



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 3 June 2021¹

Case C-825/19

Beeren-, Wild-, Feinfrucht GmbH
v
Hauptzollamt Erfurt

(Request for a preliminary ruling from the Thüringer Finanzgericht (Finance Court of Thuringia, Germany))

(Reference for a preliminary ruling – Customs Union – Regulation (EU) No 952/2013 – End use procedure – Successive authorisation with retroactive effect – Temporal scope – Conditions)

1. This reference for a preliminary ruling concerns two discrete issues. First, the temporal scope of Article 211 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code² ('the UCC') and second, the interpretation of Article 294(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92³ ('the Community Customs Code Implementing Regulation' or 'the CCC IR'), if Article 211 of Regulation No 952/2013 is found to be inapplicable *ratione temporis*.
2. The Thüringer Finanzgericht (Finance Court of Thuringia, Germany) ('the referring court') has submitted four separate questions to the Court, the first three of which concern the temporal application of Article 211 of the UCC and the last of which concerns the interpretation of Article 294(2) of the CCC IR. As requested by the Court, I shall limit myself in this Opinion to examining the first three of those questions.

¹ Original language: English.

² OJ 2013 L 269, p. 1.

³ OJ 1993 L 253, p. 1.

I. Legal framework

A. EU law

1. Regulation No 952/2013

3. Article 211 of the UCC, entitled ‘Authorisation’, provides as follows:

‘1. An authorisation from the customs authorities shall be required for the following:

- (a) ... the end-use procedure;
- (b) ...

The conditions under which the use of one or more of the procedures referred to in the first subparagraph ... is permitted shall be set out in the authorisation.

2. The customs authorities shall grant an authorisation with retroactive effect, where all of the following conditions are fulfilled:

- (a) there is a proven economic need;
- (b) the application is not related to attempted deception;
- (c) the applicant has proven on the basis of accounts or records that:
 - (i) all the requirements of the procedure are met;
 - (ii) where appropriate, the goods can be identified for the period involved;
 - (iii) such accounts or records allow the procedure to be controlled;
- (d) all the formalities necessary to regularise the situation of the goods can be carried out, including, where necessary, the invalidation of the customs declarations concerned;
- (e) no authorisation with retroactive effect has been granted to the applicant within three years of the date on which the application was accepted;
- (f) an examination of the economic conditions is not required, except where an application concerns renewal of an authorisation for the same kind of operation and goods;
- (g) the application does not concern the operation of storage facilities for the customs warehousing of goods;
- (h) where an application concerns renewal of an authorisation for the same kind of operation and goods, the application is submitted within three years of expiry of the original authorisation.

Customs authorities may grant an authorisation with retroactive effect also where the goods which were placed under a customs procedure are no longer available at the time when the application for such authorisation was accepted.

...'

4. Article 288 of the UCC⁴ entitled 'Application' provides:

- '1. Articles [list of articles not including Article 211] shall apply as from 30 October 2013.
2. Articles other than those referred to in paragraph 1 shall apply as from 1 May 2016.'

2. *Delegated Regulation (EU) 2015/2446*

5. Article 172 of Delegated Regulation (EU) 2015/2446⁵, entitled 'Retroactive effect', provides:

'1. Where the customs authorities grant an authorisation with retroactive effect in accordance with Article 211(2) of the Code, the authorisation shall take effect at the earliest on the date of acceptance of the application.

...

3. If an application concerns renewal of an authorisation for the same kind of operation and goods, an authorisation may be granted with retroactive effect from the date on which the original authorisation expired.

...'

6. Article 256 of Delegated Regulation 2015/2446 states:

'...

[This Regulation] shall apply from 1 May 2016.

...'

II. Facts, procedure and questions referred

7. Beeren-, Wild-, Feinfrucht GmbH ('BWF') imports, processes and sells mushrooms preserved in brine. BWF had, until 31 December 2012, a valid authorisation for the importation of such mushrooms from non-EU countries and for placing them in free circulation for a specific use. BWF made repeated use of that authorisation prior to its expiration. The company did not request an extension of the authorisation. According to the order for reference, this omission was due to a 'lack of awareness'. BWF continued to import mushrooms from non-EU countries

⁴ As rectified by Corrigendum to 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 287, p. 90).

⁵ Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ 2015 L 343, p. 1) ('the UCC DR').

after 31 December 2012 for release for free circulation and did not claim any favourable customs treatment for those imports. BWF paid the resulting customs duties, the cost of which it was unable to pass on to its customers.

