

3. If the answer to the second question is in the affirmative, can a difference in situation such as that established between teachers seconded to the European Schools, whose remuneration is funded both by their national authorities and by the European School in which they teach, on the one hand, and officials of the European Community, whose remuneration is funded by the Community alone, on the other hand, justify a situation in which, in the light of the principles laid down in the articles cited above and although the [Service Regulations for staff seconded to the European School] expressly refer to the Staff Regulations of Officials of the European Community, the exchange rates applied in order to maintain an equivalent purchasing power are not the same?

⁽¹⁾ OJ 1994 L 212, p. 3.

**Reference for a preliminary ruling from the Augstākās tiesas Senāts (Republic of Latvia) lodged on 4 June 2009
— Schenker SIA v Valsts ieņēmumu dienests**

(Case C-199/09)

(2009/C 193/12)

Language of the case: Latvian

Referring court

Augstākās tiesas Senāts

Parties to the main proceedings

Applicant: Schenker SIA

Defendant: Valsts ieņēmumu dienests

Question referred

Must Article 6(2) of Commission Regulation (EEC) No 2454/93 ⁽¹⁾ of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code be interpreted as meaning that, with regard to an application for binding tariff information, binding information must be issued on identical goods, which share the same commercial denomination, article number or any other criterion which distinguishes or identifies the goods concerned?

⁽¹⁾ OJ 1993 L 253, p. 1.

Appeal brought on 27 May 2009 by Commission of the European Communities against the judgment of the Court of First Instance (Second Chamber) delivered on 10 March 2009 in Case T-249/06: Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT), formerly Nikopolsky Seamless Tubes Plant 'Niko Tube' ZAT, Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT), formerly Nizhnedneprovsky Tube-Rolling Plant VAT v Council of the European Union

(Case C-200/09 P)

(2009/C 193/13)

Language of the case: English

Parties

Appellant: Commission of the European Communities (represented by: H. van Vliet, C. Clyne, Agents)

Other parties to the proceedings: Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT), formerly Nikopolsky Seamless Tubes Plant 'Niko Tube' ZAT, Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT), formerly Nizhnedneprovsky Tube-Rolling Plant VAT, Council of the European Union

Form of order sought

The appellant claims that the Court should:

- set aside point 1 of the Judgment;
- dismiss the Application in its entirety;
- order the Applicants to pay the Commission's costs in bringing this Appeal

Pleas in law and main arguments

FIRST GROUND OF APPEAL — application of the Single Economic Entity-concept in the determination of the export price

The Commission considers that the Court of First Instance makes two legal errors when it states: 'According to consistent case-law concerning the calculation of normal value, but applicable by analogy to the calculation of the export price, the sharing of production and sales activities within a group formed by legally distinct companies does not alter the fact that one is dealing with a single economic entity which organises in that manner a series of activities which are carried out, in other cases, by an entity which is also a single entity from the legal point of view'.

Firstly, the CFI erred by not providing any reasoning whatsoever as to why the so-called single economic entity concept (SEE-concept) would also be applicable by analogy to the determination of the export price in dumping calculations.

Secondly, the CFI erred by not following the consistent earlier case-law of the Court of Justice with respect to the SEE-concept, including *inter alia*, Sharp Corporation, Minolta Camera, Ricoh and Canon-II, which decided the opposite.

SECOND GROUND OF APPEAL — Burden of Proof and standard of review

This ground of appeal relates to the burden of proof and the standard of judicial review. The Commission considers that on this point, in paragraphs 180-190, the CFI commits various legal errors by not applying the appropriate standard of review. While citing the judgment in *Kundan and Tata*, the CFI failed to take into account of the fact that after that judgment the wording of Art. 2(10)(i) of the Basic Regulation was adapted precisely to cater for situations such as the one at issue. This clearly leaves a certain margin of discretion to the institutions. The CFI applied the incorrect legal test, consequently requiring a particularly high burden of proof from the institutions, in an area where they enjoy the normal wide discretion. Therefore, the CFI has not shown, as it should have done, that there has been a manifest error in the appraisal of the facts by the institutions.

THIRD GROUND OF APPEAL — Article 2(10) first paragraph of the Basic Regulation.

This third ground challenges points 193-197 of the contested Judgment. It follows that if the first and or second ground of appeal are well-founded, then as a corollary to the CFI's own reasoning, its finding that 2(10), first paragraph, has been violated by the Institutions, is wrong in law.

FOURTH GROUND OF APPEAL — THE RIGHTS OF DEFENCE

This ground is directed at points 200-211 of the Contested Judgment. The Commission considers that in those points, the CFI applied an excessively stringent and therefore unjustified test regarding the Applicant's rights of defence. The amount of the adjustment and the transactions it concerned had already been known to the Applicants for some time (since the first final information document). Moreover, the second final information document provided a clarification, in reaction to a comment which the Applicants had made after receiving that document; the Commission clarified, that the earlier mentioning of Art. 2(9) as a legal basis for the adjustment had been erroneous. Therefore, Applicants were informed, fully, of the exact reasons why the Commission intended to apply an adjustment, namely that it considered that Sepco acts as a trader which performs, for the Applicants, functions similar to those of an agent working on a commission basis.

The Commission considers that by providing this information, it provided the Applicants with sufficient information to allow them to exercise their rights of defence. Therefore, the CFI commits a legal error when it implies, in point 201, that more should have been added in the paragraph of the final disclosure relating to this point. Contrary to what the CFI

implies, the Applicants were aware of the reason why the Commission intended to include this adjustment in its proposal to the Council, namely that Sepco's relation with the applicants was covered by Art. 2(10)(i) second sentence. Moreover, the Commission considers that its position is supported by earlier rulings of the Court of Justice (e.g., the EFMA-case).

Finally, the Commission considers that the CFI makes a legal error in point 209 when it 'mixes' the substantive issue whether it was lawful to apply the adjustment with the question whether the Applicants' rights of defence have been respected. It states: 'It has been shown above, that [the institutions acted unlawfully by applying the adjustment]. Therefore, it must be concluded that' by not furnishing its final motivation already at the time of the 2nd final disclosure, the institutions violated the Applicants' rights of defence. There is, however, contrary to what the CFI implies, no causal link between the two. The mere fact that the CFI finds that an adjustment was, in its view, unlawfully applied, does not mean that the Applicant's rights of defence were violated. The question is whether the institutions provided the Applicants', during the administrative procedure, with the necessary information to allow it to submit information. The fact that the CFI considers the adjustment to be unlawful does not mean that 'therefore' during the administrative procedure the rights of defence of the Applicants have been violated.

AS TO THE QUESTION WHETHER THE COURT OF JUSTICE CAN RULE ON THE PLEAS AT ISSUE ITSELF (or whether it should refer the matter back to the CFI)

In the Commission's view, should the Court rule that the above pleas in law are founded, and set aside point 1 of the operative part of the Contested Judgment, it would have a sufficiently developed file in front of it to rule on the relevant pleas itself (and to reject them). However, this is a matter for the Court and the Commission will not go into it further.

Reference for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 8 June 2009 — Flachglas Torgau GmbH v Federal Republic of Germany

(Case C-204/09)

(2009/C 193/14)

Language of the case: German

Referring court

Bundesverwaltungsgericht