



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

19 October 2017*

(Reference for a preliminary ruling — Regulation (EEC) No 2658/87 — Customs Union — Common Customs Tariff — Tariff classification — Combined Nomenclature — Tariff headings — Subheading 6212 20 00 (Panty girdles) — Explanatory Notes to the Combined Nomenclature — Explanatory Notes to the Harmonised System)

In Case C-556/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Finance Court, Hamburg, Germany), made by decision of 11 May 2016, received at the Court on 3 November 2016, in the proceedings

Lutz GmbH

v

Hauptzollamt Hannover,

THE COURT (Ninth Chamber),

composed of C. Vajda, President of the Chamber, E. Juhász (Rapporteur) and K. Jürimäe, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Lutz GmbH, by T. Lutz,
- the European Commission, by B.-R. Killmann and A. Caeiros, acting as Agents,

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

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of subheading 6212 20 00 of the Combined Nomenclature 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 Implementing Regulation (EU) No 927/2012 of 9 October 2012 (OJ 2012 L 304, p. 1) ('the CN').
- 2 The request has been made in proceedings between Lutz GmbH and the Hauptzollamt Hannover (Principal Customs Office, Hanover) concerning the tariff classification of shaping knickers.

Legal context

The combined nomenclature,

- 3 The second part of the CN, entitled 'Schedule of Customs Duties', contains Section XI relating to 'Textiles and textile articles'. That section includes Chapters 61 and 62.
- 4 Chapter 61 of the CN, entitled 'Articles of apparel and clothing accessories, knitted or crocheted', contains Note 2(a), according to which that chapter does not cover goods of heading 6212.
- 5 Subheading 6108 22 00 of the CN relates to 'Women's or girls' slips, petticoats, briefs, panties, nightdresses, pyjamas, négligés, bathrobes, dressing gowns and similar articles, knitted or crocheted — Slips and petticoats of man-made fibres'.
- 6 That subheading lays down a conventional rate of duty of 12%.
- 7 In Chapter 62 of the CN, entitled 'Articles of apparel and clothing accessories, not knitted or crocheted', Note 1 provides that that chapter applies only to made-up articles of any textile fabric other than wadding, excluding knitted or crocheted articles (other than those of heading 6212).
- 8 Heading 6212 of the CN relates to 'Brassières, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted'.
- 9 Subheading 6212 20 00 of the CN concerns 'Brassières, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted — Girdles and panty girdles'.
- 10 Subheading 6212 90 00 of the CN covers brassières, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted other than brassieres, girdles and panty girdles and corselettes.
- 11 The conventional rate of customs duty applicable to the whole of heading 6212 is 6.5%.

Explanatory Notes to the Combined Nomenclature

- 12 Pursuant to Article 9(1) of Regulation No 2658/87, the Commission is to adopt explanatory notes to the combined nomenclature of the European Union ('the Explanatory Notes to the CN').

- 13 It is clear from the request for a preliminary ruling that for the resolution of the dispute in the main proceedings the Explanatory Notes to the CN, published in the *Official Journal of the European Union* on 4 March 2015 (OJ 2015 C 76, p. 1) are relevant. The Explanatory Notes to the CN relating to subheading 6212 20 00 is worded as follows:

‘Girdles and panty girdles

This subheading covers panty girdles, whether or not knitted or crocheted, cut in the form of briefs with or without legs or high-waisted briefs with or without legs.

They must be characteristic of the variety.

- (a) hug the waist and hips and have side panels of 8 cm or higher (measured from the leg to the top);
- (b) have vertical elasticity and restricted horizontal elasticity. Reinforcements or a stomach insert, even with applied lace, ribbons, trimmings or the like, are acceptable if the elasticity remains vertical;
- (c) be composed of the following textile materials:
 - blends of cotton with an elastomer yarn content of at least 15%, or
 - blends of man-made fibres with an elastomer yarn content of at least 10%, or
 - blends of cotton (not more than 50%) and a high proportion of man-made fibres with an elastomer yarn content of at least 10%.’