8. The fact of the expired authorisation was discovered during a company audit. On 9 January 2015, BWF requested an extension of the original authorisation (a ‘successive authorisation’). On 14 January 2015, the Hauptzollamt Erfurt (Principal Customs Office, Erfurt, Germany) (‘the Hauptzollamt’) granted a successive authorisation with retroactive effect from 9 January 2015 (i.e. from the date the application was submitted); it refused to grant authorisation with retroactive effect from the time of expiration of the prior authorisation (that is to say, from 1 January 2013).

9. Referring to its strained economic situation in the context of an ongoing restructuring, BWF once again requested that the successive authorisation be granted with effect from 1 January 2013. The Hauptzollamt refused that request by decision of 13 May 2015 holding that the conditions for granting a retroactive authorisation pursuant to Article 294(2) of the CCC IR and/or Article 294(3) of the CCC IR were not met.

10. BWF brought an administrative appeal against that decision. The Hauptzollamt refused that administrative appeal by decision of 6 April 2016, and on 3 May 2016, BWF brought an action against that decision before the referring court.

11. In the context of that action, BWF argued that the grant of a successive authorisation with retroactive effect should be governed by Article 211 of the UCC and not by Article 294 of the CCC IR, since the former, as a procedural rule, should be applied retroactively to a pending case.

12. On 21 March 2019 and, thus, while the main proceedings were pending, the Hauptzollamt issued a new decision on the basis of Article 294 of the CCC IR, replacing the decision of 13 May 2015 (in the form of the decision on the administrative appeal of 6 April 2016), and again refusing BWF’s application for extension of the retroactive effect of its successive authorisation as from 1 January 2013. This decision was based on a different reasoning than the prior decision. It is this later decision of 21 March 2019 that is the subject of the proceedings before the referring court.

13. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Is Article 211(2) of 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) (‘the UCC’) to be interpreted as applying only to applications whose retroactive authorisation period would be valid as from 1 May 2016?
- (2) If Question 1 is answered in the negative: In the case of applications for retroactive authorisation whose authorisation period is before 1 May 2016, is Article 211 of the UCC to be applied only if the retroactive authorisation was applied for before the new law entered into force, but the customs authorities refused such applications for the first time after 1 May 2016?

- (3) If Question 2 is answered in the negative: In the case of applications for retroactive authorisation whose authorisation period is before 1 May 2016, is Article 211 of the UCC to be applied even if the customs authorities refused such applications both before and after 1 May 2016 (with different reasoning)?
- (4) If Questions 1 and 2 are answered in the affirmative and Question 3 is answered in the negative: Is Article 294(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92 (OJ 1993 L 253, p. 1) to be interpreted as meaning that
- (a) an authorisation could be granted with retroactive effect from the date the original authorisation expired, as provided for in Article 294(3), for a maximum retroactive period of one year before the date the application was submitted and
 - (b) the proof of economic need provided for in Article 294(3) must also exist and attempted deception or obvious negligence be excluded in the case of the successive authorisation under Article 294(2)?

14. Written observations were submitted by BWF and the European Commission. No hearing was requested and none was held.

III. Analysis

A. Preliminary remarks

15. By its first three questions, the referring court is, in essence, seeking guidance on the temporal application of Article 211(2) of the UCC and, in particular, whether that provision may be applicable, *ratione temporis*, to a situation such as the one at issue in the main proceedings.

16. As the Court has repeatedly held, a new rule of law applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations.⁶

17. In particular, according to settled case-law, procedural rules are generally taken to apply to all proceedings pending on the date at which they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force, unless it clearly follows from their terms, their objectives or their general scheme that such an effect must be given to them.⁷

⁶ Judgment of 26 March 2015, *Commission v Moravia Gas Storage* (C-596/13 P, EU:C:2015:203, paragraph 32 and the case-law cited).

⁷ Judgments of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 9); of 23 February 2006, *Molenbergnatie* (C-201/04, EU:C:2006:136, paragraph 31); of 11 December 2008, *Commission v Freistaat Sachsen* (C-334/07 P, EU:C:2008:709, paragraph 44); and of 26 March 2015, *Commission v Moravia Gas Storage* (C-596/13 P, EU:C:2015:203, paragraph 33). Further, the Court held, in *Meridionale Industria Salumi and Others*, paragraphs 11 and 12, that procedural and substantive rules of a regulation that formed an indivisible whole and the individual provisions of which may not be considered in isolation could not be accorded retroactive effect 'unless sufficiently clear indications lead to [that] conclusion'.

