Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

21 July 2016*

(Reference for a preliminary ruling — Customs union — Common Customs Tariff — Customs procedures with economic impact — Outward processing — Regulation (EEC) No 2913/92 — Article 148(c) — Issue of authorisation — Economic conditions — Absence of serious harm to the essential interests of Community processors — Concept of 'Community processors')

In Case C-4/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 19 December 2014, received at the Court on 12 January 2015, in the proceedings

Staatssecretaris van Financiën

v

Argos Supply Trading BV,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Lycourgos, E. Juhász, C. Vajda, and K. Jürimäe (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 13 January 2016,

after considering the observations submitted on behalf of:

— Argos Supply Trading BV, by J.A.G. Winkels and O.R.L. Gemin, belastingadviseurs,

— the Netherlands Government, by M. Bulterman and B. Koopman, acting as Agents,

— the Greek Government, by K. Nasopoulou and K. Karavasili, acting as Agents,

— the European Commission, by L. Grønfeldt, H. Kranenborg and A. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2016,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 148(c) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 19) ('the Customs Code').

2 The request has been made in proceedings between the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) and Argos Supply Trading BV ('Argos') concerning the rejection, by the Netherlands customs authorities, of an application by that company for authorisation to use the outward processing procedure.

Legal context

Regulation (EEC) No 2473/86

3 **Council Regulation (EEC) No 2473/86 of 24 July 1986 on outward processing relief arrangements and the standard exchange system (OJ 1986 L 212, p. 1), contained the provisions applicable to that customs procedure until the entry into force of the Customs Code. The first recital of that regulation stated:**

'Whereas, under the international division of labour, many Community undertakings have recourse to outward processing arrangements, that is the export of goods with a view to their subsequent re-import after processing, working or repair; whereas recourse to these arrangements is justified for economic or technical reasons.'

The Customs Code

4 As from 1 May 2016, Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1, and corrigendum, OJ 2013 L 287, p. 90) has replaced the Customs Code. However, in view of the time of the facts at issue in the main proceedings, the Customs Code remains applicable to the present case.

5 The third and fourth recitals of the Customs Code provided:

'Whereas, based on the concept of an internal market, the Code must contain the general rules and procedures which ensure the implementation of the tariff and other measures introduced at Community level in connection with trade in goods between the [European Union] and third countries; whereas it must cover, among other things, the implementation of common agricultural and commercial policy measures, taking into account the requirements of these common policies;

Whereas it would appear advisable to specify that this Code is applicable without prejudice to specific provisions laid down in other fields; whereas such specific rules may exist or be introduced in the context, inter alia, of legislation relating to agriculture, statistics, commercial policy or own resources.'

6 Article 84 of the Customs Code provided that, where the term 'customs procedure with economic impact' was used in Articles 85 to 90 of that Code, it was to be understood as applying to, inter alia, processing under customs control and outward processing.

7 In accordance with Article 85 of the Customs Code, the use of any customs procedure with economic impact was to be conditional upon authorisation being issued by the customs authorities.

8 Article 133 of that Code stated:

‘Authorisation [for processing under customs control] shall be granted only:

...

(e) where the necessary conditions for the procedure to help create or maintain a processing activity in the [European Union] without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are fulfilled. …’

9 Article 145 of the Customs Code stated:

‘1. The outward processing procedure shall ... allow Community goods to be exported temporarily from the customs territory of the [European Union] in order to undergo processing operations and the products resulting from those operations to be released for free circulation with total or partial relief from import duties.

…

3. The following definitions shall apply:

(a) “temporary export goods” means goods placed under the outward processing procedure;

(b) “processing operations” means the operations referred to in Article 114(2)(c), first, second and third indents;

(c) “compensating products” means all products resulting from processing operations;

...’

10 Article 148 of that Code provided:

‘Authorisation [for outward processing] shall be granted only:

...

(c) where authorisation to use the outward processing procedure is not liable seriously to harm the essential interests of Community processors (economic conditions).’

11 Article 151(1) of that Code provided:

‘The total or partial relief from import duties provided for in Article 145 shall be effected by deducting from the amount of the import duties applicable to the compensating products released for free circulation the amount of the import duties that would be applicable on the same date to the temporary export goods if they were imported into the customs territory of the [European Union] from the country in which they underwent the processing operation or last processing operation.’

The Implementing Regulation

12 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), was repealed, with effect from 1 May 2016, by Commission Implementing Regulation (EU) 2016/481 of 1 April 2016 (OJ 2016 L 87, p. 24).

