JUDGMENT OF THE COURT (Second Chamber)

19 March 2009 *

In Case C-256/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Düsseldorf (Germany), made by decision of 16 May 2007, received at the Court on 31 May 2007, in the proceedings

Mitsui & Co. Deutschland GmbH

v

Hauptzollamt Düsseldorf,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, J. Makarczyk, P. Kūris (Rapporteur) and C. Toader, Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 June 2008,

after considering the observations submitted on behalf of:

— Mitsui & Co. Deutschland GmbH, by H. Nehm, Rechtsanwalt,

— the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,

— the Commission of the European Communities, by S. Schønberg and F. Hoffmeister, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 October 2008,

gives the following

Judgment

1 This reference for a preliminary ruling relates, first, to the interpretation of Article 29(1) and (3)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Customs Code') and of Article 145(2) and (3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 444/2002 of 11 March 2002 (OJ 2002 L 68, p. 11; 'the Implementing Regulation'). The reference relates, second, to the validity of Article 145(2) and (3) of the Implementing Regulation.

2 The reference has been made by the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) (Germany) in the course of proceedings between Mitsui & Co. Deutschland GmbH ('Mitsui') and the Hauptzollamt Düsseldorf (the Principal Customs Office, Düsseldorf, 'the Hauptzollamt'), concerning repayment of customs duties.

Legal context

Community legislation

3 Under Article 29 of the Customs Code:

'1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided:

(a) that there are no restrictions as to the disposal or use of the goods by the buyer, other than restrictions which:

— are imposed or required by a law or by the public authorities in the Community,

— limit the geographical area in which the goods may be resold,

or

— do not substantially affect the value of the goods;

(b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with Article 32;

and

(d) that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for customs purposes under paragraph 2.

…

3. (a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instrument and may be made directly or indirectly.

…’

4 Article 67 of the Customs Code provides:

‘Save as otherwise expressly provided, the date to be used for the purposes of all the provisions governing the customs procedure for which the goods are declared shall be the date of acceptance of the declaration by the customs authorities.’

5 Article 236 of the Customs Code provides:

‘1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

…

2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or force majeure.

Where the customs authorities themselves discover within this period that one or other of the situations described in the first and second subparagraphs of paragraph 1 exists, they shall repay or remit on their own initiative.'

6 Recitals 5 and 6 in the preamble to Regulation No 444/2002 state:

'(5) After release for free circulation, the price agreed between buyer and seller can be subject in certain cases to modification in order to take account of the defective nature of goods.

(6) Consequently, the rules in force should expressly allow a transaction value under Article 29 of the [Customs] Code to take account of those special circumstances, with appropriate safeguards and subject to the application of reasonable time-limits.'

7 Regulation No 444/2002, which entered into force on 19 March 2002, introduced a new version of Article 145 of the Implementing Regulation.

8 The said Article 145(2) and (3) provide:

'2. After release of the goods for free circulation, an adjustment made by the seller, to the benefit of the buyer, of the price actually paid or payable for the goods may be taken into consideration for the determination of the customs value in accordance with Article 29 of the [Customs] Code, if it is demonstrated to the satisfaction of the customs authorities that:

(a) the goods were defective at the moment referred to by Article 67 of the [Customs] Code;

(b) the seller made the adjustment in performance of a warranty obligation provided for in the contract of sale, concluded before release for free circulation of the goods;

(c) the defective nature of the goods has not already been taken into account in the relevant sales contract.

3. The price actually paid or payable for the goods, adjusted in accordance with paragraph 2, may be taken into account only if that adjustment was made within a period of 12 months following the date of acceptance of the declaration for entry to free circulation of the goods.'

National legislation

9 Book 2 of the German Civil Code (Bürgerliches Gesetzbuch; 'the BGB') governs the law of obligations. Title I of Section 8 contains the rules on contracts of sale.