The Harmonised System Explanatory Notes

- 14 The Customs Cooperation Council, now the World Customs Organisation (WCO), was established by the convention establishing that body, concluded in Brussels on 15 December 1950. The Harmonised Commodity Description and Coding System (‘the HS’) was drawn up by the WCO and established by the International Convention on the Harmonised Commodity Description and Coding System, concluded in Brussels on 14 June 1983 and approved, with its amending protocol of 24 June 1986, on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).
- 15 Under Article 6(1) of that convention, a committee known as the ‘Harmonised System Committee’, composed of representatives from each of the Contracting Parties, was established within the Customs Cooperation Council. One of the tasks of the Committee is to propose amendments to that convention and to prepare explanatory notes (‘HS Explanatory Notes’), classification opinions and other advice on the interpretation of the HS.
- 16 According to the HS Explanatory Notes on heading 6212, that heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof, and these articles may be made of any textile material including knitted or crocheted fabrics (whether or not elastic).

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

- 17 In October 2013, Lutz requested a binding tariff information for shaping knickers and, in its request, it proposed that those knickers should be classified under subheading 6212 90 00 of the CN.

- 18 The German customs authorities issued the binding tariff information according to which those knickers were to be classified under subheading 6108 22 00 of the CN.
- 19 Taking the view that that classification was incorrect, Lutz filed a complaint which was rejected and then brought an action before the Finanzgericht Hamburg (Finance Court, Hamburg, Germany).
- 20 That court states that the article at issue is shaping knickers designed as hip panties in knitted fabric with vertical and horizontal elasticity. It states that if the knickers are pulled by hand they are less stretchy horizontally than vertically, and the degree to which horizontal stretchability is restricted may be the subject of different assessments based on individual perceptions. The referring court observes that that article does not contain any specific non-elastic components incorporated horizontally.
- 21 According to that court, the provisions of importance for the purpose of deciding the dispute in the main proceedings are subheading 6108 22 00 and 6212 20 00 of the CN and the Explanatory Notes to the CN relating to those subheadings.
- 22 It considers that, if the article at issue were to constitute a panty-girdle within the meaning of subheading 6212 20 00 (Girdles and panty-girdles), it would be classified under heading 6212, which is, as compared to heading 6108, the most appropriate heading.
- 23 The referring court states that if, however, that article does not constitute a panty girdle within the meaning of subheading 6212 20 00, it must be classified under heading 6108 and subheading 6108 22 00 (briefs and panties of man-made fibres).
- 24 That court adds that the Explanatory Notes to the CN relating to subheading 6212 20 00 define ‘panty girdles’ more precisely for the purpose of that subheading, and it is common ground that the article at issue has the characteristics which are described in points (a) and (c) of that explanatory note.
- 25 In those circumstances, according to that court, the decisive issue in the present case is whether, in addition to those characteristics, that article also has the characteristics described in the first sentence of point (b) of the second subparagraph of that explanatory note, that is having vertical elasticity and restricted horizontal elasticity.
- 26 However, it considers that the words in the first sentence of point (b) of the second subparagraph of that explanatory note, ‘having vertical elasticity and restricted horizontal elasticity’ are not sufficiently clear and precise.
- 27 Thus, by its questions, that court asks the Court of Justice to interpret the first sentence of point (b) of the second subparagraph of the Explanatory Notes to the CN relating to subheading 6212 20 00.
- 28 First, the referring court, which starts from the premiss that panty girdles must always have horizontal elasticity, asks in particular about the comparison to be made between horizontal and vertical elasticity. In that connection, it states that horizontal elasticity must be clearly less than vertical elasticity, since only minimal differences in the vertical and horizontal elasticity would not satisfy the requirements set out in that explanatory note.
- 29 Second, that court observes that the characteristic described as ‘restricted’ can also refer to an absolute restriction on horizontal elasticity, in the sense that the horizontal elasticity of the panty-girdle has, by means of additional constraints, a fixed limit blocking the horizontal elasticity at a certain point of its extension. In that connection, the second sentence of point (b) of the second subparagraph of the Explanatory Note to subheading 6212 20 00 might suggest that that type of restriction on elasticity is covered.

