



## Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

22 April 2021 \*

(Reference for a preliminary ruling – Customs union – Community Customs Code – Regulation (EEC) No 2913/92 – Article 29(1) – Article 32(1)(e)(i) – Union Customs Code – Regulation (EU) No 952/2013 – Article 70(1) – Article 71(1)(e)(i) – Determination of the customs value – Transaction value – Adjustment – Price including delivery at the border)

In Case C-75/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), made by decision of 29 January 2020, received at the Court on 13 February 2020, in the proceedings

**‘Lifosa’ UAB**

v

**Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos,**

third parties:

**Kauno teritorinė muitinė,**

**‘Transchema’ UAB,**

THE COURT (Eighth Chamber),

composed of N. Wahl (Rapporteur), President of the Chamber, L.S. Rossi and J. Passer, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- ‘Lifosa’ UAB, by A. Seliava and E. Sinkevičius, advokatai,
- the Lithuanian Government, by V. Kazlauskaitė-Švenčionienė, acting as Agent,

\* Language of the case: Lithuanian.

– the European Commission, by F. Clotuche-Duvieusart and J. Jokubauskaitė, acting as Agents, having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 29(1) and Article 32(1)(e)(i) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; ‘the Community Customs Code’) and Article 70(1) and Article 71(1)(e)(i) 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 Union Customs Code’).
- 2 The request has been made in proceedings between ‘Lifosa’ UAB (‘the importer’) and the Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos (Customs Department under the Ministry of Finance, Lithuania) concerning the decision of the customs authorities to impose on the importer inter alia an adjustment of the customs value of the imported goods.

### **Legal context**

#### *EU law*

#### *The Community Customs Code*

- 3 Article 29(1) of the Community Customs Code provided:

‘The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided:

...

- (b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

...’

- 4 Article 29(3)(a) of the Community Customs Code was worded as follows:

‘The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instrument and may be made directly or indirectly.’

5 Article 32(1) to (3) of the Community Customs Code stated:

‘1. In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:

...

(e) (i) the cost of transport and insurance of the imported goods, ...

...

to the place of introduction into the customs territory of the Community.

2. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.’

***Regulation (EEC) No 2454/93***

6 Article 164(c) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), which was in Chapter 4, headed ‘Provisions concerning transport costs’, of Title V of Part I of the regulation, provided:

‘In applying Article 32(1)(e) ... of the [Community Customs] Code:

...

(c) where transport is free or provided by the buyer, transport costs to the place of introduction, calculated in accordance with the schedule of freight rates normally applied for the same modes of transport, shall be included in the customs value.’

***The Union Customs Code***

7 Article 70 of the Union Customs Code, headed ‘Method of customs valuation based on the transaction value’, states:

‘1. The primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, adjusted, where necessary.

2. The price actually paid or payable shall be the total payment made or to be made by the buyer to the seller or by the buyer to a third party for the benefit of the seller for the imported goods and include all payments made or to be made as a condition of sale of the imported goods.

3. The transaction value shall apply provided that all of the following conditions are fulfilled:

...

(b) the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

...'

8 Article 71 of the Union Customs Code, headed 'Elements of the transaction value', provides:

'1. In determining the customs value under Article 70, the price actually paid or payable for the imported goods shall be supplemented by:

...

(e) the following costs up to the place where goods are brought into the customs territory of the Union:

(i) the cost of transport and insurance of the imported goods; ...

...

2. Additions to the price actually paid or payable, pursuant to paragraph 1, shall be made only on the basis of objective and quantifiable data.

3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.'

### ***Implementing Regulation (EU) 2015/2447***

9 Article 138 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation No 952/2013 (OJ 2015 L 343, p. 558), headed 'Transport costs', provides in paragraph 3:

'Where transport is free of charge or provided by the buyer, the transport costs to be included in the customs value of the goods shall be calculated in accordance with the schedule of freight rates normally applied for the same modes of transport.'

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

10 The importer is a company established in Lithuania, which inter alia produces fertilisers. During the period from 1 January 2014 until 31 October 2016, pursuant to a contract concluded on 23 September 2011, it purchased from an intermediary, 'Transchema' UAB, and imported into the customs territory of the European Union various quantities of technical sulphuric acid produced by a company established in Belarus, Naftan JSC ('the producer').

11 For each transaction, a supplementary contract was concluded that stipulated a specific price and stated that that contract was to be performed in accordance with the Incoterm 'Delivered at Frontier' (DAF) forming part of Incoterms 2000 drawn up by the International Chamber of Commerce, under which all the costs of transporting the imported goods are borne by the producer up to the agreed place of delivery at the border.

