



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

23 October 2014*

(Reference for a preliminary ruling — Community Customs Code — Recovery of import duties — Origin of goods — Means of proof — Charter of Fundamental Rights of the European Union — Article 47 — Rights of the defence — Right to effective judicial protection — Procedural autonomy of the Member States)

In Case C-437/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 12 July 2013, received at the Court on 2 August 2013, in the proceedings

Unitrading Ltd

v

Staatssecretaris van Financiën,

THE COURT (Sixth Chamber),

composed of S. Rodin, President of the Chamber A. Borg Barthet and M. Berger (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 3 July 2014,

after considering the observations submitted on behalf of:

- Unitrading Ltd, by R. Niessen-Cobben, acting as counsel,
- the Netherlands Government, by B. Koopman, M. Bulterman and H. Stergiou, acting as Agents,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the United Kingdom Government, by J. Beeko, acting as Agent, and by K. Beal QC,
- the European Commission, by W. Roels and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Dutch.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between Unitrading Ltd ('Unitrading') and the Staatssecretaris van Financiën concerning the imposition of customs import duties.

Legal context

- 3 Article 243 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Customs Code'), provides:

'1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.

...

2. The right of appeal may be exercised:

- (a) initially, before the customs authorities designated for that purpose by the Member States;
- (b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.'

- 4 Article 245 of the Customs Code provides:

'The provisions for the implementation of the appeals procedure shall be determined by the Member States.'

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

- 5 On 20 November 2007 Unitrading, established in Rickmansworth (United Kingdom), made a declaration to the Netherlands customs authorities for release into free circulation of 86 400 kg of fresh garlic bulbs ('the goods'). The declaration was submitted by F.V. de Groof's In- en Uitklaringsbedrijf BV, trading under the name of Comex ('Comex'). In the declaration, Pakistan was cited as being the country of origin of the goods. It was accompanied by a certificate of origin issued by the Karachi Chamber of Commerce and Industry on 5 November 2007.
- 6 On 21 November 2007, the Netherlands customs authorities took samples of the goods. On the same day, those authorities demanded an additional guarantee, on the ground that they had doubts as regards the country of origin cited. When Unitrading had provided that guarantee, on 26 November 2007 those authorities granted release of the goods. The Customs Laboratory in Amsterdam (Netherlands) had a portion of each sample examined, using a high-resolution method called 'ICP/MS [Inductively coupled plasma mass spectroscopy]' ('the portions of the samples') by a laboratory of the US Department of Homeland Security, Customs and Border Protection ('the American laboratory'). By letter of 8 January 2008, the American laboratory reported, essentially, that the probability that the goods in question had originated in China was at least 98%.

- 7 At Comex's request, a different portion of each sample was sent to the American laboratory, which, after examination, confirmed its earlier findings. However, Comex's proposal that the goods be examined in Pakistan, at the cost of the company on behalf of which the goods had been imported into the Netherlands, was rejected by the customs authorities.
- 8 The Amsterdam customs laboratory sent the results of the examination to the Netherlands customs office concerned. It also informed the customs office that the remaining samples examined would not be stored in the laboratory, but that until 30 May 2009 counter-samples would be stored in a central storage facility, of which Unitrading was informed on 11 June 2008. On 2 December 2008 the customs authorities concluded that the goods had originated in China.
- 9 On 19 December 2008, a notice of assessment of customs duties ('the contested notice of assessment') was issued and served on Unitrading. Having regard to the alleged fact that the goods originated in China, additional duties of EUR 1 200 per 1 000 kg, namely EUR 98 870.40, were imposed.
- 10 Unitrading appealed against the contested notice of assessment, disputing the examinations carried out by the American laboratory. The American laboratory, having been asked certain questions by the Amsterdam customs laboratory, stated in an email of 9 February 2009 that the portions of the samples had been compared with the data in the American databanks relating to the declared country of origin, namely Pakistan, and from the suspected country of origin, namely China. In March 2009 the American laboratory also informed the Amsterdam customs laboratory that more than 15 trace elements had been discovered in the samples of the goods. Nevertheless, it refused to disclose the information concerning the regions of China and Pakistan which had been compared, on the ground that these were sensitive data to which access was restricted by law.
- 11 In a mission report of 20 October 2009 concerning enquiries made in China on a number of consignments of fresh garlic bulbs sent to Belgium, the Netherlands and the United Kingdom for which the country of origin declared was Pakistan while it was suspected that the goods originated in China, the European Anti-Fraud Office (OLAF) concluded that there were strong reasons to believe that the country of origin of the goods in question was in fact China and not Pakistan.
- 12 The contested notice of assessment having been confirmed, in those circumstances, by the customs authorities, Unitrading brought an action before the Rechtbank te Haarlem (District Court, Haarlem) which, by judgment of 12 August 2010, declared the appeal brought against that decision to be unfounded. Unitrading appealed against that judgment before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam), which, on 10 May 2012, upheld the judgment delivered at first instance, taking the view, in particular, that the Netherlands customs authorities had shown that the goods did not originate in Pakistan but in China. The Gerechtshof te Amsterdam further stated that, at the time of the hearing before it, in Amsterdam there were still portions of the samples of the goods which could be used for a possible second expert opinion. Unitrading pursued an appeal in cassation before the referring court.
- 13 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Do the rights enshrined in Article 47 of the Charter ... mean that if customs authorities, in the context of the submission of evidence as to the origin of imported goods, intend to rely on the results of an examination carried out by a third party with regard to which that third party does not disclose further information either to the customs authorities or to the declarant, as a result of which it is made difficult or impossible for the defence to verify or disprove the correctness of the conclusion arrived at and the court is hampered in its task of evaluating the results of the examination, those examination results may not be taken into account by the court? Does it

