



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

21 October 2021 *

(Reference for a preliminary ruling – Customs union – End-use procedure – Authorisation with retroactive effect – Regulation (EU) No 952/2013 – Union Customs Code – Article 211(2) – Scope *ratione temporis* – Conditions – Regulation (EEC) No 2454/93 – Article 294(2) – Scope)

In Case C-825/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Thüringer Finanzgericht (Finance Court, Thuringia, Germany), made by decision of 22 October 2019, received at the Court on 12 November 2019, in the proceedings

Beeren-, Wild-, Feinfrucht GmbH

v

Hauptzollamt Erfurt,

THE COURT (Fourth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Fourth Chamber, S. Rodin and N. Piçarra (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Beeren-, Wild-, Feinfrucht GmbH, by H. Nehm, Rechtsanwalt,
- the European Commission, by B.-R. Killmann and F. Clotuche-Duvieusart, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 June 2021,

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of 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, and corrigendum OJ 2013 L 287, p. 90; ‘the UCC’) and of Article 294(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 1602/2000 of 24 July 2000 (OJ 2000 L 188, p. 1) (‘Regulation No 2454/93’).
- 2 The request has been made in proceedings between Beeren-, Wild-, Feinfrucht GmbH (‘BWF’) and the Hauptzollamt Erfurt (Principal Customs Office, Erfurt, Germany; ‘the customs authority’), concerning the extent of the retroactive effect of an authorisation to suspend customs duties granted to BWF for the importation of goods under the end-use procedure.

Legal context

Regulation (EEC) No 2913/92

- 3 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) was repealed with effect from 1 May 2016 by the UCC. Article 21 of Regulation No 2913/92 provided:

‘1. The favourable tariff treatment from which certain goods may benefit by reason of their nature or end-use shall be subject to conditions laid down in accordance with the Committee procedure. ...

2. For the purposes of paragraph 1, the expression “favourable tariff treatment” means any reduction or suspension, even within the framework of a tariff quota, of an import duty within the meaning of Article 4(10).’

Regulation No 2454/93

- 4 Regulation No 2454/93 was repealed, with effect from 1 May 2016, by Commission Implementing Regulation (EU) 2016/481 of 1 April 2016 (OJ 2016 L 87, p. 24). Article 292(1) of Regulation No 2454/93 provided:

‘The granting of a favourable tariff treatment in accordance with Article 21 of the Code shall, where it is provided that goods are subject to end-use customs supervisions, be subject to a written authorisation.

Where goods are released for free circulation at a reduced or zero rate of duty on account of their end-use and the provisions in force require that the goods remain under customs supervision in accordance with Article 82 of the Code, a written authorisation for the purposes of end-use customs supervisions shall be necessary.’

- 5 Article 294 of that regulation was worded as follows:

‘1. The customs authorities may issue a retroactive authorisation.

Without prejudice to paragraphs 2 and 3, a retroactive authorisation shall take effect on the date the application was submitted.

2. 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.

3. In exceptional circumstances, the retroactive effect of an authorisation may be extended further, but not more than one year before the date the application was submitted, provided a proven economic need exists and:

- (a) the application is not related to attempted deception or to obvious negligence;
- (b) the applicant's accounts confirm that all the requirements of the arrangements can be regarded as having been met and, where appropriate, in order to avoid substitution the goods can be identified for the period involved, and such accounts allow the arrangements to be verified;
- (c) all the formalities necessary to regularise the situation of the goods can be carried out, including, where necessary, the invalidation of the declaration.'

The UCC

6 Article 211 of the UCC, entitled 'Authorisation', provides in paragraphs 1 and 2:

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

- (a) the use of the inward or outward processing procedure, the temporary admission procedure or the end-use procedure;

...

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.

...'

7 Article 254 of that code, entitled 'End-use procedure', states in paragraph 1:

'Under the end-use procedure, goods may be released for free circulation under a duty exemption or at a reduced rate of duty on account of their specific use.'

8 Article 288 of the UCC, entitled 'Application', provides, in paragraph 1, that the articles listed in that paragraph are to apply as from 30 October 2013, that is to say from the date of entry into force of that code, in accordance with Article 287. Article 288(2) provides that articles other than those referred to in paragraph 1 – including Articles 211 and 254 of that code – are to apply as from 1 May 2016.

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

9 BWF processes and sells mushrooms preserved in brine, unsuitable for consumption in an unaltered state, intended for the food-canning industry.

