Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

10 July 2019*

(Reference for a preliminary ruling – Customs Union – Regulation (EEC) No 2913/92 – Articles 202 and 203 – Customs duties on imports – Incurrence of a customs debt on account of infringements of customs legislation – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(d) and Article 30 – VAT on importation – Chargeable event – Concept of 'importation' of goods – Requirement that the goods must enter the economic network of the Union – Carriage of those goods to a Member State other than that in which the customs debt was incurred)

In Case C-26/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hessisches Finanzgericht (Finance Court, Hesse, Germany), made by decision of 2 November 2017, received at the Court on 16 January 2018, in the proceedings

Federal Express Corporation Deutsche Niederlassung

v

Hauptzollamt Frankfurt am Main,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 5 December 2018,

after considering the observations submitted on behalf of:

– Federal Express Corporation Deutsche Niederlassung, by R. Welzel and U. Reimer, Steuerberater,

– the Hauptzollamt Frankfurt am Main, by U. Beck, acting as Agent,

– the Greek Government, by K. Georgiadis and M. Tassopoulou, acting as Agents,

– the European Commission, by F. Clotuche-Duvieusart and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2019,

* Language of the case: German.

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 2(1)(d) and Article 30 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive').

2 The request has been made in proceedings between Federal Express Corporation Deutsche Niederlassung ('FedEx') and the Hauptzollamt Frankfurt am Main (Principal Customs Office, Frankfurt am Main, Germany; 'the German Principal Customs Office') concerning the obligation to pay the value added tax (VAT) in Germany arising from the incurrence of a customs debt on importation on account of infringements of customs legislation committed in the territory of that Member State.

Legal context

EU law

Regulation (EEC) No 2913/92

3 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) repealed and replaced Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) from 1 May 2016. However, in the light of the date of the facts in the main proceedings, Regulation No 2913/92, as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1; 'the Customs Code'), remains applicable to the present case.

4 Article 40 of the Customs Code stated:

'Goods entering the customs territory of the Community shall be presented to customs by the person who brings them into that territory or, if appropriate, by the person who assumes responsibility for carriage of the goods following such entry, with the exception of goods carried on means of transport only passing through the territorial waters or the airspace of the customs territory of the Community without a stop within this territory. The person presenting the goods shall make a reference to the summary declaration or customs declaration previously lodged in respect of the goods.'

5 Article 50 of the Customs Code provided:

'Until such time as they are assignated a customs-approved treatment or use, goods presented to customs shall, following such presentation, have the status of goods in temporary storage. Such goods shall hereinafter be described as "goods in temporary storage".'

6 Article 91(1)(a) of the Customs Code provided:

'The external transit procedure shall allow the movement from one point to another within the customs territory of the Community of:

(a) non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures'.

7 Article 202(1) and (2) of the Customs Code was worded as follows:

‘1. A customs debt on importation shall be incurred through:

(a) the unlawful introduction into the customs territory of the Community of goods liable to import duties

or

(b) the unlawful introduction into another part of that territory of such goods located in a free zone or free warehouse.

For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.’

8 Article 203(1) and (2) of the Customs Code stated:

‘1. A customs debt on importation shall be incurred through:

– the unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.’

The VAT Directive

9 Under Article 2(1)(d) of the VAT Directive:

‘The following transactions shall be subject to VAT:

…

(d) the importation of goods.’

10 Article 30 of that directive states:

‘“Importation of goods” shall mean the entry into the Community of goods which are not in free circulation within the meaning of Article 24 of the Treaty.

In addition to the transaction referred to in the first paragraph, the entry into the Community of goods which are in free circulation, coming from a third territory forming part of the customs territory of the Community, shall be regarded as importation of goods.’

11 Article 60 of the VAT Directive provides:

‘The place of importation of goods shall be the Member State within whose territory the goods are located when they enter the Community.’

12 Article 61 of the same directive provides:

'By way of derogation from Article 60, where, on entry into the Community, goods which are not in free circulation are placed under one of the arrangements or situations referred to in Article 156, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the place of importation of such goods shall be the Member State within whose territory the goods cease to be covered by those arrangements or situations.

