



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

20 June 2013*

(Tariff classification — Combined Nomenclature — Sugar-based product consisting of 65% lysine sulphate and 35% impurities resulting from the manufacturing process — Regulation (EC) No 1719/2005 — Regulation (EC) No 1265/2001 — Production refund on certain products used in the chemical industry — Community aid wrongly paid — Repayment — Principle of the protection of legitimate expectations)

In Case C-568/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vestre Landsret (Denmark), made by decision of 9 November 2011, received at the Court on 14 November 2011, in the proceedings

Agroferm A/S

v

Ministeriet for Fødevarer, Landbrug og Fiskeri,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis (Rapporteur), J.-C. Bonichot, A. Arabadjev and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 22 November 2012,

after considering the observations submitted on behalf of:

- Agroferm A/S, by J. Lentz, advokat,
- the Danish Government, by V. Pasternak Jørgensen, acting as Agent, and by J. Pinborg, advokat,
- the European Commission, by C. Barslev and P. Rossi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 January 2013,

gives the following

* Language of the case: Danish.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of headings 2309, 2922 and 3824 of the Combined Nomenclature listed in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EC) No 1719/2005 of 27 October 2005 (OJ 2005 L 286, p. 1, ‘the CN’), and of the principles of European Union law governing the recovery of sums wrongly paid.
- 2 The request has been made in proceedings between Agroferm A/S (‘Agroferm’) and Ministeriet for Fødevarer, Landbrug og Fiskeri (the Danish Ministry of Food, Agriculture and Fisheries, ‘Ministeriet’) concerning the repayment, by Agroferm, of lysine sulphate production refunds which had been wrongly paid to it.

Legal context

International law

- 3 The Harmonised Commodity Description and Coding System (‘the HS’) was drawn up by the Customs Cooperation Council, now the World Customs Organisation, and established by the International Convention on the Harmonised Commodity Description and Coding System concluded at Brussels on 14 June 1983 and the Protocol of Amendment thereto of 24 June 1986, which were approved on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).
- 4 According to the Explanatory Notes to the HS relating to chapter 29 thereof, the word ‘impurities’ applies exclusively to substances whose presence in the single chemical compound results solely from the manufacturing process. Those substances are not to be regarded as impurities permitted under those notes when they are deliberately left in the product with a view to rendering it suitable for specific use rather than for general use.
- 5 The Explanatory Notes to the HS relating to heading 2309 thereof state that that heading covers preparations designed to be used in the manufacture of ‘complete’ or ‘supplementary’ feeds. Those preparations are, generally speaking, compound compositions consisting of a number of substances, sometimes called ‘additives’, the nature and proportions of which vary according to the animal production required. Those substances, which include amino-acids, improve, inter alia, digestion and, more generally, ensure that the animal makes good use of the feeds and safeguard its health.

European Union law

Tariff classification

- 6 The CN is based on the HS. Part Two of the CN contains a classification of goods in sections, chapters, headings and subheadings.
- 7 Chapter 23 of the CN is entitled ‘Residues and waste from the food industries; prepared animal fodder’. Under Note 1 to that Chapter, heading 2309 of the CN includes ‘products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material, other than vegetable waste, vegetable residues and by-products of such processing’. Heading 2309 of the CN is entitled ‘Preparations of a kind used in animal feeding’.

- 8 Chapter 29 of the CN is entitled ‘Organic Chemicals’. Note 1(a) and (b) of that chapter states:
‘Except where the context otherwise requires, the headings of this chapter apply only to:
- (a) separate chemically defined organic compounds, whether or not containing impurities;
 - (b) mixtures of two or more isomers of the same organic compound (whether or not containing impurities), except mixtures of acyclic hydrocarbon isomers (other than stereoisomers), whether or not saturated (chapter 27).’
- 9 Heading 2922 of the CN is entitled ‘Oxygen-function amino-compounds’.
- 10 Chapter 38 of the CN is entitled ‘Miscellaneous chemical products’. Heading 3824 of the CN relates to ‘[p]repared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included’.

Production refunds

– Regulation (EC) No 1260/2001

- 11 Article 7(3) of Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector (OJ 2001 L 178, p. 1) provides:

‘It has been decided to grant production refunds on the products listed in Article 1(1)(a) and (f) and on the syrups listed in Article 1(1)(d), and on chemically pure fructose (levulose) falling within CN Code 1702 50 00 as an intermediate product, where these fall within one of the situations referred to in Article 23(2) [EC] and are used to manufacture certain products of the chemical industry.