10 During the period between 1 January 2010 and 31 December 2012, BWF held an authorisation 'for the release for free circulation of non-Union goods for a specific use', on the basis of which it imported those goods on 10 occasions, benefiting from a suspension of customs duties.

11 BWF subsequently continued to import those goods without, however, having applied for an extension of that authorisation. During a tax inspection, the competent authority found that BWF no longer held the required authorisation. Consequently, on 9 January 2015, BWF applied for an extension of the authorisation which it had held it until 31 December 2012.

12 On 14 January 2015, the customs authority granted that application in part. It granted BWF, on the basis of Article 294(1) of Regulation No 2454/93, a new authorisation with retroactive effect to the date on which the application was lodged, that is 9 January 2015.

13 On 22 April 2015, BWF, referring to a difficult economic situation due to ongoing restructuring, requested that the retroactive effect of the new authorisation be extended to 1 January 2013, the date on which the original authorisation expired.

14 By decision of 13 May 2015, the customs authority rejected that request on the basis of Article 294(2) of Regulation No 2454/93. It took the view that BWF could not rely on paragraph 3 of that article either, since, first, it extends the retroactive effect of authorisations

only for a period which may not exceed one year before the date of submission of the application and, second, BWF had not demonstrated the existence of an economic need. It also found that, owing to the obvious negligence on the part of BWF, which had not submitted its application for renewal in good time despite instructions to that effect, it was not appropriate to grant BWF the benefit of such a retroactive effect.

- 15 Since the complaint against that decision was rejected on 6 April 2016, BWF brought an action against that rejection decision before the referring court on 3 May 2016.
- 16 BWF argues, in the first place, that the legality of the decision of the customs authority of 6 April 2016 not to grant retroactive authorisation for the period from 1 January 2013 to 8 January 2015 should be examined in the light of Article 211 of the UCC, which became applicable on 1 May 2016. That article is, in the applicant's view, a 'purely' procedural provision which, according to the Court's settled case-law, is to be applied retroactively.
- 17 In the second place, BWF submits that the customs authority infringed Article 294(3) of Regulation No 2454/93, in that, first, it applied the criterion of 'obvious negligence', laid down in point (a) of that provision, in the context of the examination of an application for renewal of an authorisation under Article 294(2) of that regulation. Second, the customs authority was wrong to take the view that the time limit on the retroactive effect of authorisations, laid down in Article 294(3) of that regulation, was applicable to applications submitted under paragraph 2 of that article.
- 18 On 21 March 2019, the customs authority adopted a new decision rejecting the application for authorisation with retroactive effect until 1 January 2013, on the basis of Article 294(2) of Regulation No 2454/93. That decision is based on reasoning that differs from the prior decisions. It is apparent from the documents before the Court that that decision was adopted following the communication to the parties to the main proceedings of the referring court's opinion that the decisions of the customs authority of 13 May 2015 and 6 April 2016 were unlawful (*rechstwidrig*), on the ground that that authority had not exercised the discretion conferred on it by Article 294 of that regulation. The decision of the customs authority of 21 March 2019 is thus an amended administrative act (*korrigierter Verwaltungsakt*).
- 19 The referring court states that, under national procedural law, the action brought by BWF on 3 May 2016 must be regarded as concerning the decision of 21 March 2019 rejecting the application for authorisation with retroactive effect from 1 January 2013. It takes the view that the outcome of the dispute before it depends on whether Article 211 of the UCC is applicable to that dispute, even though the application for authorisation with retroactive effect was lodged on 9 January 2015, on which date the provisions of that article were not yet applicable under Article 288(2) of the UCC.
- 20 That court considers Article 211 of the UCC to be a procedural provision, 'fundamentally because of its place in the structure of the legislation and its essential content'. It recognises, however, that that article sets out certain criteria for the delivery of authorisation with retroactive effect, which do not explicitly appear in Article 291 et seq. of Regulation No 2454/93. In those circumstances, the referring court is uncertain whether Article 211 of the UCC must be regarded as a 'purely procedural provision' or as a provision which includes both procedural and substantive provisions which form an indivisible whole, and the individual provisions of which cannot be

considered in isolation with regard to the time at which they take effect, by analogy with the judgment of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270).