- 12 The customs value of the goods that was declared by the importer was the amounts actually paid as set out on the invoices issued by the intermediary.
- 13 When the Kaunas Customs Office (Lithuania) carried out an audit, it found that the customs value thereby declared of the imported goods was lower than the costs actually incurred by the producer for their transport by rail to the border crossing point. Since the Kaunas Customs Office took the view that those transport costs had to be added to the transaction value of the goods, on 9 February 2017 it adopted a decision intended to correct the customs value declared by the importer by adding to it the costs of transporting the goods outside the customs territory of the European Union. Thus, the importer was required to pay EUR 25 876 in respect of the adjustment of the customs value, EUR 412 in default interest on the corresponding unpaid customs duties, EUR 187 152 in respect of the import VAT that was payable and EUR 42 492 in default interest on the VAT, as well as a fine of EUR 42 598.
- 14 The importer contested that decision before the Customs Department under the Ministry of Finance, which upheld it.
- 15 The importer brought an action before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania).
- 16 By judgment of 28 November 2017, the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius) dismissed the importer's action as unfounded. The importer brought an appeal against that judgment before the Lietuvos vyriausioji administracinis teismas (Supreme Administrative Court of Lithuania).
- 17 According to the referring court, it is common ground between the parties to the main proceedings that the sale price of the imported goods included the costs of delivery to the border, which were borne by the producer under the agreed delivery terms described in paragraph 11 of the present judgment.
- 18 That court states in addition that the customs value of those goods that was specified by the importer in its customs declarations was constituted by the amounts paid for the goods and that the amounts paid corresponded to the real value of the goods. Nonetheless, the customs value thereby declared was less than the costs incurred by the producer for transport of the goods by rail up to the Lithuanian border.
- 19 In that regard, the customs authorities submit that, if, for the purpose of determining the customs value of the imported goods, their transaction value is not adjusted by adding the transport costs incurred by the producer, the customs declarations do not reflect all of the elements of those goods that have economic value.
- 20 Conversely, the importer submits that the sale price of the imported goods reflects their real value because, first, the producer is unable to process or store them and, second, recycling them gives rise to very high costs. Accordingly, although it does not cover all the transport costs incurred by the producer, that price is still justified and economically advantageous for the producer, as the amount of the ecological tax imposed in Belarus in respect of the recycling of the imported goods would exceed the sum of the declared customs value and the transport costs of those goods.

- 21 In this instance, the referring court raises the question whether, for the purpose of determining the customs value of the imported goods, Article 29(1) and Article 32(1)(e)(i) of the Community Customs Code and Article 70(1) and Article 71(1)(e)(i) of the Union Customs Code require the transport costs to be added to the transaction value of those goods in a situation, such as that at issue in the main proceedings, in which, whilst the conditions of sale provide that the sale price of the goods includes the transport costs, the transport costs incurred by the producer exceed the price at which the producer transfers the goods to the importer.
- 22 In those circumstances, the Lietuvos vyriausioji administracinė teisėsauga (Supreme Administrative Court of Lithuania) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
- ‘Are Article 29(1) and Article 32(1)(e)(i) of [the Community Customs Code] and Article 70(1) and Article 71(1)(e)(i) of [the Union Customs Code] to be interpreted as meaning that the transaction ... value must be adjusted to include all the costs actually incurred by the ... producer in transporting the goods to the place where they were brought into the customs territory of the European Union ... when, as in the present case, (1) under the delivery conditions ... the obligation to cover those costs was borne by the ... producer and (2) those costs of transport exceeded the price that was agreed upon and was actually paid ... by the ... importer, but (3) the price actually paid ... by the ... importer corresponded to the real value of the goods, even if that price was insufficient to cover all the costs of transport incurred by the ... producer?’

### **Consideration of the question referred**

- 23 By its question, the referring court asks, in essence, whether Article 29(1) and Article 32(1)(e)(i) of the Community Customs Code and Article 70(1) and Article 71(1)(e)(i) of the Union Customs Code must be interpreted as meaning that, for the purpose of determining the customs value of imported goods, the costs actually incurred by the producer for their transport to the place where they have been brought into the customs territory of the European Union should be added to the transaction value of the goods when, according to the agreed delivery terms, the obligation to cover those costs lies with the producer, those costs exceed the price actually paid by the importer, but that price corresponds to the real value of the goods.
- 24 First of all, it should be recalled that that the objective of EU law on customs valuation is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values. The customs value must consequently reflect the real economic value of imported goods and, therefore, take into account all of the elements of those goods that have economic value. Whilst, as a general rule, the price actually paid for the goods forms the basis for calculating their customs value, that price is a factor that potentially must be adjusted where necessary in order to avoid the setting of an arbitrary or fictitious customs value (judgment of 20 June 2019 *Oribalt Rīga*, C-1/18, EU:C:2019:519, paragraphs 22 and 23 and the case-law cited).
- 25 In that regard, the referring court states that the price paid for the imported goods corresponds to their real value and that there is no basis for asserting that the price actually paid by the importer for those goods is fictitious because it results from fraud or an abuse of law.
- 26 Consequently, the dispute in the main proceedings does not seem to concern an arbitrary or fictitious customs value, a matter which will be for the referring court to verify, but relates solely to whether, in a situation such as that at issue in the main proceedings, Article 29(1) and

Article 32(1)(e)(i) of the Community Customs Code and Article 70(1) and Article 71(1)(e)(i) of the Union Customs Code require, for the purpose of determining the customs value of imported goods, that the transport costs incurred, in accordance with the contractual terms, by the producer and included in the sale price be added to the transaction value of the goods when that price does not enable all the transport costs to be covered.