...’

– Regulation (EC) No 1265/2001

- 12 Article 1 of Commission Regulation (EC) No 1265/2001 of 27 June 2001 laying down detailed rules for the application of Council Regulation (EC) No 1260/2001 as regards granting the production refund on certain sugar products used in the chemical industry (OJ 2001 L 178, p. 63) states:

‘1. For the purposes of this Regulation “basic products” means:

- (a) products referred to in Article 1(1)(a) and (f) of Regulation ... No 1260/2001 and
- (b) sugar syrups referred to in Article 1(1)(d) of Regulation ... No 1260/2001 and falling within CN codes ex 1702 60 95 and ex 1702 90 99 having a purity of at least 85%

which are used in the manufacture of the products of the chemical industry listed in Annex I.

...’

- 13 Article 2 of Regulation No 1265/2001 provides:

‘1. The production refund shall be granted by the Member State in whose territory processing of the basic products takes place.

2. The Member State may grant the refund only if customs control, or administrative inspection affording equivalent guarantees, ensures that the basic products are used for the purpose specified in the application referred to in Article 3.'

14 Article 10 of that regulation provides:

'1. Application for a production refund shall be made in writing to the competent authority of the Member State where the basic product is to be processed.

The application must specify:

...

(c) the tariff heading and description of the chemical product for the manufacture of which the basic product is to be used;

...

3. For the purposes of paragraph 2:

...

(b) entitlement to the production refund shall be made conditional on the granting of prior approval to the processor by the Member State on whose territory the said processor is to process the intermediate product into a chemical product referred to in Annex I.

The approvals referred to in the second subparagraph shall be granted by the Member State in question if the applicant gives the latter every opportunity to conduct the necessary verifications.

...'

15 It follows from Annex I to Regulation No 1265/2001 that production refunds are granted for the manufacture of products classified under chapters 29 (organic chemicals) and 38 (miscellaneous chemical products) of the CN.

Financing of the common agricultural policy

16 Article 8 of Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy provided:

'1. Member States shall, in accordance with national laws, regulations and administrative provisions, take the measures necessary to:

(a) satisfy themselves that transactions financed by the Fund are actually carried out and executed correctly;

(b) prevent and pursue irregularities;

(c) recover sums lost as a result of irregularities or negligence.

The Member States shall inform the Commission of the measures taken for those purposes and in particular of the state of the administrative and judicial procedures.

2. In the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

The sums recovered shall be paid to the accredited paying agencies and deducted by them from the expenditure financed by the Fund. The interest on sums recovered or paid late shall be paid into the Fund.

...'

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

- 17 Agroferm is a Danish undertaking that, until June 2006, manufactured lysine sulphate in a factory in Esbjerg (Denmark). Lysine compounds are manufactured from sugar, which is the basic product.
- 18 On 19 May 2004, Agroferm applied to the Danish customs authorities for a prior approval for the grant of lysine sulphate production refunds. In that application, Agroferm stated that the product which it planned to manufacture was lysine sulphate, which, in its view, came under heading 2922 of the CN. Following a favourable response from those authorities to that application, Agroferm regularly received production refunds corresponding to the quantities of sugar which it used to manufacture lysine sulphate.
- 19 Following analyses carried out by Force Technology, a private company acting on behalf of the Danish customs authorities, responsible for analysing samples of products for the purposes of their tariff classification, it was proposed that the product made by Agroferm be classified under chapter 23 of the CN and not under chapter 29 thereof. In an opinion dated 5 April 2006, Force Technology stated that the analysed sample had been manufactured by fermentation and that the product concerned contained lysine sulphate and co-products of fermentation. Force Technology stated that a product which was only 66% 'pure' (the percentage of lysine sulphate contained in dry matter) could not be classified under chapter 29 of the CN.
- 20 Having been consulted by the Danish customs authorities, the Customs Code Committee stated that a case-by-case approach had to be preferred when deciding on the admissible level of impurities and the classification of chemical products, and that it was appropriate to classify the preparation at issue in the main proceedings under chapter 23 of the CN and not under chapter 29 thereof.
- 21 By a decision of 10 August 2006, Direktoratet for FødevareErhverv (the Danish Food Industry Agency, 'Direktoratet') informed Agroferm that it had now been established, after consulting the European Commission and the Customs Code Committee, that the products manufactured by Agroferm were not to be classified as lysine-based products for the purpose of heading 2922 of the CN, and that, therefore, Agroferm was not entitled to production refunds.
- 22 On 22 November 2006, Direktoratet decided that Agroferm should repay a total amount of around DKK 86.6 million, plus interest, corresponding, in its view, to the production refunds received between August 2004 and March 2006, an amount on which the parties to the main proceedings disagree.
- 23 On 18 December 2006, Agroferm brought, before Ministeriet, an action directed against the decisions taken by Direktoratet. In a decision of 18 July 2008, Ministeriet followed the decisions adopted by Direktoratet on all counts and held that Agroferm had not acted in good faith when it had applied to receive production refunds.