Similarly, where, on entry into the Community, goods which are in free circulation are placed under one of the arrangements or situations referred to in Articles 276 and 277, the place of importation shall be the Member State within whose territory the goods cease to be covered by those arrangements or situations.'

13 Article 70 of the VAT Directive reads as follows:

'The chargeable event shall occur and VAT shall become chargeable when the goods are imported.'

14 Article 71 of that directive states:

'1. Where, on entry into the Community, goods are placed under one of the arrangements or situations referred to in Articles 156, 276 and 277, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the chargeable event shall occur and VAT shall become chargeable only when the goods cease to be covered by those arrangements or situations.

However, where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event shall occur and VAT shall become chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable.

2. Where imported goods are not subject to any of the duties referred to in the second subparagraph of paragraph 1, Member States shall, as regards the chargeable event and the moment when VAT becomes chargeable, apply the provisions in force governing customs duties.'

German law

15 Paragraph 1 of the Umsatzsteuergesetz (Law on turnover tax) of 21 February 2005 (BGBl. 2005 I, p. 386), in the version applicable to the facts of the main proceedings ('the UStG'), entitled 'Taxable transactions', provides in point 4 of subparagraph 1:

'The following transactions shall be subject to turnover tax:

…

4. the importation of goods into the national territory … (import turnover tax);

…'

16 Paragraph 13 of the UStG, entitled 'Chargeability of the tax', provides in subparagraph 2:

'Paragraph 21(2) shall be applicable to import turnover tax.'

17 Paragraph 21 of the UStG, entitled 'Special provisions in respect of import turnover tax', provides in subparagraph 2:

'The rules applicable to customs duties shall apply by analogy to import turnover tax'.

18 Paragraph 14 of the Einfuhrumsatzsteuer-Befreiungsverordnung (Federal regulation on the exoneration from import tax) of 11 August 1992 (BGBl. 1992 I, p. 1526), in the version applicable to the facts of the main proceedings, entitled 'Refund or remission', provides in subparagraph 1:

'The import turnover tax shall be refunded or remitted in the cases provided for in Articles 235 to 242 of the Customs Code; those provisions and their implementing rules are applicable by analogy.'

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

19 During the month of January 2008, FedEx sent goods from Israel, Mexico and the United States ('the goods at issue') liable to import duties to various recipients located in Greece, their final destination. Those goods were transported in 18 separate lots ('the 18 lots') by air to Frankfurt am Main (Germany), where they were placed in another aircraft to be transported onwards to Greece.

20 By letter of 23 October 2008, the customs office at Athens airport (Greece) informed the German Principal Customs Office that the 18 lots had been transported onwards to Greece contrary to customs law.

21 In the light of that information, the German Principal Customs Office found that 14 of the 18 lots had not undergone, in Germany, the presentation to customs provided for in Article 40 of the Customs Code, and inferred from this that those lots had been introduced into the customs territory of the European Union unlawfully. It thus took the view that, pursuant to Article 202 of the Customs Code, a customs debt on importation had been incurred through the unlawful introduction of those lots.

22 In the case of 3 of the 18 lots, the German Principal Customs Office found that the goods concerned were in temporary storage on their arrival at Frankfurt am Main airport, that they had been transported onwards to Athens without having been placed under the Community external transit arrangements and that they had therefore been removed from the place of storage without authorisation. With regard to the final lot, it was found that, before the goods were transported to Athens, an external transit procedure had been duly discharged from Paris (France) to Frankfurt am Main but that those goods had likewise been removed from the place of storage without authorisation. In relation to these four lots, the German Principal Customs Office took the view that a customs debt on importation was incurred, on the basis of Article 203 of the Customs Code, through the infringements of customs legislation.

23 Accordingly, with regard to the 18 lots, the German Principal Customs Office issued FedEx, on 30 November and 1 December 2010, with five notices relating to the collection of customs duties on imports. The same office found, in relation to those lots, that VAT on importation, referred to in Germany as import turnover tax, was payable on the ground that, in accordance with Paragraph 21(2) of the UStG, the rules applicable to customs duties are to apply by analogy to that tax.