18. I shall therefore address, first, the question as to whether Article 211(2) of the UCC is to be construed as a substantive or a procedural rule. Since I reach the conclusion that Article 211(2) of the UCC does set out a substantive rule, I shall address, second, the question as to whether it clearly follows from the terms, the objectives or the general scheme of that provision that it should nevertheless be applied with retroactive effect.

B. Is Article 211(2) of the UCC a substantive or a procedural rule?

19. The referring court in its order for reference states that it views Article 211 of the UCC, fundamentally, as a procedural rule. In support of that view, the referring court points to the placement of the provision in the structure of the UCC and the main substance thereof. The applicant in the main case also submits that Article 211 of Regulation No 952/13 should be viewed as a procedural rule.

20. I do not share that analysis.

1. The content of Article 211(2) of the UCC

21. Although the Court has not, as yet, addressed the question as to whether Article 211(2) of the UCC should be considered a substantive or a procedural rule or whether that provision should be interpreted as having retroactive effect, the Court has, however, addressed the distinction between substantive and procedural rules in the field of customs law in several cases. The Court has generally held that provisions that were determinative for the existence (or amount) of the customs debt were ‘substantive rules’, which could not usually be accorded retroactive application.

22. In the judgments of 23 February 2006, *Molenbergnatie* (C-201/04, EU:C:2006:136), and of 8 September 2005, *Beemsterboer Coldstore Services* (C-293/04, EU:C:2006:162), the Court held, respectively, that rules governing the customs debt itself and rules governing the conditions under which a person liable avoided the post-clearance recovery of import duties were substantive rules.

23. Thus, in *Molenbergnatie*, the Court considered that Article 221(1) and (2) of Regulation (EEC) No 2913/92⁸ concerning communications of ‘the amount of duty’ to the debtor enacted rules of an entirely procedural nature.⁹ Those rules did not govern the existence of the customs debt.

24. In contrast, the Court found Article 221(3) of the CCC enacted a rule ‘governing the customs debt itself’.¹⁰ That paragraph provided that ‘communication to the debtor [should] not take place after the expiry of a period of three years from the date on which the customs debt was incurred’. Since the debt, in the view of the Court, was ‘time-barred and, consequently, extinguished’ on

⁸ Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) (‘the CCC’).

⁹ Judgment of 23 February 2006, *Molenbergnatie* (C-201/04, EU:C:2006:136, paragraph 36).

¹⁰ *Idem*, paragraph 39.

expiry of that period, the Court concluded that the provision enacted a substantive rule.¹¹ As such, Article 221(3) of the CCC could not be applied to recovery of a customs debt incurred prior to 1 January 1994, the date that provision came into force.¹²

25. In *Beemsterboer Coldstore Services*, the Court held that Article 220(2)(b) of the CCC enacted a substantive rule ‘to the extent [it] govern[ed] the conditions under which a person liable avoid[ed] the post-clearance recovery of import duties as a result of an error on the part of the customs authorities’.¹³ In Advocate General Kokott’s words, the provision had a substantive content, because it ‘serve[d] to clarify the question whether or not a debtor still ha[d] to pay an amount legally owed’.¹⁴

26. In the case *Mitsui & Co. Deutschland* (C-256/07, EU:C:2009:167), the Court abstained from characterising explicitly a provision setting out a 12-month time limitation for certain price adjustments to be taken into account as a substantive (as opposed to a procedural) rule. Instead, the Court refused to accord retroactive effect to the provision in question on the basis that retroactive application of the new, shorter time limitation for those adjustments would ‘undermin[e] legitimate expectations’.¹⁵ However, Advocate General Mazák in his Opinion in that case stated explicitly his view that the substantive nature of the rule in question resulted from the fact that it ‘define[d] the conditions for the application of the right to adjust the transaction value’.¹⁶ That value, I should add, was determinative for the amount of the customs debt.

27. A distinction based on whether the rules in question are determinative for the existence or the amount of the customs debt makes good sense. As the Commission points out in its observations, the relief or exemption from or the imposition of customs duty for identical goods imported at the same time and under the same factual circumstances cannot depend on the duration of the administrative or legal proceedings. The same set of factual circumstances, arising at the same time, should give rise to the same customs debt and be treated according to the same substantive rules.