- 24 By an application of 23 September 2009, Agroferm brought proceedings before the Retten i Esbjerg (the local court in Esbjerg), which, by a decision of 4 November 2009 and following the unanimous assent of the parties, referred the case to the Vestre Landsret (Western Regional Court) (Denmark) on the ground that the dispute in the main proceedings constituted a test case, in terms of Danish civil procedure, since the case related to the interpretation of questions concerning European Union law and since the referral of a request for a preliminary ruling was to be envisaged.
- 25 In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Does a product which is manufactured from sugar fermented with the aid of *Corynebacterium glutamicum* bacteria and which – as specified in more detail in Annex 1 to the order for reference – consists of approximately 65% lysine sulphate, in addition to impurities from the manufacturing process (unmodified raw materials, reagents used in the manufacturing process, and by-products), come under heading 2309, heading 2922 or heading 3824 in the [CN]?’

Is it relevant in this connection whether the impurities have been left deliberately with a view to making the product particularly suitable, or to improve its suitability, for animal feed production, or whether the impurities have been left because it is not necessary or expedient to remove them? What guidelines should be used to assess this matter in any given case?

Is it relevant to the answer that it is possible to manufacture other products containing lysine, including “pure” ($\geq 98\%$) lysine and lysine-HCl products that have a higher lysine content than the lysine sulphate product described above, and is it relevant in this connection that the amount of lysine sulphate and other impurities in the lysine sulphate product described above corresponds to that contained in other producers’ lysine sulphate products? What guidelines should be used to assess this matter in any given case?

- (2) If it is assumed that, according to the principle of legality, the production was not covered by the refund scheme, would it be contrary to European Union law for the national authorities, in compliance with national principles of legal certainty and the principle of the protection of legitimate expectations, to refrain, in a case such as the present, from seeking recovery of refund amounts that the producer accepted in good faith?
- (3) If it is assumed that, according to the principle of legality, the production was not covered by the refund scheme, would it be contrary to European Union law for the national authorities, in compliance with national principles of legal certainty and the principle of the protection of legitimate expectations, to honour, in a case such as the present, commitments (refund certificates) which were subject to time-limits and which the producer accepted in good faith?

Consideration of the questions referred

The first question

- 26 By its first question the referring court asks, in essence, whether a product such as that at issue in the main proceedings, a compound of lysine sulphate with impurities resulting from the manufacturing process, comes under headings 2309, 2922 or 3824 of the CN.
- 27 It should be noted in that regard that it is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the

relevant heading of the CN and in the section or chapter notes (see, inter alia, Case 40/88 *Weber* [1989] ECR 1395, paragraph 13; Case C-142/06 *Olicom* [2007] ECR I-6675, paragraph 16; and Case C-215/10 *Pacific World and FDD International* [2011] ECR I-7255, paragraph 28).