make any difference to the answer to that question that that third party withholds the information concerned from the customs authorities and from the party concerned on the ground, not further explained, that “law enforcement sensitive information” is involved?

- (2) Do the rights enshrined in Article 47 of the Charter mean that when the customs authorities cannot disclose further information in respect of the examination carried out which forms the basis for their position that the goods have a specific origin — the results of which are challenged by reasoned submissions — the customs authorities — in so far as can reasonably be expected of them — must cooperate with the party concerned in connection with the latter’s request that it conduct, at its own expense, an inspection and/or sampling in the country of origin claimed by that party?
- (3) Does it make a difference to the answer to the first and second questions that, following the notification of the customs duties payable, portions of the samples of the goods, to which the party concerned could have obtained access with a view to having an examination carried out by another laboratory, were still available for a limited period, even though the result of such an examination would have had no bearing on the fact that the results obtained by the laboratory used by the customs authorities could not be verified, with the result that even in that case it would have been impossible for the court — if that other laboratory were to find in favour of the origin claimed by the party concerned — to compare the results of the two laboratories with respect to their reliability? If so, must the customs authorities point out to the party concerned that portions of the samples of the goods are still available and that it may request those samples for purposes of such an examination?

Consideration of the questions referred

The first question

- 14 By its first question, the referring court asks, in essence, whether Article 47 of the Charter must be interpreted as precluding the proof of the origin of imported goods adduced by the customs authorities resting on the results of an examination carried out by a third party with regard to which that third party refuses to disclose further information either to the customs authorities or to the customs declarant, as a result of which it is made difficult or impossible to verify or disprove the correctness of the conclusions reached.
- 15 In Unitrading’s submission, if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based. Furthermore, having regard to the adversarial principle that forms part of the rights of the defence, which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them. The Court, in its judgment in *ZZ* (C-300/11, EU:C:2013:363), has already held that if it proves necessary not to disclose certain information to the person concerned, in particular in the light of overriding considerations connected with State security, the national court must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, those considerations and the rights enshrined in Article 47 of the Charter.
- 16 The Czech Government points out that if the customs authorities intend to base their decision on the fact that the statement by a declarant of the country of origin does not correspond to the reality, they must bear the burden of proof of that allegation. Only an inspection report showing clearly which

procedure has been used and the result to which it has led, sufficiently clearly to enable the customs authorities to assess the credibility and relevance of the results and the person concerned usefully to put forward his view on those results, can be regarded as probative.