28. Applying this logic to the questions posed by the referring court, I consider Article 211(2) of the UCC to be a substantive provision.

29. Article 211(2) of the UCC in the English language version¹⁷ states that ‘the customs authorities shall grant an authorisation with retroactive effect’ where all of the listed conditions are fulfilled. In the absence of such an authorisation covering the importation of the goods at issue by BWF during the period from 1 January 2013 to 8 January 2015, customs duties were due on the importation of those goods.

¹¹ *Idem*, paragraph 41.

¹² *Idem*, paragraph 42. See for a critical view of the Court’s analysis in *Molenbergnatie*, Opinion of Advocate General Sharpston in Joined Cases *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb* (C-278/07 to C-280/07, EU:C:2008:521, points 31 and 32). However, the critique set out in Advocate General Sharpston’s Opinion concerned whether the expiry of a limitation period actually extinguishes the customs debt (as the Court held in *Molenbergnatie*), and thus whether the limitation period actually governed the debt itself. It did not call into question the finding that a rule governing the debt should be considered a substantive rule.

¹³ Judgment of 9 March 2006, *Beemsterboer Coldstore Services* (C-293/04, EU:C:2006:162, paragraph 20).

¹⁴ Opinion of Advocate General Kokott in *Beemsterboer Coldstore Services* (C-293/04, EU:C:2005:527, point 24).

¹⁵ Judgment of 19 March 2009, *Mitsui & Co. Deutschland* (C-256/07, EU:C:2009:167, paragraph 36).

¹⁶ Point 47 of that Opinion.

¹⁷ I note that the French language version differs in meaning from the English version: ‘Les autorités douanières *peuvent* accorder une autorisation avec effet rétroactif ...’ (emphasis added). The Bulgarian, Danish, German, Italian, Polish, Slovak and Swedish language versions all appear to be consistent with the English version. The difference is not determinative for the analysis of this Opinion.

30. If, however, BWF were granted an authorisation with retroactive effect, either pursuant to Article 211(2) of the UCC or pursuant to Article 294 of the CCC IR, the end-use exemption would apply, and BWF could apply for a refund of the paid customs duties.

31. The fulfilment of all of the conditions listed in Article 211 of the UCC is not only a condition for the granting of an authorisation with retroactive effect, but – disregarding for the moment the French language version of Article 211(2) of the UCC – actually requires the customs authorities to grant such an authorisation upon application. That authorisation is, in turn, determinative for the existence of the customs debt with respect to the goods in question.

32. Pursuant to the case-law referred to in points 22 to 26 of this Opinion, it is therefore my view that Article 211(2) of the UCC must be considered as setting out a substantive rule.

33. A closer look at the individual conditions listed in Article 211(2)(a) to (h) of the UCC only confirms that view.

34. Subparagraph (a) requires a ‘proven economic need’ and subparagraph (b) requires that the application not be related to attempted deception. Neither the existence of an economic need nor the absence of deception concern procedural matters; rather, they are substantive requirements that must be fulfilled to qualify for an authorisation with retroactive effect. Even though subparagraph (a) requires a ‘proven’ economic need, it does not address the procedural issues of providing such proof.

35. Subparagraph (c) requires the applicant to prove, on the basis of accounts or records: that all requirements of the procedure are met; that, where appropriate, the goods can be identified for the period involved; and that the accounts or records allow the procedure to be controlled. Subparagraph (d) requires that all the formalities necessary to regularise the situation of the goods can be carried out, and subparagraph (f) provides that ‘an examination of the economic conditions is not required’. Even though those provisions concern procedural issues, they do not address the manner in which those requirements should be fulfilled or how that proof should be provided, but rather set out conditions for the granting of an authorisation with retroactive effect.

36. Subparagraph (e) sets out the condition that no authorisation with retroactive effect has been granted to the applicant within three years of the date on which the application was accepted, subparagraph (g) excludes applications concerning the operation of storage facilities for the customs warehousing of goods, and subparagraph (h) places a three-year limitation on applications concerning the same kind of operation and goods.

37. All of these requirements are, in my view, either entirely or predominantly, substantive conditions.

2. The place of Article 211(2) in the structure of the UCC

38. Article 211 is contained in Chapter 1, entitled ‘General provisions’ of Title VII of the UCC, entitled ‘Special procedures’. Chapter 1 encompasses Articles 210 to 225 of the UCC.