- 28 It should also be recalled that the HS Explanatory Notes are an important means of ensuring the uniform application of the Common Customs Tariff and, as such, may be regarded as useful aids to its interpretation (see, to that effect, Case C-11/93 *Siemens Nixdorf* [1994] ECR I-1945, paragraph 12; Case C-15/05 *Kawasaki Motors Europe* [2006] ECR I-3657, paragraph 36; and *Pacific World and FDD International*, paragraph 29).
- 29 As regards, in the first place, heading 2922 of the CN, Note 1(a) to chapter 29 of the CN provides that the headings of that chapter apply only to separate chemically defined organic compounds, whether or not containing impurities.
- 30 It is apparent from the order for reference that the lysine sulphate based product at issue in the main proceedings was a chemically defined organic compound containing around 65% lysine sulphate and 35% biomass resulting from the fermentation manufacturing process used. Further, according to the referring court, that biomass, which contains nutrients with a high biological value, had been deliberately left in that product in order to improve the product's suitability for use as an additive in animal feed and to prevent the lysine sulphate from absorbing moisture.
- 31 The question therefore arises whether that biomass may be placed in that category of impurities the presence of which, according to Note 1(a) to chapter 29 of the CN, does not call into question classification under the headings of that chapter.
- 32 In that regard, although Note 1 to chapter 29 of the CN permits the presence of impurities, it must be held that they are necessarily residual, in order not to affect the 'separateness' of the organic compound at issue. Indeed, as the Advocate General observed in point 31 of her Opinion, the reason for that tolerance is related to the fact that as a general rule 100% purity may not be technically possible.
- 33 In addition, it follows from Notes 1(f) and (g) to chapter 29 of the CN that the headings of that chapter may include inter alia the products referred to in Note 1(a) with various added substances necessary for their preservation or transport, or to facilitate their identification, or for safety reasons, provided that the additions do not render the product particularly suitable for a specific use rather than for general use.
- 34 If, according to Notes 1(f) and (g) of chapter 29, the addition of other substances in products capable of being classified under that chapter must meet certain precise requirements, relating in particular to reasons of safety or identification, whilst maintaining the general use of the product concerned, it is clear that, *a fortiori*, the same is true of the impurities mentioned in Note 1(a) of that chapter.
- 35 Where a product contains impurities resulting from the manufacturing process which render it suitable for specific uses, distinct from its general use, such a product cannot be considered to be 'separate' within the meaning of Note 1(a) to Chapter 29 of the CN, since such impurities determine its use.
- 36 Indeed, that finding also follows from the Explanatory Notes to the HS relating to Chapter 29 thereof, as set out in paragraph 4 of this judgment.
- 37 In the present case, it is apparent from the order for reference that the impurities are left in the product at issue in the main proceedings after fermentation with a view to rendering it suitable for a specific use, rather than for its general use, as an additive for complete animal feed containing a number of nutrients with a high biological value.

- 38 It follows that a lysine sulphate based product such as that at issue in the main proceedings cannot be classified under heading 2922 of the CN.
- 39 As regards heading 2309 of the CN, that covers ‘preparations of a kind used in animal feeding’. In accordance with Note 1 to Chapter 23 of the CN, that heading includes products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material, other than vegetable waste, vegetable residues and by-products of such processing.
- 40 Further, it follows from the Explanatory Notes to the HS relating to heading 2309 thereof, as stated in paragraph 5 of this judgment, that that heading covers, in particular, additives, the nature and proportions of which vary according to the animal production required, which include amino-acids.
- 41 In that regard, it must be noted that the intended use of a product may also constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties (see Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 36; *Olicom*, paragraph 18, and Case C-123/09 *Roeckl Sporthandschuhe* [2010] ECR I-4065, paragraph 28).
- 42 It is apparent from the order for reference that the lysine sulphate based product at issue in the main proceedings was designed, as an additive, to be used in the production of animal feed. It consisted of a number of substances, including amino-acids, supplying nutritional benefits to animals.
- 43 Accordingly, the objective characteristics of such a product, and, in particular, the biomass resulting from the manufacturing process deliberately left in it, meant that it was designed for use as an additive in the production of animal feed. It follows that that product met the requirements of classification under heading 2309 of the CN.
- 44 As for heading 3824 of the CN, suffice it to note that it is a residual heading, which applies solely when the product concerned cannot be classified under another heading. Since that is not the case here, it is not necessary to examine the relevance of that heading.
- 45 Consequently the answer to the first question is that the CN must be interpreted as meaning that a product composed of lysine sulphate and impurities resulting from the manufacturing process must be classified under heading 2309 as a preparation of a kind used in animal feeding.

The second and third questions

- 46 By its second and third questions, which should be examined together, the referring court asks, in essence, whether European Union law precludes national customs authorities, having regard to the principles of legal certainty and of the protection of legitimate expectations which must be observed under national law, first, from seeking repayment of wrongly paid lysine sulphate production refunds that the producer accepted in good faith and, second, from refusing to pay lysine sulphate production refunds which those authorities had given undertakings to that producer to pay.
- 47 At the outset, it must be borne in mind that it is settled case-law that it cannot be regarded as contrary to European Union law for national law, as far as the withdrawal of administrative measures and the recovery of sums wrongly paid by public authorities are concerned, to take into account, in addition to the principle of legality, the principles of the protection of legitimate expectations and legal certainty, since those principles form part of the legal order of the European Union. Those principles must be observed all the more strictly in the case of rules liable to have financial consequences (see Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others* [2008] ECR I-1561, paragraph 52 and case-law cited).