10 In the case of defective goods, Paragraph 437 of the BGB confers the following rights on the purchaser:

'If goods are defective, the purchaser may, provided the requirements of the following provisions are met and unless otherwise specified,

1. require subsequent performance under Paragraph 439;

2. terminate the contract … or reduce the purchase price under Paragraph 441;

3. claim damages … or reimbursement of unnecessary expenditure …'

11 If the purchaser opts for the subsequent performance of the contract, Paragraph 439(1) of the BGB confers the following rights on him:

'By way of subsequent performance, the purchaser may require the repair of the defect or the delivery of goods which are free from defect, according to his preference.'

12 If the purchaser opts for reduction of the purchase price, Paragraph 441 of the BGB provides as following:

'1. Instead of terminating the contract, the purchaser may, by declaration to the vendor, reduce the purchase price. …

…

3. In the case of a price reduction, the purchase price shall be reduced in the proportion which the value of the goods free of defects would, at the time when the contract was entered into, have had to the actual value. Where necessary, the price reduction shall be established by estimation.'

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

13 According to the referring court, Mitsui imports new Subaru motor vehicles from Japan, which are offered for sale in the European Union through distributors. The seller/manufacturer grants a three-year guarantee for those vehicles to cover technical or other defects. In the context of that guarantee, the seller/manufacturer reimburses to Mitsui the costs which it incurred in relation to third parties under the guarantee, in particular those pertaining to the implementation of measures by distributors owing to defects in the goods. At the end of each month, Mitsui informs the seller/manufacturer of the services provided under the guarantee to which it has agreed and receives a credit note the following month.

14 On 13 June 2003 Mitsui applied for reimbursement of the customs duty for the services provided under the guarantee in respect of motor vehicles it had released into free circulation in July 2000.

15 By decision of 27 May 2004, the Hauptzollamt granted Mitsui a reimbursement calculated on the services provided under the guarantee and invoiced by Mitsui to the seller/manufacturer up until February 2002. On the other hand, the request for reimbursement was rejected in respect of services provided under the guarantee between March 2002 and June 2003.

16 The Hauptzollamt stated in this connection that, under Article 145(3) of the Implementing Regulation, costs arising under a guarantee could be recognised as reducing the customs value only if the price of the imported goods was adjusted within 12 months of the goods being released into free circulation. That also applied to customs clearances before the entry into force of Regulation No 444/2002 on 19 March 2002. For goods released for free circulation in July 2000, only price adjustments made prior to, or during, February 2002 could be taken into account.

17 Mitsui lodged an objection to that decision. It claimed that Article 145 of the Implementing Regulation did not apply to its request for reimbursement, since the cases of guarantees did not involve subsequent price adjustment for the purposes of that provision, but the setting of the amount of a warranty obligation. In addition, that provision, as amended by Regulation No 444/2002, could not be applied to imports which entered into free circulation before 19 March 2002, that is, prior to the entry into force of Regulation No 444/2002. Community law includes a general prohibition on the retroactive application of Community acts, which encompasses substantive provisions such as Article 145(2) and (3) of the Implementing Regulation.

18 As the Finanzgericht Düsseldorf was uncertain as to the interpretation of Article 29 of the Customs Code and the interpretation and validity of Article 145(2) and (3) of the Implementing Regulation, it decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do payments by the seller/manufacturer to the buyer which, as in the present case, are made in the context of a guarantee agreement and by which the buyer is reimbursed the expenditure on repairs invoiced to him by his [distributors] reduce the customs value under Article 29(1) and (3)(a) of [the Customs Code] which was declared on the basis of the price agreed between the seller/manufacturer and the buyer?

(2) Do the payments referred to in Question 1 by the seller/manufacturer to the buyer for the reimbursement of expenses incurred under a guarantee constitute an adjustment of the transaction value under Article 145(2) of [the Implementing Regulation]?

(3) Should either of the first two questions be answered in the affirmative: is Article 145(2) and (3) of [the Implementing Regulation] to be applied to imports in

respect of which the customs declarations were accepted before entry into force of [Regulation No 444/2002]?

(4) Should Question 3 be answered in the affirmative: is Article 145(2) and (3) of [the Implementing Regulation] valid?'