- 30 According to that court, the question also arises as to which are the objective criteria on the basis of which either the comparison between vertical and horizontal elasticity is to be made or, if there is an absolute restriction on that elasticity, the characteristics of that elasticity. As regards the case in which a comparison between vertical and horizontal elasticity is to be made, a purely sensory examination by manually stretching the material or use of technical measurement methods providing data on the stretchability of the material used are possible.
- 31 Finally, the referring court observes that, since the first sentence of point (b) of the second subparagraph of the Explanatory Notes to the CN relating to subheading 6212 20 00 are incapable of defining the features and characteristics of a panty girdle relevant for classification purposes, it may be necessary, as regards the requirements that the horizontal elasticity must satisfy and, having regard to the HS Explanatory Note relating to heading 6212, to take as a basis only the existence of a verifiable body-supporting function.
- 32 In those circumstances, the Finanzgericht Hamburg (Finance Court, Hamburg) decided to stay proceedings and seek a preliminary ruling from the Court on the following questions:
- ‘1. (a) Are the ... Explanatory Notes to the [CN] on subheading 6212 20 00 ... to be interpreted as meaning that a panty girdle has “restricted horizontal” elasticity where the horizontal elasticity is less than the vertical elasticity?
(b) If the answer to Question 1(a) is in the affirmative:

On the basis of which objective criteria is this comparison between vertical and horizontal elasticity to be made?
2. If the answer to Question 1(a) is in the negative:
(a) Are the ... Explanatory Notes to the [CN] on subheading 6212 20 00 ... to be interpreted as meaning that a panty girdle has “restricted horizontal” elasticity only where the horizontal elasticity is clearly less than the vertical elasticity?
(b) If the answer to Question 2(a) is in the affirmative:

On the basis of which objective criteria is this comparison between vertical and horizontal elasticity to be made and which assessment criterion should be applied in that respect?
3. If the answer to Question 2(a) is in the negative:
(a) Are the ... Explanatory Notes to the [CN] on subheading 6212 20 00 ... to be interpreted as meaning that the restriction of horizontal elasticity in panty girdles is not defined by a comparison between vertical and horizontal elasticity but refers rather to an absolute restriction of horizontal elasticity?
(b) If the answer to Question 3(a) is in the affirmative:

On the basis of which objective criteria is it necessary to examine whether the elasticity of a panty girdle is restricted horizontally within the meaning referred to under 3(a)?’

Consideration of the questions referred

- 33 By its questions, the referring court asks essentially the extent of the horizontal elasticity in order to fall within heading 6212 20 00 of the CN.
- 34 As a preliminary point, it must be recalled that, according to the wording of the first phrase of the second subparagraph, point (b), of the Explanatory Note to the CN relating to subheading 6212 20 00, knickers must have vertical elasticity and restricted horizontal elasticity to be classified under that subheading.

- 35 However, it must be observed that, as far as concerns the Explanatory Notes to the CN, although they are an important aid to the interpretation of the scope of the various tariff headings, they do not have legally binding force (see, to that effect, judgment of 9 June 2016, *MIS*, C-288/15, EU:C:2016:424, paragraph 23 and the case-law cited).
- 36 It should be stated that as it is clear from Section A, entitled ‘General Rules for the interpretation of the combined Nomenclature’ of Title I, headed ‘General Rules’, in the first part of the CN, entitled ‘Preliminary provisions’, the classification of goods is to be determined according to the terms of the headings and any section or chapter notes, the titles of sections, chapters and sub-chapters being provided for ease of reference only (see, to that effect, judgment of 8 December 2016, *Lemnis Lighting*, C-600/15, EU:C:2016:937, paragraph 35).
- 37 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 of the notes to the sections or chapters (judgments of 8 December 2016, *Lemnis Lighting*, C-600/15, EU:C:2016:937, paragraph 36, and of 16 February 2017, *Aramex Nederland*, C-145/16, EU:C:2017:130, paragraph 22).
- 38 It should be borne in mind that the Council of the European Union has conferred upon the Commission, acting in cooperation with the customs experts of the Member States, broad discretion to define the subject matter of tariff headings falling to be considered for the classification of particular goods. However, the Commission’s power to adopt the measures mentioned in Article 9(1)(a), (b) (d) and (e) of Regulation No 2658/87, like drafting additional notes, does not authorise it to alter the subject matter of the tariff headings which have been defined on the basis of the HS established by the HS Convention whose scope the European Union has undertaken, under Article 3 thereof, not to modify (judgment of 12 February 2015, *Raytek and Fluke Europe*, C-134/13, EU:C:2015:82, paragraph 29).
- 39 It is clear from the wording of heading 6212 of the CN that that heading includes ‘brassières, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted’. Furthermore, subheading 6212 20 00 of the CN specifically refers, in the context of heading 6212 thereof, to ‘Girdles and panty girdles’.
- 40 As regards the HS Explanatory Notes, it should be added that, although they do not have legally binding force, they 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 (judgment of 17 March 2016, *Sonos Europe*, C-84/15, EU:C:2016:184, paragraph 33 and the case-law cited).
- 41 According to the HS Explanatory Notes on heading 6212, that heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof, and these articles may be made of any textile material including knitted or crocheted fabrics (whether or not elastic).
- 42 It is clear from the generic terms ‘girdle’, ‘panty-girdle’ and ‘corset’, supported by the references in the annex to the written submissions lodged at the Court by the Commission, that the articles corresponding to those terms produce an effect of supporting and sculpting the human body which is achieved by a compression action on the body.
- 43 Such an effect is possible only to the extent that the horizontal elasticity of those articles is very restricted.
- 44 The Commission argues that there must be an absolute restriction on horizontal elasticity which requires the use of inelastic materials, or that elements composed of such materials are specially inserted into panty-girdles.