- 27 First, in accordance with Article 29(1) of the Community Customs Code and Article 70(1) of the Union Customs Code, the transaction value of the imported goods constitutes the ‘primary basis’ for their customs value. It is only by way of supplement that certain additions may be made to that basis in order to reflect the real economic value of those goods, pursuant to Article 32 of the Community Customs Code and Article 71 of the Union Customs Code.
- 28 Whilst Article 32(1)(e)(i) of the Community Customs Code and Article 71(1)(e)(i) of the Union Customs Code enable the price actually paid to be supplemented by the addition of the transport costs, those provisions require the transport costs not to have already been included in that price, which they have been when the conditions of sale stipulate a ‘Delivered at Frontier’ price.
- 29 Such an approach is confirmed by Article 164(c) of Regulation No 2454/93 and Article 138(3) of Implementing Regulation 2015/2447. Those provisions permit the transport costs to be added to the transaction value of the imported goods only where transport is either free of charge or provided by the importer.
- 30 The referring court states that, in the main proceedings there is no basis for asserting that the agreed sale price did not include the costs of transporting the imported goods and also the price paid by the importer corresponded to the real value of those goods.
- 31 Consequently, neither the conditions laid down in Article 32(1)(e)(i) of the Community Customs Code and Article 71(1)(e)(i) of the Union Customs Code nor those laid down in Article 164(c) of Regulation No 2454/93 and Article 138(3) of Implementing Regulation 2015/2447 are fulfilled in a situation such as that at issue in the main proceedings.
- 32 A different interpretation of those provisions would be tantamount to requiring the importer to make double payment of costs of transporting the imported goods and, consequently, to taking the view that, where imports are subject to conditions of sale providing for such costs to be included in the sale price of those goods, the transaction value should automatically be corrected.
- 33 The fact that, in the present instance, the costs of transporting the imported goods incurred by the producer exceed the price actually paid by the importer is not capable of altering that conclusion, provided that that price reflects the real value of the goods, a matter which will be for the referring court to establish.
- 34 Second, the risk mentioned by the European Commission in its written observations that an economic operator could avoid the obligations relating to the determination of the customs value of imported goods, by relying on its contractual freedom, does not seem well-founded in circumstances such as those at issue in the main proceedings. Such a risk would presuppose that the costs of transporting those goods have not been paid, which, as the referring court states, is not the case here. Furthermore, it follows from Article 29(1) of the Community Customs Code and Article 70(1) of the Union Customs Code that the conditions of sale are taken into account when determining the customs value of those goods.

- 35 Whilst an economic operator cannot evade EU law by invoking its contractual obligations, the customs value of imported goods nevertheless cannot be determined in the abstract. In accordance with the Court's case-law, it is determined on the basis of the conditions on which the sale concerned was made, even if they do not accord with trade practice or may appear unusual for the type of contract in question (see, to that effect, judgment of 4 February 1986, *Van Houten International*, 65/85, EU:C:1986:53, paragraph 13). Thus, the Court has held that, in order to determine whether the customs value of the imported goods reflects their real economic value, the specific legal circumstances of the parties to the contract of sale should be taken into account (see, to that effect, judgment of 15 July 2010, *Gaston Schul*, C-354/09, EU:C:2010:439, paragraph 38). Accordingly, failure to take account of the conditions of sale when determining the customs value of those goods would not only be contrary to Article 29(1) of the Community Customs Code and Article 70(1) of the Union Customs Code, but would moreover lead to a result that does not enable the real economic value of the goods to be reflected.
- 36 In the light of all the foregoing considerations, the answer to the question referred is that Article 29(1) and Article 32(1)(e)(i) of the Community Customs Code and Article 70(1) and Article 71(1)(e)(i) of the Union Customs Code must be interpreted as meaning that, for the purpose of determining the customs value of imported goods, the costs actually incurred by the producer for their transport to the place where they have been brought into the customs territory of the European Union should not be added to the transaction value of the goods when, according to the agreed delivery terms, the obligation to cover those costs lies with the producer, even though those costs exceed the price actually paid by the importer, provided that that price corresponds to the real value of the goods, a matter which is for the referring court to establish.

### Costs

- 37 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 (Eighth Chamber) hereby rules:

**Article 29(1) and Article 32(1)(e)(i) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and Article 70(1) and Article 71(1)(e)(i) of 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 meaning that, for the purpose of determining the customs value of imported goods, the costs actually incurred by the producer for their transport to the place where they have been brought into the customs territory of the European Union should not be added to the transaction value of the goods when, according to the agreed delivery terms, the obligation to cover those costs lies with the producer, even though those costs exceed the price actually paid by the importer, provided that that price corresponds to the real value of the goods, a matter which is for the referring court to establish.**

[Signatures]