The questions referred to the Court

The first and second questions

19 By its first two questions, which should be dealt with together, the referring court asks in substance whether Article 29(1) and (3)(a) of the Customs Code and Article 145(2) of the Implementing Regulation must be interpreted as meaning that, when defects affecting goods became apparent after the goods were released for free circulation, but it is demonstrated that they existed before such release, and those defects give rise, under a warranty obligation, to subsequent reimbursements by the seller/manufacturer to the buyer, reimbursements which correspond to the costs of repairs invoiced by the buyer's own distributors, such reimbursements can result in a reduction of the transaction value of the goods and, as a result, of their customs value, which was declared on the basis of the price initially agreed between the seller/manufacturer and the buyer.

20 In order to answer those questions, it should first be pointed out that, according to the settled case-law of the Court, the objective of the Community legislation on customs valuation is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values (Case C-11/89 *Unifert* [1990] ECR I-2275, paragraph 35, and Case C-15/99 *Sommer* [2000] ECR I-8989, paragraph 25). The

customs value must thus reflect the real economic value of an imported good and take into account all of the elements of that good that have economic value (see Case C-306/04 *Compaq Computer International Corporation* [2006] ECR I-10991, paragraph 30).

21 According to the findings of the referring court, the Japanese seller/manufacturer sold new vehicles to Mitsui. The customs value of the imported goods which was declared corresponded, in the main proceedings, to the price initially agreed between the seller/manufacturer and Mitsui. The seller/manufacturer, having granted a three-year guarantee to cover technical or other defects of the new vehicles sold, had subsequently to reimburse to Mitsui any costs that it had incurred in respect of third parties in the framework of that guarantee.

22 If it appears, after the date of importation of a vehicle, that it was defective at the time of its importation, its real economic value, as the Advocate General stated in point 21 of his Opinion, is lower than the transaction value declared at the time of its release for free circulation.

23 Article 29(1) and (3) of the Customs Code does not, admittedly, specify the conditions under which subsequent adjustments to the transaction value, which is the basis for calculation of the customs value, must be treated.

24 However, the price actually paid or payable is a factor that must potentially be adjusted where necessary in order to avoid the setting of an arbitrary or fictitious customs value (see, to that effect, Case 183/85 *Repenning* [1986] ECR 1873, paragraph 16).

25 The Court has, in particular, already held that it must be accepted that, where the goods to be valued were bought free of defects but were damaged before their release for free

circulation, the price actually paid or payable must be reduced in proportion to the damage suffered, since it is an unforeseeable reduction in the commercial value of the goods (see *Repenning*, paragraph 18, and *Unifert*, paragraph 35).

26 Similarly, in the main proceedings, it must be accepted that the price actually paid or payable can be reduced in proportion to the reduction in the commercial value of the goods owing to a hidden defect which it is shown was present before their release into free circulation and gave rise to subsequent repayments under a warranty obligation which, as a result, may result in a subsequent reduction in the customs value of those goods.

27 As is apparent from the terms of recitals 5 and 6 in the preamble to Regulation No 444/2002, Article 145(2) of the Implementing Regulation specified on that point a solution already indicated by Article 29 of the Customs Code itself. Article 145(2) defines the conditions under which an adjustment made by the seller, to the benefit of the buyer, of the price actually paid for the goods released for free circulation may be taken into consideration for the determination of their customs value. There are three cumulative conditions. They are fulfilled when it can be demonstrated that the goods were defective at the moment of acceptance of the declaration by the customs authorities, the price adjustment derives from the performance of a warranty obligation provided for in the contract of sale, concluded before release for free circulation of the goods, and the defective nature of the goods has not already been taken into account in the sales contract.

28 Similarly, the payments made by a seller to a buyer in accordance with a guarantee agreement, by which the buyer is reimbursed the costs of repairs invoiced by his own customers, are an 'adjustment' to the price actually paid or payable, since the words 'adjustment … of the price' in Article 145 of the Implementing Regulation cover various situations including a reduction of the price actually paid or payable.