24 FedEx paid the customs duties on imports and the import turnover tax resulting from those five notices. However, in November 2011, that company applied for a refund of those duties and that tax on the ground, inter alia, that they had been collected twice, contrary to EU law. In that regard, FedEx claimed that the goods at issue, after arriving in Athens, were released for free circulation and that the import duties, including the Greek import turnover tax, were collected. By notices of 9 and 10 April 2013, the German Principal Customs Office rejected those applications for a refund.

25 Following the complaint procedures brought by FedEx against those notices, the tax authority amended the rates of taxation applied in two of the five notices of 30 November and 1 December 2010 and issued a partial refund of the import turnover tax related to those two notices.

26 On 13 June 2014, FedEx brought an action before the Hessisches Finanzgericht (Finance Court, Hesse) (Germany) against those five notices. At the hearing, FedEx discontinued its action in respect of the customs duties on imports but maintained its application as regards the import turnover tax. In that connection, it submitted that that tax is a tax on consumption imposed only on goods which are actually consumed in the national territory. Since the goods at issue were transported to Greece without having been introduced into the German economic network, they cannot be regarded as having been imported into German territory and as being capable of forming the subject matter of a taxable transaction on that basis.

27 The referring court therefore has doubts whether, further to the infringements of customs legislation mentioned in paragraphs 21 and 22 of this judgment, which gave rise to a customs debt on importation, VAT on importation was incurred in Germany in relation to the goods at issue.

28 In this regard, the referring court mentions paragraph 65 of the judgment of 2 June 2016, *Eurogate Distribution and DHL Hub Leipzig* (C-226/14 and C-228/14, EU:C:2016:405), which refers to the concept of the 'risk' of entry into the economic network of the European Union. That court observes that, if that concept is to be applied, in cases in which goods introduced into the territory of the European Union were not placed under a customs arrangement or were removed from the arrangement under which they had been placed, it remains to be examined only whether there is a risk of those goods entering the economic network of the European Union in the fiscal territory of the Member State concerned. In the present case, such a risk must be deemed to exist because the goods at issue, having been introduced unlawfully or unlawfully removed from customs supervision, were, specifically, not or no longer under such surveillance. In particular, the goods introduced unlawfully into the customs territory of the European Union could have been removed unnoticed and consumed untaxed.

29 However, in the light of the judgments of the Court of 1 June 2017, *Wallenborn Transports* (C-571/15, EU:C:2017:417) and of 18 May 2017, *Latvijas Dzelzceļš* (C-154/16, EU:C:2017:392), the referring courts asks whether VAT on importation, with regard to the Member State within whose fiscal territory the goods were introduced into the European Union, is incurred only where those goods also enter the economic network of the European Union in the fiscal territory of that Member State. In those circumstances, that economic network is entered only once the goods have been released for free circulation in accordance with customs legislation or where an infringement of customs legislation leads to the presumption that the goods have entered that economic network and that they may have been consumed or used. Only those two situations constitute 'importation' within the meaning of the VAT Directive.

30 In those circumstances, the Hessisches Finanzgericht (Finance Court, Hesse) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is importation within the meaning of Articles 2(1)(d) and 30 of [the VAT Directive] subject to the condition that goods which have been introduced into the territory of the European Union must enter the economic network of the European Union, or is the mere risk that the goods introduced may enter the economic network of the European Union sufficient?

(2) If importation is subject to the condition that goods must enter the economic network of the European Union:

Do goods which have been introduced into the territory of the European Union automatically enter the economic network of the European Union in the case where, contrary to customs law, those goods are not placed under an arrangement within the meaning of the first paragraph of Article 61 of the [VAT] Directive or, although initially placed under such an arrangement, they later cease to be covered by that arrangement on account of conduct contrary to customs law, or is it the case that, in the event of conduct contrary to customs law, entry into the economic network of the European Union is subject to the condition that it may be presumed that, on account of the conduct contrary to customs law, the goods entered the economic network of the European Union in the fiscal territory of the Member State in which the unlawful conduct was committed and may have been consumed or used?'