- 17 The Netherlands Government states that it was not possible for the customs authorities, Unitrading or the referring court to learn the full details of the examinations carried out by the American laboratory. Nevertheless, having regard to the reliability of that laboratory, the authorities were entitled legitimately to consider that the reports on the results of the examinations constituted sufficient proof. For the judicial review guaranteed by Article 47 of the Charter to be effective, the person concerned must, *inter alia*, be able to ascertain the reasons upon which the decision taken in relation to him is based. That requirement was met in the dispute in the main proceedings.
- 18 The United Kingdom Government submits that, subject to the principles of equivalence and effectiveness, under Article 245 of the Customs Code, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing the exercise of the right of action against a decision of the national customs authority unfavourable to the person concerned. The Court has established, in paragraphs 57 to 66 of the judgment in *ZZ* (EU:C:2013:363), a distinction between the grounds on which an administrative decision is based and the evidence underlying those grounds, and it has held that it is for the national court to assess whether and to what extent the restrictions on the rights of the defence arising from a failure to disclose the evidence are such as to affect the evidential value of that evidence.
- 19 In the view of the European Commission, in the absence of EU rules on the concept of proof, all means of evidence which the procedural laws of the Member States admit in proceedings analogous to that laid down in Article 243 of the Customs Code are, in principle, admissible. However, it follows from paragraphs 62 to 67 of the judgment in *ZZ* (EU:C:2013:363) that the competent customs authorities are required to prove that attaining important objectives in the Member States' interest would be compromised by the disclosure of precise and full evidence which supports the lawfulness of their decision.
- 20 In that regard, it must be borne in mind that, according to the Court's settled case-law, if the judicial review guaranteed by Article 47 of the Charter is to be effective, on the one hand, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction. On the other, the court with jurisdiction must have the power to require the authority concerned to provide that information, in order to put that court fully in a position in which it may carry out the review of the lawfulness of the national decision in question (see to that effect, judgment in *ZZ*, EU:C:2013:363, paragraph 53 and the case-law cited).
- 21 It is also clear from the Court's case-law that, as regards judicial proceedings, having regard to the adversarial principle that forms part of the rights of the defence which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them. The fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views (judgment in *ZZ*, EU:C:2013:363, paragraphs 55 and 56 and the case-law cited).

- 22 However, it does not appear that, in a case such as that at issue in the main proceedings, the principles referred to in paragraphs 20 and 21 of the present judgment have been infringed. It follows from the order for reference that Unitrading knew of the grounds on which the decision concerning it is based, that it was aware of all the documents and observations submitted to the court with a view to influence its decision and that it was able to comment on them before that court.
- 23 In those circumstances, the results of the examinations provided by the American laboratory merely constitute evidence which both the customs authorities and the Netherlands courts, also taking account of the arguments and evidence submitted by Unitrading, were able to regard as adequate to establish the true origin of the goods. As the Commission has rightly pointed out, given that there is no legislation at EU level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in proceedings similar to those laid down in Article 243 of the Customs Code is in principle admissible (judgment in *Sony Supply Chain Solutions (Europe)*, C-153/10, EU:C:2011:224, paragraph 41 and the case-law cited).
- 24 The admissibility of such evidence, even if it is important or decisive for the outcome of the dispute concerned, cannot be called into question by the sole fact that that evidence cannot fully be verified by either the party concerned or the court hearing the matter, as appears to be the case of the results of the examinations by the American laboratory in the main proceedings. Although, in such a case, the party concerned cannot fully verify the accuracy of those results of the examinations, it is not, however, in a situation comparable to that at issue in the case which gave rise to the judgment in *ZZ* (EU:C:2013:363), where both the national authority concerned and the court hearing an action against the decision adopted by that authority refused, by application of the national legislation at issue in that case, to give precise and full disclosure to the person concerned of the grounds on which the decision concerning him was based.
- 25 Nor does it appear that the right to effective judicial protection has been infringed in the dispute in the main proceedings, given that the courts seised in turn do not appear to be bound, under the national procedural law, by the assessment of the facts made and, in particular, the type of evidence used by the customs authority (see, to that effect, judgment in *Wilson*, C-506/04, EU:C:2006:587, paragraph 61).
- 26 Since the relevance of evidence not entirely verifiable by all the parties to the proceedings or by the court hearing the case, as is the situation as regards the results of the examinations at issue in the main proceedings, can validly be challenged by the party concerned, in particular by arguing that that evidence can constitute only indirect proof of the facts alleged and by putting forward other evidence to support his assertions, the right of that person to effective judicial protection, referred to in Article 47 of the Charter, has not, in principle, been infringed. As is apparent from the order for reference and the observations of the Netherlands Government submitted at the hearing, the courts seised in turn in the main proceedings appear to be free to assess the relevance of the evidence submitted to them.
- 27 Since Article 245 of the Customs Code provides, in that context, that the provisions for the implementation of the appeals procedure provided for in Article 243 of that code are to be determined by the Member States, it must be held that it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing those actions, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render in practice impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). Those considerations also apply with regard, specifically, to evidential rules (see, to that effect, judgment in *Direct Parcel Distribution Belgium*, C-264/08, EU:C:2010:43, paragraphs 33 and 34 and the case-law cited).

