consigned from Taiwan and Thailand, whether declared as originating in Taiwan and Thailand or not, currently falling within CN codes ex 7019 51 00 and ex 7019 59 00 (TARIC codes 7019510012, 7019510013, 7019590012 and 7019590013).

14 The first paragraph of Article 2 of the Initiating Regulation lays down that, pursuant to Article 13(3) and Article 14(5) of the Basic Regulation, the customs authorities are directed to take the appropriate steps to register the imports into the Union identified in Article 1 of the Initiating Regulation.

15 In accordance with Article 4, the Initiating Regulation came into force on 25 May 2012, that is to say, the day following its publication in the *Official Journal of the European Union*.

16 Following the investigation referred to in the Initiating Regulation, the Council adopted the Extending Regulation.

17 Article 1(1) of the Extending Regulation provides for the extension of the definitive anti-dumping duty imposed by Article 1(2) of the Original Regulation on the imports of open mesh fabrics of glass fibres with a cell size of more than 1.8 mm both in length and in width and weighing more than 35g/m^2 originating in the People's Republic of China to the imports of those same products consigned from Taiwan and Thailand, whether declared as originating in Taiwan and Thailand or not.

18 In accordance to Article 1(2) of the Extending Regulation, the duty extended under paragraph 1 of that article is collected on imports of open mesh fabrics of glass fibres consigned from Taiwan and Thailand, whether declared as originating in Taiwan and Thailand or not, registered in accordance with Article 2 of the Initiating Regulation, and Articles 13(3) and 14(5) of the Basic Regulation.

19 In accordance with Article 4 thereof, the Extending Regulation came into force on 17 January 2013, that is to say, the day following its publication in the *Official Journal of the European Union*.

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 Between 12 March and 18 May 2012, Selena România, a company established in Romania, released for free circulation, in the Union, open mesh fabrics of glass fibres, with a cell size of more than 1.8 mm in width and in length and weighing more than 35 g/m^2, imported from suppliers established in Taiwan ('the imports at issue').

21 By a regularisation decision of 5 February 2014, the DGRFP requested that Selena România pay the sum of RON 1 151 748 (approximately EUR 257 970), corresponding to anti-dumping duty and value added tax owed by the latter in relation to that release for free circulation, together with interest and penalties for late payment, on the ground that, following a verification of Selena România's activities carried out after the event and an investigation by the European Anti-Fraud Office (OLAF), it was found that the imports at issue originated in fact in the People's Republic of China and, consequently, they were subject to the anti-dumping duties provided for in the Initial Regulation and in the Extending Regulation. The DGRFP found that OLAF's investigation report had established that the lots of fibre glass fabrics which were the subject of the imports at issue had been consigned from the People's Republic of China to Taiwan, where they were neither processed nor refined, before being exported to the Union, so that the Chinese non-preferential origin had to be maintained for these consignments.

22 Selena România brought administrative proceedings against the regularisation decision before the Direcția Generală Regională a Finanțelor Publice Galați (Galați Regional Directorate-General of Public Finances, Romania) which upheld the decision.

23 On 22 July 2014, Selena România brought an action before the referring court seeking the annulment of the regularisation decision. It relies in support of its action, in particular, on a plea in law alleging the erroneous retroactive application by the DGRFP of the rules on initiating an investigation and extension of the duty. It clarifies that, at the time the imports at issue took place, neither of those regulations was in force.

24 The referring court is uncertain as to the temporal scope of the Extending Regulation. In particular, it asks whether the definitive anti-dumping duty, imposed by Article 1 of the Extending Regulation, is applicable to imports into the Union from Taiwan, such as the imports at issue, carried out before the entry into force of the Extending Regulation, but after that of the Original Regulation.

25 That court states, in that respect, that the principle of non-retroactivity of Union measures has already been laid down by the case-law of the Court and in particular the case-law initiated by the judgments of 9 June 1964 in *Capitaine* v *Commission* (69/63, EU:C:1964:38) and of 9 December 1965 in *Singer* (44/65, EU:C:1965:122), but that certain exceptions to that principle had been allowed.

26 In those circumstances, the Curtea de Apel București (Bucharest Court of Appeal) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(a) Is the Extending Regulation to be interpreted as meaning that it also applies to imports made by residents of the European Union from Taiwan before 17 January 2013, in other words in 2012, but after the adoption of the Original Regulation?

(b) Does the definitive anti-dumping duty provided for in Article 1 of the Extending Regulation also apply to imports made by residents of the European Union from Taiwan during the period before 17 January 2013, and before the date of adoption of the Initiating Regulation and making such imports subject to registration, but after the adoption of the Original Regulation?'

Consideration of the questions referred for a preliminary ruling

27 By its questions, which should be examined together, the referring court asks, essentially, whether Article 1(1) of the Extending Regulation must be interpreted as meaning that the definitive anti-dumping duty extended by that provision applies retroactively to goods consigned from Taiwan, released for free circulation in the Union after the date of entry into force of the Initiating Regulation, but before that of the Original Regulation.

28 The Extending Regulation having been adopted on the basis of Article 13 of the Basic Regulation, it must be noted that, in accordance with paragraph 1 of that article, the anti-dumping duties imposed pursuant to that regulation may be extended to imports from third countries of like goods, or parts thereof, when circumvention of the measures in force is taking place. According to Article 13(3), investigations are initiated by a Commission regulation which may instruct the customs authorities to make imports subject to compulsory registration in accordance with Article 14(5) of the Basic Regulation.