However, in view of the time of the facts at issue in the main proceedings, Regulation No 2454/93, as amended by Commission Regulation (EC) No 993/2001 of 4 May 2001 (OJ 2001 L 141, p. 1) ('the Implementing Regulation'), remains applicable to that case.

13 Chapter 6 of Title III of the Implementing Regulation, entitled 'Customs procedures with economic impact', related to the outward processing procedure. Article 585 of that regulation, which is included in that chapter, provided as follows:

'1. Except where indications to the contrary exist, the essential interests of Community processors shall be deemed not to be seriously harmed.

...'

The Combined Nomenclature

14 The Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and the statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EC) No 1214/2007 of 20 September 2007 (OJ 2007 L 286, p. 1), contains a Chapter 22, entitled 'Beverages, spirits and vinegar'. That chapter includes the subheading 2207 10 00, worded 'Undenatured ethyl alcohol of an alcoholic strength by volume of 80% vol or higher'. The goods classified under that heading are subject to customs duty of EUR 19.2 per hectolitre, equivalent to an *ad valorem* charge of approximately 40%.

15 Subheading 3824 90 97, entitled, 'Other', is included in Chapter 38, entitled 'Miscellaneous chemical products', of that Combined Nomenclature. The customs duties applicable to goods covered by that subheading amount to 6.5% *ad valorem*.

16 In accordance with subheadings 2710 11 25 to 2710 11 90, included in Chapter 27 of that Combined Nomenclature, entitled 'Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes', all of the goods corresponding to the wording 'motor spirit' are subject to a charge of 4.7% *ad valorem*.

The dispute in the main proceedings and the question referred

17 On 30 June 2008, Argos submitted a request to the Netherlands customs authorities pursuant to Article 85 of the Customs Code for authorisation to use an outward processing procedure. That company wished to place under that procedure petrol of Community origin to be exported for the purpose of being blended with bioethanol from a third country that had not been released for free circulation in the European Union. Following blending, in a ratio of approximately 15 units of petrol to 85 units of bioethanol, Argos claims that it would obtain ethanol 85 ('E85'), a biofuel suitable for use in certain modified vehicles, known as 'flexible fuel' vehicles.

18 It was evident from that application that Argos planned to perform that blending on the high seas. The petrol and bioethanol were, it stated, to be brought on board a ship in a Netherlands port and loaded into two compartments separated by a partition. After that ship had set sail, and once it was outside EU territorial waters, that partition would be removed, allowing the two constituents to mix together, the process being assisted by the sea swell. The ship would then return to the Netherlands.

19 The E85 thus obtained would, according to Argos, be declared to customs for release for free circulation in the European Union and subjected to the import duty payable on that product (amounting to 6.5% *ad valorem*). In that context, application of the outward processing procedure, according to Argos, would entitle it to a reduction in that duty equivalent to the amount of the

customs duty, at the rate of 4.7% *ad valorem*, which would have been applicable for petrol of Community origin on the same date if it had been imported and released for free circulation in the European Union from the place where it was blended.

20 The Netherlands customs authorities referred Argos' application to the European Commission in order for the latter to assess whether the economic conditions for granting an authorisation to use the outward processing procedure under Article 148(c) of the Customs Code had been satisfied. The Commission subsequently sought the opinion of the Customs Code Committee ('the Committee').

21 The Committee took the view that Argos should be refused the benefit of recourse to that procedure on the ground that those conditions had not been satisfied. It based its decision on the arguments put forward by the Commission at a meeting of the Committee held on 11 November 2009. During that meeting, the Commission argued that the importation of a large quantity of E85 into the European Union would seriously harm the essential interests of Community bioethanol producers. That imported E85, it found, was in direct competition with Community bioethanol since bioethanol is the main constituent of E85. According to the Commission, the Community bioethanol industry faced a situation of overcapacity.

22 By a decision of 13 April 2010, the Netherlands customs authorities, citing those arguments, rejected Argos' application. That company thereupon brought an action against the decision rejecting its application before the Rechtbank Haarlem (District Court, Haarlem, Netherlands), which dismissed its action.