- 45 Although the need for horizontal elasticity to be very restricted must be acknowledged, it does not appear to be essential that panty-girdles consist of inelastic material or have inelastic elements.
- 46 It appears to be technically possible that in tubular knitted girdles and panty-girdles, control panels are incorporated during the knitting.
- 47 Also the intended purpose of the product at issue in the main proceedings must be taken into consideration, as that purpose may constitute an objective criterion for classification if it is inherent in the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see, to that effect, judgment of 26 April 2017, *Stryker EMEA Supply Chain Services*, C-51/16, EU:C:2017:298, paragraph 40 and the case-law cited).
- 48 Having regard to the intended purpose of the product at issue in the main proceedings, classified as 'sculpting knickers' by the referring court and 'seamless shapewear' by the main customs office in Hanover, it appears that, by its action, that product is intended to support and sculpt the human body. Therefore, that product has, subject to verification by the referring court, the essential characteristic of very restricted horizontal elasticity in order to support the human body and to create the objective effect of a slimmer silhouette.
- 49 In that connection, Lutz claims essentially that, unlike traditional corsets and girdles, in which the effects of supporting and sculpting the human body are generally achieved by a rigid stitched front panel and elastic side panels, which involves the assembly of the various parts by a sewing machine, the new system of knitted support belt knitted with circular stitching in those under garments, which is a patented technical innovation, automatically incorporates the slimming panels in those garments, so that a graduated corseting effect is incorporated into it.
- 50 Thus, it must be held that the girdle or panty-girdle at issue may be distinguished from ordinary underwear by much reduced horizontal elasticity, in order to support the human body and achieve a slimmer silhouette.
- 51 Furthermore, the CN Explanatory Notes, set out in paragraphs 13 and 34 of the present judgment, do not seek to make classification of a girdle or panty-girdle under subheading 6212 20 00 of the CN dependent on a complete lack of horizontal elasticity.
- 52 Therefore, it is clear from the objective characteristics and properties of the knickers at issue in the main proceedings that it may fall within subheading 6212 20 00 of the CN.
- 53 It is for the referring court to check the physical characteristics of the product at issue in the main proceedings, and the claims of the parties in the main proceedings relating to that product.
- 54 Having regard to all of the foregoing considerations, the answer to the questions referred is that the CN must be interpreted as meaning that knickers characterised by reduced horizontal elasticity, but which do not contain inelastic elements incorporated into them, may be classified under subheading 6212 20 00 of the CN if an examination establishes that they have substantially reduced horizontal elasticity in order to support the human body and create a slimming effect on the silhouette.

Costs

- 55 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 (Ninth Chamber) hereby rules:

The Combined Nomenclature 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 Implementing Regulation (EU) No 927/2012 of 9 October 2012, must be interpreted as meaning that knickers characterised by reduced horizontal elasticity, but which do not contain inelastic elements incorporated into them, may be classified under subheading 6212 20 00 of the Combined Nomenclature if an examination establishes that they have substantially reduced horizontal elasticity in order to support the human body and create a slimming effect on the silhouette.

[Signatures]