The questions referred for a preliminary ruling

The first question

31 By its first question, the referring court asks, in essence, whether Article 2(1)(d) and Article 30 of the VAT Directive are to be interpreted as meaning that, where goods are introduced into the territory of the European Union, the concept of the 'importation of goods', within the meaning of those provisions, refers only to the entry of those goods into the economic network of the European Union, or whether that concept also covers the risk of such goods entering that network.

32 As a preliminary point, it should be recalled that, according to settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paragraph 57 and the case-law cited).

33 Under Article 2(1)(d) of the VAT Directive, the importation of goods is to be subject to VAT. The first paragraph of Article 30 of that directive states that 'importation of goods' is to mean the entry into the Community of goods which are not in free circulation within the meaning of Article 24 EC.

34 In accordance with the case-law of the Court, since VAT is by nature a tax on consumption, it applies to goods and services that enter the economic network of the European Union and may be the object of consumption (judgment of 18 May 2017, *Latvijas Dzelzceļš*, C-154/16, EU:C:2017:392, paragraph 69 and the case-law cited).

35 In the present case, it is clear from the actual wording of the order for reference that the goods at issue were transported to Greece, their final destination, where they were consumed. It is therefore established that those goods entered the economic network of the European Union within the meaning of the VAT Directive.

36 Accordingly, as the Advocate General observed in point 43 of his Opinion, in a case such as that in the main proceedings, the question whether the existence of a 'risk' of goods entering the economic network of the European Union is sufficient to take the view that those goods were the object of 'importation', within the meaning of Article 2(1)(d) and Article 30 of the VAT Directive, appears to be hypothetical.

37 In the light of the case-law cited in paragraph 32 of this judgment, the first question is therefore inadmissible.

The second question

38 By its second question, the referring court asks, in essence, whether Article 2(1)(d) and Article 30 of the VAT Directive are to be interpreted as meaning that, where goods are introduced into the territory of the European Union, it is sufficient that those goods have been the subject of infringements of customs legislation in a particular Member State, which gave rise to a customs debt on importation, to take the view that those goods entered the economic network of the European Union in that Member State.

39 In that regard, it should be noted that, under Article 60 of the VAT Directive, the place of importation of goods is to be the Member State within whose territory the goods are located when they enter the Community. The first paragraph of Article 61 of that directive provides that, by way of derogation from Article 60 of the Directive, where, on entry into the Community, goods which are not in free circulation are placed under one of the arrangements or situations referred to in Article 156 of the Directive, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the place of importation of such goods is to be the Member State within whose territory the goods cease to be covered by those arrangements or situations.

40 Article 70 of the VAT Directive provides that the chargeable event is to occur and VAT is to become chargeable when the goods are imported. Article 71(1) of the VAT Directive provides inter alia in its first subparagraph that where, on entry into the Community, goods are placed under customs warehousing arrangements, the chargeable event is to occur and VAT is to become chargeable only when the goods cease to be covered by those arrangements. However, the second subparagraph of that article covers the specific situation in which, in the case of imported goods subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event is to occur and VAT is to become chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable.

41 According to settled case-law of the Court, import VAT and customs duties display comparable essential features since they arise from the fact of importation of goods into the European Union and the subsequent distribution of those goods through the economic channels of the Member States. This parallel nature is, moreover, confirmed by the fact that the second subparagraph of Article 71(1) of the VAT Directive authorises Member States to link the chargeable event and the date on which the VAT on importation becomes chargeable with those laid down for customs duties (judgments of 28 February 1984, *Einberger*, 294/82, EU:C:1984:81, paragraph 18, and of 11 July 2013, *Harry Winston*, C-273/12, EU:C:2013:466, paragraph 41).

42 In the present case, it is clear from the order for reference that, in the course of 2008, various goods from third countries liable to import duties were transported to Germany before being carried onwards to Greece, their final destination. Some of those goods were not presented to the German customs authorities and were therefore introduced unlawfully into the customs territory of the European Union. The other goods were introduced lawfully into that territory in Germany but were then transported onwards to Greece having been removed from customs supervision, in breach of customs law.