23 Argos brought an appeal against the decision of the Rechtbank Haarlem (District Court, Haarlem) before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam). By a decision of 3 October 2013, the Gerechtshof te Amsterdam quashed the decision of the first-instance court, holding in particular that, in order to establish whether the economic conditions governing use of the outward processing procedure were satisfied in the present case, it was necessary to determine whether the processing of Community petrol into E85 under the outward processing procedure adversely affected the essential interests, not of Community producers of bioethanol, but those of Community producers of E85. However, according to the Gerechtshof te Amsterdam, since the Netherlands customs authorities did not have evidence demonstrating that the requested procedure adversely affected the latter producers' essential interests, those authorities ought to have taken the view that the economic conditions for that procedure were satisfied in accordance with the presumption set out in Article 585(1) of the Implementing Regulation. The State Secretary for Finance thereupon brought an appeal in cassation before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

24 The Hoge Raad takes the view that the outcome of that appeal depends on the interpretation of the term 'Community processors' in Article 148(c) of the Customs Code and, more specifically, on the question whether that term may include Community producers of bioethanol.

25 In particular, that court has doubts as to whether the findings of the Court in relation to the procedure for processing under customs control in the judgment of 11 May 2006 in *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312) should be extended, by analogy, to the outward processing procedure. It is, according to the Hoge Raad, apparent from that judgment that, in the context of examining whether there has been compliance with the economic conditions for use of the latter procedure, both the economic interests of Community producers of the finished product obtained following processing and those of Community producers of the basic products used during processing must be taken into account.

26 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In an examination of the economic conditions governing an outward processing customs procedure, must the term "Community processors" in Article 148(c) of the Customs Code be interpreted as also covering Community producers of basic products or intermediate products identical to those processed, as non-Community goods, in the processing operation?'

The question referred for a preliminary ruling

Preliminary observations

27 In the first place, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has indicated, in its order for reference, that, in the factual circumstances of the case in the main proceedings, as established by the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam), there was nothing to show that the benefit of the outward processing procedure requested by Argos would affect the essential interests of Community producers of E85.

28 However, the Commission disputes that premise and argues, in essence, that the use of that procedure would affect both the essential interests of Community producers of bioethanol and those of Community producers of E85. In the Commission's view, that is evident, in particular, from the minutes of the Committee meeting of 11 November 2009, referred to in paragraph 21 of the present judgment. According to the Commission, if it is accepted that the benefit of that procedure also affects the essential interests of Community producers of E85, the question referred will become irrelevant.

29 In so far as the Commission seeks to call into question the factual context of the case in the main proceedings, as it appears in the order for reference, it should be borne in mind that, in the context of proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. The Court of Justice is thus empowered to rule on the interpretation or validity of EU law provisions only on the basis of the facts which the national court puts before it (see, inter alia, judgment of 16 July 1998 in *Dumon and Froment*, C-235/95, EU:C:1998:365, paragraph 25 and the case-law cited).

30 It is therefore not for the Court to determine whether, in the case in the main proceedings, the benefit of outward processing requested by Argos would or would not affect the essential interests of Community producers of E85. It is, by contrast, for the Court to answer the question submitted by the referring court on the basis of the assumption, made by the latter, that the interests of those producers would not be affected.

31 In the second place, with regard to the Greek Government's argument that the outward processing procedure does not apply to processing operations carried out on the high seas, to the extent that Article 151(1) of the Customs Code requires that such operations be conducted in a specified 'country', it is necessary to accept, as does the Advocate General in points 46 to 49 of his Opinion, that, particularly in view of the wording of Article 145 of that Code, that procedure may apply where those operations take place outside the customs territory of the European Union. Accordingly, the fact that, in the case in the main proceedings, the operations contemplated by Argos had to take place in the high seas is not such as to preclude application of the provisions of the Customs Code relating to that customs procedure with economic impact.

Substance

32 By its question, the referring court asks, in essence, whether Article 148(c) of the Customs Code must be interpreted as meaning that, in the context of a request for authorisation to use the outward processing procedure, in order to assess whether the economic conditions governing the use of that procedure are satisfied, it is necessary to consider not only the essential interests of Community producers of products analogous to the finished product resulting from the envisaged processing operations, but also those of Community producers of products analogous to the basic products or to the intermediate non-EU products intended to be incorporated in Community goods temporarily exported during those operations.

33 According to the referring court, it is necessary, in particular, to determine whether the answer given by the Court in its judgment of 11 May 2006 in *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312, paragraph 52) as regards the procedure for processing under customs control is transposable to that of outward processing. In that judgment the Court held that, in the context of the assessment of the economic conditions laid down in Article 133(e) of the Customs Code for the use of processing under customs control, account must be taken not only of the market for the finished products but also of the economic situation on the market for the basic products used to produce those products.