29 More specifically, it follows from Article 13(3) of the Basic Regulation that, in the event of circumvention, the extension of established definitive measures takes effect from the date on which the registration was imposed pursuant to Article 14(5) of that regulation (judgment of 6 June 2013 in *Paltrade*, C-667/11, EU:C:2013:368, paragraph 26).

30 Whilst Article 10(1) of the Basic Regulation affirms the principle of non-retroactivity of anti-dumping measures, since such measures cannot as a rule be applied to any goods other than those released for free circulation after the date on which the regulation introducing them entered into force, several provisions of the Basic Regulation derogate from that principle. Those provisions permit the application of anti-dumping measures to goods released for free circulation before the entry into force of the regulation introducing them, on condition that the imports at issue have been registered in accordance with Article 14(5) of the Basic Regulation (judgment of 17 December 2015 in *APEX*, C-371/14, EU:C:2015:828, paragraph 48).

31 As for the Extending Regulation, it is expressly stated in Article 1(2) of that regulation that the duty extended under paragraph 1 of that article is collected on imports of open mesh fabrics of glass fibres, such as those covered by that article, consigned from Taiwan, whether declared as originating in Taiwan and Thailand or not, registered in accordance with Article 2 of the Initiating Regulation, as well as Article 13(3) and Article 14(5) of the Basic Regulation.

32 In this instance, it is common ground that the imports at issue were carried out before the date of entry into force of the Initiating Regulation, namely 25 May 2012, that is to say, before they could have been registered in accordance with Article 2 of that regulation.

33 Consequently, it follows from the preceding considerations that the extended anti-dumping duty under Article 2(1) of the Extending Regulation is not applicable retroactively to imports, such as the imports at issue, which were carried out before the date of entry into force of the Initiating Regulation.

34 In order to give a useful answer to the referring court, it must, nevertheless, be explained that, as claimed by the Romanian Government and the Commission in their written observations, that interpretation does not preclude the definitive anti-dumping duties imposed by Article 1(1) of the Original Regulation from applying to such imports if it is established, after a verification carried out after the event, that those imports originate in reality in the People's Republic of China.

35 It must be noted that, under Article 1(1) of the Original Regulation, a definitive anti-dumping duty is imposed on imports of open mesh fabrics of glass fibres described in that article and which originate in the People's Republic of China.

36 As is apparent from Article 26 of the Customs Code, although EU legislation provides that the origin of the goods must be evidenced by the production of a document, the production of that document does not prevent, in case of serious doubt, customs authorities from requiring any supplementary evidence to ensure that the indication of origin does comply with the rules established by EU legislation in this field. In that respect, the Court has already ruled that the purpose of the verification after the event is to check the accuracy of the origin indicated on the certificate of origin (see, by analogy, judgment of 8 November 2012 in *Lagura Vermögensverwaltung*, C-438/11, EU:C:2012:703, paragraph 17 and the case-law cited).

37 It follows that the fact that goods are accompanied by certificates of origin is not a circumstance capable of preventing the recovery of duty due in respect of the import of those goods if, after that import has taken place, those certificates prove to be inaccurate (see, to that effect, judgment of 17 July 1997 in *Pascoal & Filhos*, C-97/95, EU:C:1997:370, paragraphs 55 to 57 and the case-law cited).

38 As regards the imports at issue, it is for the referring court to establish whether, for each consignment of open mesh fabrics of glass fibres released for free circulation in the Union, the custom authorities have sufficient evidence to find that, despite being consigned from Taiwan and declared as originating in that country, those consignments must be considered as originating in reality in the People's Republic of China, in which case the anti-dumping duty imposed by Article 1(1) of the Original Regulation is applicable to them. In that case, as stated by the Commission in its written observations, the post-clearance recovery of that duty must take place in accordance with the rules concerning the recovery of the customs debt in the Customs Code.

39 In the light of all the foregoing, the answer to the questions referred is that Article 1(1) of the Extending Regulation must be interpreted as meaning that the definitive anti-dumping duty imposed by that provision is not applicable retroactively to goods consigned from Taiwan and released for free circulation in the Union after the date of coming into force of the Original Regulation but before that of the Initiating Regulation. Nevertheless, the anti-dumping duty introduced by Article 1(1) of the Original Regulation applies to imports of such goods, if it is established that, despite being consigned from Taiwan and declared as originating in that country, those goods in fact originate in the People's Republic of China.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 1(1) of Council Implementing Regulation (EU) No 21/2013 of 10 January 2013 extending the definitive anti-dumping duty imposed by Implementing Regulation (EU) No 791/2011 on imports of certain open mesh fabrics of glass fibres originating in the People's Republic of China to imports of those same goods consigned from Taiwan and Thailand, whether declared as originating in Taiwan and Thailand or not, is to be interpreted as meaning that the definitive anti-dumping duty extended by that provision is not applicable retroactively to goods consigned from Taiwan, released for free circulation in the Union after the date of entry into force of Council Implementing Regulation (EU) No 791/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain open mesh fabrics of glass fibres originating in the People's Republic of China, but before that of Commission Regulation (EU) No 437/2012 of 23 May 2012 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Implementing Regulation No 791/2011, and making such imports subject to registration. Nevertheless, the anti-dumping duty imposed by Article 1(1) of Regulation No 791/2011 applies to imports of such goods, if it is established that, despite being consigned from Taiwan and declared as originating in that country, those goods in fact originate in the People's Republic of China.

[Signatures]