43 It is not disputed that, in the case in the main proceedings, as a result of those infringements of customs legislation, a customs debt on importation was incurred in Germany on the part of the company which introduced the goods at issue into the territory of the European Union, on the basis – respectively – of Article 202(1)(a) and Article 203(1) of the Customs Code.

44 According to the case-law of the Court, in addition to the customs debt, there may also be a requirement to pay VAT in the case where, based on the particular unlawful conduct which gave rise to the customs debt, it can be presumed that the goods entered the economic network of the European Union and that they may have undergone consumption, that is, the act on which VAT is levied (judgments of 2 June 2016, *Eurogate Distribution and DHL Hub Leipzig*, C-226/14 and C-228/14, EU:C:2016:405, paragraph 65, and of 1 June 2017, *Wallenborn Transports*, C-571/15, EU:C:2017:417, paragraph 54).

45 In particular, the Court has held that, in the event that goods liable to import duties are removed from customs supervision in a free zone and are no longer located in that zone, it should, in principle, be presumed that they have entered the economic network of the European Union (judgment of 1 June 2017, *Wallenborn Transports*, C-571/15, EU:C:2017:417, paragraph 55).

46 In the present case, first, with regard to the goods at issue which were not lawfully introduced into the customs territory of the European Union, in the light of the case-law cited in paragraphs 44 and 45 of this judgment, it should, in principle, be presumed that they entered the economic network of the European Union in the territory of the Member State in which they were introduced into the European Union, that is to say in Germany.

47 Second, as for the goods at issue which were removed from customs surveillance, they ceased to be covered in Germany by the customs arrangements under which they were placed. Accordingly, in the light of the case-law cited in paragraphs 44 and 45 of this judgment, it should likewise be presumed that they entered the economic network of the European Union in that Member State.

48 However, as the Advocate General observed in points 56 and 68 of his Opinion, such a presumption may be rebutted if it is established that, despite the infringements of customs legislation and the incurrence, as a result, of a customs debt on importation in the Member State in which those infringements were committed, the goods were introduced into the economic network of the European Union in the territory of another Member State, where they were intended for consumption. In such cases, VAT on importation is payable in the latter Member State.

49 It is apparent from the order for reference that, although the goods at issue were the subject of infringements of customs legislation in German territory, they were simply transferred from one aircraft to another in that territory.

50 It is true that, on account of those infringements of customs legislation, the goods at issue, which were physically on the territory of the European Union, were no longer under the supervision of the German customs authorities, which were unable to monitor the movement of those goods.

51 However, in the present case, it is clear from the order for reference that it is established that the goods at issue were transported to Greece, their final destination, where they were consumed.

52 Accordingly, in a case such as that in the main proceedings, the infringements of customs legislation that occurred on German territory do not, in themselves, constitute a sufficient basis to take the view that the goods at issue entered the economic network of the European Union in Germany.

53 In those circumstances, it should be held that, in such a case, the goods entered the economic network of the European Union in the Member State of their final destination and that, therefore, the VAT on importation related to those goods was incurred in that Member State.

54 In the light of the foregoing considerations, the answer to the second question is that Article 2(1)(d) and Article 30 of the VAT Directive must be interpreted as meaning that, where goods are introduced into the territory of the European Union, it is not sufficient that those goods have been the subject of infringements of customs legislation in a particular Member State, which gave rise in that State to a customs debt on importation, to take the view that the goods entered the economic network of the European Union in that Member State, where it is established that the same goods were transported onwards to another Member State, their final destination, where they were consumed, the VAT on importation related to the goods thus being incurred only in the latter Member State.

Costs

55 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 (First Chamber) hereby rules:

Article 2(1)(d) and Article 30 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, where goods are introduced into the territory of the European Union, it is not sufficient that those goods have been the subject of infringements of customs legislation in a particular Member State, which gave rise in that State to a customs debt on importation, to take the view that the goods entered the economic network of the European Union in that Member State, where it is established that the same goods were transported onwards to another Member State, their final destination, where they were consumed, the value added tax on importation related to the goods thus being incurred only in the latter Member State.

[Signatures]