34 In that regard, it should be noted that, as is clear from Article 84 of the Customs Code, outward processing and processing under customs control are both customs procedures with economic impact. The use of one or other of those procedures requires, in accordance with Article 85 of that Code, an authorisation issued by the customs authorities. For those two procedures, that authorisation is subject, in particular, to compliance with conditions, referred to as 'economic', laid down, as regards processing under customs control, in Article 133(e) of that Code and, as regards outward processing, in Article 148(c) of that Code.

35 However, those economic conditions are worded differently depending on the procedure concerned. Article 148(c) of the Customs Code provides that authorisation for outward processing is to be granted only where such authorisation is not liable seriously to harm the essential interests of Community processors. Article 133(e) of that Code, for its part, provides that authorisation for processing under customs control is to be granted only where the necessary conditions for the procedure to help create or maintain a processing activity in the European Union, without adversely affecting the essential interests of Community producers of similar goods, are fulfilled.

36 In particular, the use of the concept of 'processors' in Article 148(c) of the Customs Code suggests that, for the purposes of assessing whether the economic conditions governing the use of the outward processing procedure are satisfied, it is necessary to focus solely on the essential interests of industries carrying out, in the EU, processing operations, the subject matter of those conditions, therefore, being more restricted than those of processing under customs control, such as interpreted by the Court in its judgment of 11 May 2006 in *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312).

37 Nevertheless, the wording of Article 148(c) of the Customs Code is not unambiguous. It does not specify either the markets concerned by the activities of those 'processors' or the specific factors to be taken into account in assessing whether their essential interests may be adversely affected. Consequently, it is necessary to interpret that provision in the light of the general scheme and purpose of the outward processing procedure (see, to that effect, judgments of 19 June 1980 in *Roudolff*, 803/79, EU:C:1980:166, paragraph 7, and of 11 May 2006 in *Friesland Coberco Dairy Foods*, C-11/05, EU:C:2006:312, paragraph 47).

38 In that regard, it follows from Article 145 of the Customs Code that the outward processing procedure is intended to allow Community goods to be exported temporarily from the customs territory of the European Union in order to undergo processing operations and to allow the products resulting from

those operations, known as 'compensating products', to be released for free circulation with total or partial relief from import duties. More specifically, under Article 151(1) of that Code, the benefit of that procedure entails the deduction, from the amount of the import duties applicable to the compensating products released for free circulation, of an amount equivalent to the import duties that would be applicable on the same date to the temporary export goods if they were imported into the customs territory of the European Union from the country in which they underwent the processing operation or last processing operation.

39 Such a procedure is justified by its purpose, namely to avoid the imposition of customs duties on goods exported for processing purposes at the time of their re-importation into the territory of the European Union (see, to that effect, judgments of 17 July 1997 in *Wacker Werke*, C-142/96, EU:C:1997:386, paragraph 21, and of 2 October 2003 in *GEFCO*, C-411/01, EU:C:2003:536, paragraph 51). In that regard, it follows from the first recital of Regulation No 2473/86 that, in establishing that procedure, the legislature intended to take note of the fact that EU undertakings often undertake, for economic or technical reasons, processing operations on the territory of a third country before re-importing the goods thus processed into the European Union.

40 It follows that the key objective of such a customs procedure is to neutralise, as noted by the Advocate General in point 67 of his Opinion, certain consequences, deemed harmful to EU industry, resulting from the application of common import and export procedures.

41 In that context, the economic conditions governing the use of the outward processing procedure contained in Article 148(c) of the Customs Code serve to enable the customs authorities to assess whether the use of the outward processing procedure is essentially favourable to that industry, while ensuring that the benefits which a trader would derive from that procedure do not result, in return, in significant disadvantages for other EU producers. Those economic conditions must therefore be construed in a manner that allows the customs authorities to take full account of such conflicts of interest within the EU industry (see, by analogy, judgment of 11 May 2006 in *Friesland Coberco Dairy Foods*, C-11/05, EU:C:2006:312, paragraphs 49 and 50).

42 With regard to such conflicts of interest, it should be noted that, by promoting the relocation of processing operations of Community goods outside the European Union, the benefit of the outward processing procedure granted to a Community trader is liable to affect mainly the essential interests of industries which carry out, within the European Union, similar processing operations, that is to say, the producers of products analogous to those which result from the outward processing.