39. The organisation of the provisions of Chapter 1 loosely follows a pattern where one or two wholly or predominantly substantive provisions concerning, respectively, authorisation (Article 211), discharge of a special procedure (Article 215), or movement of goods (Article 219) and usual forms of handling (Article 220) are followed by an article entitled ‘Delegation of

power’, empowering the Commission to adopt delegated acts supplementing certain non-essential parts of those rules (Articles 212, 216 and 221), and an article entitled ‘Conferral of implementing powers’ (Articles 213, 217 and 222), instructing the Commission to ‘specify, by means of implementing acts, the procedural rules’ concerning part of those substantive rules.¹⁸

40. Therefore, I do not consider that the structure of the UCC mitigates in favour of treating Article 211(2) as a procedural rule. On the contrary, the placement of Article 211(2) in Chapter 1 of Title VII is where one would expect to find a substantive, and not a procedural, rule.

C. May Article 211(2) nevertheless be applied retroactively?

41. The substantive rules of EU law may exceptionally be interpreted as applying to situations existing before their entry into force in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them.¹⁹

42. In *Beemsterboer Coldstore Services*, the Court in that regard held that it was appropriate to apply the new, amended version of a substantive rule to situations existing before its entry into force because the new version was ‘essentially an interpretative provision’.²⁰ In that case, the amended version of the provision at issue was enacted with the aim of improving legal certainty and, as the new text strengthened the protection of the legitimate expectations of the traders concerned, the principles of legal certainty and protection of legitimate expectations did not preclude the application of the amended version to situations existing before its entry into force.²¹

43. By contrast, Article 221(2) of the UCC introduces substantive changes to prior law. Whereas Article 294 of the CCC IR used the wording according to which the customs authorities ‘may issue a retroactive authorisation’, Article 221(2) of the UCC states that those authorities ‘shall grant an authorisation with retroactive effect’ where all of the listed conditions (of either an entirely or a predominantly substantive character) are fulfilled. This is clearly not a mere interpretative change.

44. I have found no indication in the preamble or in the legislative history that any retroactive application of Article 211(2) of the UCC was intended.

45. I should also point out that the issue for the referring court concerns whether the rules for the end-use procedure may be applied retroactively. The authorisation for the end-use procedure may only be granted under certain conditions and that procedure thus constitutes an exception to the general customs rules. As such, the rules regulating that procedure should be interpreted strictly.²² The granting of an authorisation with retroactive effect pursuant to Article 211(2) of the UCC and Article 172(1) of the UCC DR likewise constitutes an exception to the general rule for the granting of authorisations, which is subject to specific conditions. The granting of an authorisation with retroactive effect from the date on which the original authorisation expired pursuant to Article 211(2)(h) of the UCC and Article 172(3) of the UCC DR is a yet further exception to the

¹⁸ There are no specific articles empowering the Commission to adopt delegated acts or requiring it to specify procedural rules attached to Article 210, which concerns the scope of the special procedures, to Article 214 addressing records requirements, or to Article 218 concerning the transfer of rights and obligations.

¹⁹ Judgment of 9 March 2006, *Beemsterboer Coldstore Services* (C-293/04, EU:C:2006:162, paragraph 21).

²⁰ *Idem*, paragraphs 22 and 23.

²¹ *Idem*, paragraphs 25 and 26.

²² See by analogy, judgments of 11 November 1999, *Söhl & Söhlke* (C-48/98, EU:C:1999:548, paragraph 52); of 29 July 2010, *Isaac International* (C-371/09, EU:C:2010:458, paragraph 42); and of 14 January 2010, *Terex Equipment and Others* (C-430/08 and C-431/08, EU:C:2010:15, paragraph 42).

general rules for authorisations with retroactive effect, which is subject to additional conditions. An expansive interpretation of the application, *ratione temporis*, of those rules does not, therefore, appear justified.

D. The second and third question

46. A separate requirement for the application of procedural rules to a factual situation pre-dating the effective date of those rules is that the case is ‘pending’ at the time the procedural rules enter into force. The answer to the first question renders moot the second and third questions posed by the referring court. It is therefore not necessary to address the issue as to whether the case was ‘pending’ at the time that Article 211(2) of the UCC became applicable (1 May 2016).

IV. Conclusion

47. I therefore propose that the Court should provide the referring court with the following answer to the first three questions referred:

Article 211(2) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, as a substantive rule, applies only to applications whose retroactive authorisation period would be valid as from 1 May 2016.