- 28 In order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring the person liable for the customs debt to prove the place of origin of the goods declared, in that the onus is on him to refute the relevance of indirect evidence used by the customs authorities, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which the person liable could not possess, it is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry (see, to that effect, judgment in *Direct Parcel Distribution Belgium*, EU:C:2010:43, paragraph 35 and the case-law cited).
- 29 Nevertheless, where the national court, after having used all procedures available to it under national law, concludes that the true origin of the goods concerned is different from that declared and that the imposition on the declarant of additional customs duties, or even a fine, is therefore justified, Article 47 of the Charter does not preclude a decision to that effect being adopted by that court.
- 30 Having regard to the foregoing considerations, the answer to the first question is that Article 47 of the Charter must be interpreted as not precluding proof of origin of imported goods adduced by the customs authorities on the basis of national procedural rules resting on the results of an examination carried out by a third party, with regard to which that third party refuses to disclose further information either to the customs authorities or to the customs declarant, as a result of which it is made difficult or impossible to verify or disprove the correctness of the conclusions reached, provided that the principles of effectiveness and equivalence are upheld. It is for the national court to ascertain whether that is so in the main proceedings.

The second and third questions

- 31 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether, in a situation such as that at issue in the main proceedings, and when the customs authorities cannot disclose further information in respect of the examination carried out, Article 47 of the Charter must be interpreted as meaning that the rights which it enshrines mean that the customs authorities must grant the request of the party concerned that it conduct, at its own expense, an examination in the country declared as the country of origin. In addition, the referring court asks whether it matters that portions of the samples of the goods, to which the party concerned could have obtained access with a view to having an examination carried out by another laboratory, were still available for a limited period and, if so, whether the customs authorities must inform the party concerned that portions of the samples of the goods are still available and that it may request those samples for purposes of such an examination.
- 32 In order to answer the second and third questions, it must be borne in mind, firstly, that Article 47 of the Charter does not preclude, in principle, the proof of origin of imported goods, adduced by the customs authorities on the basis of national procedural law, resting on the results of examinations carried out by a third party of which it is impossible to verify or refute the accuracy, provided that the principles of effectiveness and equivalence are upheld.
- 33 Secondly, it is clear from paragraph 27 of the present judgment, on the one hand, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions under Article 243 of the Customs Code, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render in practice impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) and, on the other, that those considerations also apply with regard to evidential rules.
- 34 Those considerations are fully applicable to the second and third questions. In consequence, irrespective of the need for the Member States to comply with the principles of effectiveness and equivalence, the question whether, in a situation such as that at issue in the main proceedings, the

customs authorities must grant the request of a person concerned to carry out examinations in a third country, the relevance, in that regard, of the fact that portions of the samples of the goods remain available for a limited time and, if so, whether the customs authorities must inform the person concerned thereof, must be assessed on the basis of national procedural law.

- 35 Accordingly, the answer to the second and third questions is that, in a situation such as that at issue in the main proceedings, and when the customs authorities cannot disclose further information in respect of the examination carried out, whether the customs authorities must grant the request of the party concerned that it conduct, at its own expense, an examination in the country declared as the country of origin and whether it matters that portions of the samples of the goods, to which the party concerned could have obtained access with a view to having an examination carried out by another laboratory, were still available for a limited period and, if so, whether the customs authorities must inform the party concerned that portions of the samples of the goods are still available and that it may request those samples for purposes of such an examination must be assessed on the basis of national procedural law.

Costs

- 36 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 (Sixth Chamber) hereby rules:

1. **Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding proof of origin of imported goods adduced by the customs authorities on the basis of national procedural rules resting on the results of an examination carried out by a third party, with regard to which that third party refuses to disclose further information either to the customs authorities or to the customs declarant, as a result of which it is made difficult or impossible to verify or disprove the correctness of the conclusions reached, provided that the principles of effectiveness and equivalence are upheld. It is for the national court to ascertain whether that is so in the main proceedings.**
2. **In a situation such as that at issue in the main proceedings, and when the customs authorities cannot disclose further information in respect of the examination carried out, whether the customs authorities must grant the request of the party concerned that it conduct, at its own expense, an examination in the country declared as the country of origin and whether it matters that portions of the samples of the goods, to which the party concerned could have obtained access with a view to having an examination carried out by another laboratory, were still available for a limited period and, if so, whether the customs authorities must inform the party concerned that portions of the samples of the goods are still available and that it may request those samples for purposes of such an examination must be assessed on the basis of national procedural law.**

[Signatures]