- 21 Should the Court take the view that the dispute in the main proceedings must be decided on the basis of Article 294(2) of Regulation No 2454/93, the referring court notes that, in accordance with the internal service instructions of the German customs administration, by which it does not consider itself to be bound, the renewal of an authorisation cannot take effect retroactively, pursuant to Article 294(3) of that regulation, on a date more than one year before the date on which the application was lodged. According to that court, the German customs administration further restricts the material scope of Article 294(2) of that regulation in that it makes the renewal of the authorisation referred to therein retroactively subject to the conditions laid down in paragraph 3 of that article, namely proof of the economic need and the absence of any attempt at deception or obvious negligence on the part of the applicant.
- 22 In those circumstances, the Thüringer Finanzgericht (Finance Court, Thuringia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is Article 211(2) of [the UCC] to be interpreted as applying only to applications for whose retroactive authorisation period would be valid 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 [Regulation No 2454/93] 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)?’

The request to have the oral procedure reopened

- 23 By document lodged at the Court Registry on 18 June 2021, BWF made an application for the oral part of the procedure reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice. It submits that, since, in his Opinion of 3 June 2021, the Advocate General did not examine the fourth question referred for a preliminary ruling, an ‘exceptional situation’ exists, which can be remedied only by application of that provision.

- 24 It should be noted that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his or her involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment of 3 December 2015, *Banif Plus Bank*, C-312/14, EU:C:2015:794, paragraph 33).
- 25 Furthermore, neither the Statute of the Court of Justice of the European Union nor the Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (judgment of 16 December 2010, *Stichting Natuur en Milieu and Others*, C-266/09, EU:C:2010:779, paragraph 28 and the case-law cited). Nor do those provisions preclude the possibility for the Court to decide that a case will be decided with an Opinion which does not concern all the points of law set out in the questions referred.
- 26 Consequently, an interested party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in his or her Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (see, to that effect, judgment of 17 September 2015, *Mory and Others v Commission*, C-33/14 P, EU:C:2015:609, paragraph 26).
- 27 The fact nevertheless remains that the Court may, at any time after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information (see, to that effect, judgment of 9 June 2016, *Pesce and Others*, C-78/16 and C-79/16, EU:C:2016:428, paragraph 27).
- 28 In the present case, the Court considers that it has all the information necessary to answer the questions referred by the national court.
- 29 Consequently, after hearing the Advocate General, BWF's request for the oral part of the procedure to be reopened must be rejected.

Consideration of the questions referred

The first and third questions

- 30 By its first to third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 211(2) of the UCC must be interpreted as applying to an application for renewal of an authorisation with retroactive effect submitted before 1 May 2016, the date on which that article became applicable pursuant to Article 288(2) of the UCC, if the decision on that application was adopted after that date.
- 31 It should be recalled that, as regards the temporal scope of new rules, the Court draws a distinction according to whether they are 'procedural rules' or 'substantive rules'. The former are generally deemed to apply to all pending proceedings at the time they enter into force, unlike the latter, which are usually interpreted as applying to the future effects of situations which arose under earlier legislation and to new legal circumstances, but not 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 (see, to that effect, judgments of

23 February 2006, *Molenbergnatie*, C-201/04, EU:C:2006:136, paragraph 31; of 9 March 2006, *Beemsterboer Coldstore Services*, C-293/04, EU:C:2006:162, paragraph 21; and of 3 June 2021, *Jumbocarry Trading*, C-39/20, EU:C:2021:435, paragraph 29).

- 32 Article 211(2)(a) to (h) of the UCC lists exhaustively the conditions for the issue of an authorisation with retroactive effect required, under paragraph 1 of that article, for recourse to, inter alia, the end-use scheme. That system, provided for in Article 254 of the UCC, allows goods to be released for free circulation with under a duty exemption or at a reduced rate of duty on account of their specific use.
- 33 As the Advocate General observed in points 34 to 37 of his Opinion, the conditions to which such authorisation is subject, laid down in Article 211(2), are either entirely or mainly substantive conditions for the issue of an authorisation with retroactive effect. They are decisive for the existence, on the part of the applicant, of the customs debt relating to the goods in question.
- 34 Consequently, as is apparent from the case-law cited in paragraph 31 above, Article 211(2) of the UCC cannot, as a new substantive rule, be applied to legal situations which arose under the earlier legislation, unless it is clear from its terms, purpose or general scheme that it must apply immediately to such situations.
- 35 However, Article 211(2) of the UCC is accompanied by a special provision which specifically sets out the conditions for its temporal application, namely Article 288(2) of that code. Under that provision, the articles other than those referred to in paragraph 1 of that article, which include Articles 211 and 254, did not become applicable until 1 May 2016, even though the UCC, pursuant to Article 287 thereof, entered into force on 30 October 2013 (see, to that effect, judgment of 3 June 2021, *Jumbocarry Trading*, C-39/20, EU:C:2021:435, paragraphs 5 and 29 and the case-law cited).
- 36 It follows that Article 211 of the UCC is not applicable to events giving rise to a customs debt which occurred before 1 May 2016.
- 37 In the present case, it is apparent from the order for reference that, between 31 December 2012, the date on which the initial authorisation expired, and 9 January 2015, the date on which the retroactive authorisation, granted by the customs authority on 14 January 2015, took effect, the applicant in the main proceedings continued to import goods of the same type as those covered by the initial authorisation without having submitted an application for renewal of that authorisation. It was therefore required to pay customs duties for that purpose. The facts to which the customs debt at issue relates, the exemption of which is sought by the applicant in the main proceedings, thus occurred before 1 May 2016, the date on which Article 211 of the UCC became applicable.
- 38 In those circumstances, a situation such as that at issue in the main proceedings must be regarded as having occurred under the earlier legislation (see, to that effect, judgment of 23 February 2006, *Molenbergnatie*, C-201/04, EU:C:2006:136, paragraphs 31 and 34 and the case-law cited), namely Article 294(2) of Regulation No 2454/93.