29 It follows from the foregoing that the answer to the first two questions is that Article 29(1) and (3)(a) of the Customs Code and Article 145(2) of the Implementing Regulation must be interpreted as meaning that, when defects affecting goods became apparent after the goods were released for free circulation but it is demonstrated that they existed before such release, and those defects give rise, under a warranty obligation, to subsequent reimbursements by the seller/manufacturer to the buyer, reimbursements which correspond to the costs of repairs invoiced by the buyer's own distributors, such reimbursements can result in a reduction of the transaction value of the goods and, as a result, of their customs value, which was declared on the basis of the price initially agreed between the seller/manufacturer and the buyer.

The third question

30 By its third question, the referring court seeks to ascertain whether Article 145(2) and (3) of the Implementing Regulation applies to imports in respect of which the customs declarations were accepted by the custom authorities before 19 March 2002, the date on which Regulation No 444/2002, amending the said Article 145, entered into force.

31 In that respect, it should be recalled that the principles of the protection of legitimate expectations and legal certainty form part of the Community legal order. They must accordingly be observed by the Community institutions (see, inter alia, Case C-376/02 *'Goed Wonen'* [2005] ECR I-3445, paragraph 32 and the case-law cited).

32 Although, in general, the principle of legal certainty precludes a Community measure from taking effect from a point in time before that measure was published, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (see, in particular, *'Goed Wonen'*, paragraph 33) and, in so far as it follows clearly from the terms, objectives or

general scheme of the rules of Community law concerned, that such effect must be given to them (see, to that effect, Case C-293/04 *Beemsterboer Coldstore Services* [2006] ECR I-2263, paragraph 21 and case-law cited).

33 Neither the wording of the provisions of, or the recitals in the preamble to, Regulation No 444/2002 nor the drafting history of that regulation contain any indication that such retroactive effect must be given to Article 145 of the Implementing Regulation.

34 On the contrary, it is apparent from the minutes of the Customs Code Committee (Customs Valuation Section) (Summary of conclusions reached at the meeting of 26 October 2001; TAXUD/906.2001, EN, p. 3) that this 'provision … did not provide for retroactive application and it was not the intention to build this in, unless the Committee wished to expressly provide for it.' That was not the case.

35 In any event, as is apparent from paragraphs 31 and 32 of the present judgment, the effect given to a provision of Community law must not jeopardise the fundamental principles of the Community, in particular the principles of legal certainty and the protection of legitimate expectations.

36 Although Article 145 of the Implementing Regulation aims to improve legal certainty in that it expressly includes the taking into consideration of the adjustment of the price of goods where they are defective at the time of their importation, its application, as in the main proceedings, would none the less result in undermining the legitimate expectations of German economic operators to the extent that, as the Advocate General stated in point 50 of his Opinion, the German customs authorities applied the general deadline of three years prescribed by Article 236(2) of the Customs Code to adjustments, after importation, of the transaction value of goods on account of their defective nature, for the purposes of determining their customs value.

37 As a result, it must be held that Article 145(2) and (3) of the Implementing Regulation do not apply to situations arising prior to 19 March 2002.

38 It follows from the foregoing that the answer to the third question is that Article 145(2) and (3) of the Implementing Regulation do not apply to imports in respect of which the customs declarations were accepted before 19 March 2002.

The fourth question

39 Given the answer to the third question, there is no need to answer the fourth question.

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 (Second Chamber) hereby rules:

1. **Article 29(1) and (3)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and Article 145(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, as amended by Commission Regulation (EC) No 444/2002 of 11 March 2002, must be interpreted as meaning that, when defects affecting goods became apparent after the goods were released for free circulation but it is demonstrated that they existed before such release, and those defects give rise, under a warranty obligation, to subsequent reimbursements by the seller/manufacturer to the buyer, reimbursements which correspond to the costs of repairs invoiced by the buyer's own distributors, such reimbursements can result in a reduction of the transaction value of the goods and, as a result, of their customs value, which was declared on the basis of the price initially agreed between the seller/manufacturer and the buyer.**

2. **Article 145(2) and (3) of Regulation No 2454/93, as amended by Regulation No 444/2002, do not apply to imports in respect of which the customs declarations were accepted before 19 March 2002.**

[Signatures]