- 48 However, it must be noted that Regulation No 1265/2001, under which Agroferm received lysine sulphate production refunds, sets out the rules for the application of Regulation No 1260/2001 on the common organisation of the markets in the sugar sector in the context of the common agricultural policy.
- 49 Therefore, the legal basis for the repayment of amounts wrongly paid by the European Union under Regulation No 1265/2001 is in the provisions of Regulation No 1258/1999 on the financing of the common agricultural policy (see, by analogy, as regards the recovery of subsidies wrongly paid under the Structural Funds, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, paragraph 39).
- 50 In particular, Article 8(1)(c) of Regulation No 1258/1999 requires the Member States to recover sums lost as a result of irregularities or negligence without there being any need for authority to do so under national law (see, to that effect, Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 22).
- 51 In that context, the principle of the protection of legitimate expectations must be applied in accordance with the rules of European Union law (see, by analogy, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, paragraph 53).
- 52 In that regard, it must be stated that the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of European Union law; nor can the conduct of a national authority responsible for applying European Union law, which acts in breach of that law, give rise to a legitimate expectation on the part of a trader of beneficial treatment contrary to European Union law (see Joined Cases C-31/91 to C-44/91 *Lageder and Others* [1993] ECR I-1761, paragraph 35; Case C-94/05 *Emsland-Stärke* [2006] ECR I-2619, paragraph 31; and Case C-153/10 *Sony Supply Chain Solutions (Europe)* [2011] ECR I-2775, paragraph 47).
- 53 Article 1(1) of Regulation No 1265/2001 includes, inter alia, sugar used for the manufacture of products of the chemical industry listed in Annex I to that regulation as 'basic products' subject to a production refund. Annex I expressly refers to the products falling under chapters 29 and 38 of the CN. It is apparent, in addition, from Article 10(1)(c) of that regulation that the application for a production refund must state the tariff heading and description of the chemical product for the manufacture of which the basic product is to be used.
- 54 In that regard, as the Advocate General noted in point 63 of her Opinion, a trader may rely on a legitimate expectation of payment of a production refund only if the product manufactured by him is to be classified under the heading or in the chapter of the CN indicated in the refund certificate.
- 55 In the present case, as is apparent from the reply given to the first question referred, the product at issue in the main proceedings ought, in fact, to have been classified under heading 2309 of the CN, and not under heading 2922 thereof, as the trader who received the production refunds had incorrectly stated.
- 56 Therefore, the production refunds on that product were contrary to European Union law. Consequently, it is clear that the Danish customs authorities had no power to create, for the trader concerned, irrespective of his good faith, legitimate expectations that he would be treated in a manner contrary to European Union law. This is so even though, first, those refunds had been granted on the basis of a prior approval given by those authorities and, second, those authorities had undertaken to make further refunds, before the error made by the trader in his declaration came to their attention.
- 57 It follows from the foregoing that the answer to the second and third questions referred is that the principle of the protection of legitimate expectations must be interpreted as meaning that it does not preclude, in a situation such as that in the main proceedings, the national customs authorities from,

first, seeking repayment of a wrongly paid amount of lysine sulphate production refunds that the producer has already received and, second, refusing to pay production refunds on that product which those authorities had given undertakings to that producer to pay.

Costs

⁵⁸ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

- 1. The Combined Nomenclature listed in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Regulation (EC) No 1719/2005 of 27 October 2005, must be interpreted as meaning that a product composed of lysine sulphate and impurities resulting from the manufacturing process must be classified under heading 2309 as a preparation of a kind used in animal feeding.**
- 2. The principle of the protection of legitimate expectations must be interpreted as meaning that it does not preclude, in a situation such as that in the main proceedings, the national customs authorities from, first, seeking repayment of a wrongly paid amount of lysine sulphate production refunds that the producer has already received and, second, refusing to pay production refunds on that product which those authorities had given undertakings to that producer to pay.**

[Signatures]