- 39 The fact that the administrative procedure in the main proceedings was closed, as the referring court stated, by the decision of 21 March 2019 rejecting the application for renewal of the authorisation with retroactive effect from 1 January 2013, a decision which was thus adopted at a time when Article 211 of the UCC was already applicable, has no bearing on a legal situation which arose under Regulation No 2454/93.
- 40 In the light of all the foregoing considerations, the answer to the first to third questions is that Article 211(2) of the UCC must be interpreted as not applying to an application for renewal of authorisation with retroactive effect submitted before 1 May 2016, the date on which that article became applicable pursuant to Article 288(2) of the UCC, even if the decision on that application was adopted after that date.

The fourth question

- 41 By its fourth question, the referring court asks, in essence, whether Article 294(2) of Regulation No 2454/93 must be interpreted as meaning that the issue, by the customs authorities, of a new authorisation with retroactive effect for operations and goods of the same type as those covered by the original authorisation is also subject to the conditions laid down in paragraph 3 of that article.
- 42 In that regard, it should be noted that, in accordance with Article 294(1) of Regulation No 2454/93, ‘without prejudice to paragraphs 2 and 3’, retroactive authorisations which the customs authorities may issue are to take effect on the date of submission of the respective applications. It is apparent from the very wording of that provision that it identifies two separate situations capable of derogating from the rule of retroactive application which it lays down.
- 43 Paragraph 2 of that article refers only to the renewal of authorisations for the same kinds of operations and goods as those covered by the initial authorisation and provides that, in that situation, it ‘may be granted with retroactive effect from the date of expiry of the authorisation’. Paragraph 3 of that article does not refer to any particular authorisation and provides that the customs authorities may, ‘in exceptional circumstances’, extend the retroactive effect of an authorisation ‘not more than one year before the date the application was submitted’. It makes that extension subject to various conditions, including the possibility of demonstrating the existence of an economic need and the absence of a link between the application and an attempt to commit a deception or obvious negligence.
- 44 It follows that, if the conditions for the grant of a retroactive authorisation laid down in Article 294(3) of Regulation No 2454/93 were applicable to the issue of a new retroactive authorisation under paragraph 2 of that article, the effectiveness of the latter provision would be undermined. While that provision expressly provides that the retroactive effect of the renewal of an authorisation ‘may go back to the date of expiry of that permit’, paragraph 3 of that article requires that that effect be limited to a period ‘no more than one year before the date of submission of the application’.
- 45 In the light of the foregoing considerations, the answer to the fourth question is that Article 294(2) of Regulation No 2454/93 must be interpreted as meaning that the issue, by the customs authorities, of a new authorisation with retroactive effect for operations and goods of the same type as those covered by the original authorisation is not subject to the conditions laid down in paragraph 3 of that article.

Costs

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

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

- 1. Article 211(2) of the Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code must be interpreted as not applying to an application for renewal of authorisation with retroactive effect submitted before 1 May 2016, the date on which that article became applicable pursuant to Article 288(2) of that regulation, even if the decision on that application was adopted after that date.**
- 2. Article 294(2) of Commission Regulation No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/12 establishing the Community Customs Code, as amended by Commission Regulation (EC) No 1602/2000 of 24 July 2000, must be interpreted as meaning that the issue, by the customs authorities, of a new authorisation with retroactive effect for operations and goods of the same type as those covered by the original authorisation is not subject to the conditions laid down in paragraph 3 of that article.**

[Signatures]