43 However, in circumstances such as those at issue in the main proceedings, in which the processing operation envisaged by Argos involves the inclusion, in temporarily exported Community goods, of a significant quantity of a non-Community basic product, namely bioethanol, and in which the customs duties relating to that basic product, of approximately 40% *ad valorem*, are significantly higher than those applicable to the compensating product obtained at the conclusion of that operation, as the E85 is taxed at a rate of 6.5% *ad valorem*, it is necessary to state that the use of the outward processing procedure for that operation is also capable of seriously harming the essential interests of traders producing that basic product within the European Union.

44 To carry out that same processing operation outside the European Union would allow a company such as Argos to import into the European Union the portion corresponding to that basic product while avoiding the payment of customs duties applicable to that basic product, which duties are designed specifically to protect those Community producers from such imports. In that situation, the benefit of the outward processing procedure would provide an additional advantage to the trader requesting that procedure, consisting in the partial exemption which it would obtain from the customs duties applicable to the compensating product, thus rendering more advantageous that type of operation, which nonetheless has an adverse effect on the interests of EU producers.

45 It follows that, in the same way as the Court held in its judgment of 11 May 2006 in *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312), as regards the procedure for processing under customs control, Article 148(c) of the Customs Code must be interpreted as meaning that, in order to assess whether the economic conditions governing the use of the outward processing procedure are satisfied by a request for authorisation to use that procedure, account must be taken not only of the essential interests of Community producers of products analogous to the product resulting from the processing operations envisaged, but also of those of Community producers of products analogous to the basic products or to intermediate non-EU products to be incorporated in Community goods temporarily exported during those operations. The concept of 'Community processors' in Article 148(c) of the Customs Code must therefore be read as including those various EU producers.

46 Contrary to what Argos has argued before the Court, that interpretation is not called into question by the statement in paragraph 21 of the judgment of 17 July 1997 in *Wacker Werke* (C-142/96, EU:C:1997:386) that the possibility of tariff anomalies arising, and resulting in customs advantages for a trader requesting the benefit of the outward processing procedure, is a risk inherent in the arrangements introduced by that procedure.

47 The proceedings which gave rise to that judgment concerned the question whether it was in accordance with the outward processing procedure that, in that case, the duties relating to the goods which had been temporarily exported exceeded the duties relating to the compensating products, with the result that recourse to the outward processing procedure would potentially have led to a total exemption from import duties for those products; those proceedings did not concern the separate question of which interests could be taken into account during the examination of the economic conditions governing the use of the outward processing procedure. Accordingly, in that judgment, the Court did not rule on the question whether the consequences of tariff anomalies may or may not be included as part of that examination.

48 Finally, the interpretation set out in paragraph 45 of the present judgment takes into account the needs of the common agricultural policy, as required by the third and fourth recitals of the Customs Code (see, by analogy, judgment of 11 May 2006 in *Friesland Coberco Dairy Foods*, C-11/05, EU:C:2006:312, paragraph 51). It should be borne in mind that, as is clear from a reading of Article 38 TFEU, in conjunction with headings 22.08 and 22.09 of Annex I to that Treaty, the production of bioethanol in the European Union is an agricultural activity covered by that common policy and benefiting, in principle, from the protection offered by the particularly high customs duties applicable to imports of that product into the European Union. The interpretation adopted accordingly ensures that protection by precluding the outward processing procedure from assisting a trader seeking to evade those customs duties.

49 Having regard to all of the foregoing, the answer to the question referred is that Article 148(c) of the Customs Code must be interpreted as meaning that, in the context of a request for authorisation to use the outward processing procedure, in order to assess whether the economic conditions governing the use of that procedure are satisfied, it is necessary to take account not only of the essential interests of Community producers of products analogous to the finished product resulting from the envisaged processing operations, but also of those of Community producers of products analogous to the basic products or to the intermediate non-EU products intended to be incorporated in the Community goods temporarily exported during those operations.

Costs

50 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 (Fourth Chamber) hereby rules:

Article 148(c) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted as meaning that, in the context of a request for authorisation to use the outward processing procedure, in order to assess whether the economic conditions governing the use of that procedure are satisfied, it is necessary to take account not only of the essential interests of Community producers of products analogous to the finished product resulting from the envisaged processing operations, but also of those of Community producers of products analogous to the basic products or to the intermediate non-EU products intended to be incorporated in the Community goods temporarily exported during those operations.

[Signatures]