OPINION OF ADVOCATE GENERAL

Wahl

delivered on 10 September 2015 (1)

Case C?294/14

ADM Hamburg AG

v

Hauptzollamt Hamburg-Stadt

(Request for a preliminary ruling from the Finanzgericht Hamburg (Germany))

(Transport — Customs union and Common Customs Tariff — Community Customs Code — Tariff preferences — Article 74(1) of Regulation (EEC) No 2454/93 — Originating products exported from a beneficiary country — Requirement that the products declared for release for free circulation in the European Union be the same products as exported from the beneficiary country in which they are considered to originate — Consignment composed of a mixture of crude palm kernel oil originating in several countries benefiting from the same preferential treatment)

1. In the case before the referring court, crude palm kernel oil has been imported into the European Union from various countries in Central and South America, which all benefit from the same preferential tariff. For the purposes of transport, oil originating in several of those countries has been poured into one tank and declared for release for free circulation in the European Union as a mixture.

2. In that context, the question arises as to how, for the purposes of the application of the preferential tariff, the mixing of products originating in different countries ought to be dealt with. More specifically, the Court is asked to provide guidance on the proper construction of Article 74(1) of Regulation No 2454/93 (2) — which does not allow any alteration or transformation of the products — and in particular of the requirement that the products declared for release for free circulation in the European Union be the same products as exported from the beneficiary country in which they are considered to originate (‘the requirement of identity’).

I – **Legal framework**

A – ***Regulation (EC) No 732/2008*** (3)

3. Article 5 of Regulation No 732/2008 provides:

‘1. The tariff preferences provided shall apply to imports of products included in the arrangement enjoyed by the beneficiary country in which they originate.

2. For the purposes of the arrangements referred to in Article 1(2), the rules of origin concerning the definition of the concept of originating products, the procedures and the methods of administrative cooperation related thereto, shall be those laid down in Regulation (EEC) No 2454/93.

…’

B – *Regulation (EEC) No 2454/93*

4. Regulation No 2454/93 lays down provisions for the implementation of the Community Customs Code. (4)

5. Recital 16 in the preamble to Regulation No 1063/2010, by which Regulation No 2454/93 was amended, explains that there is a need for flexibility since the rules in force at the time of the adoption of the amending regulation required evidence of direct transport to the European Union which may be difficult to obtain. Due to that requirement, some products which were accompanied by a valid proof of origin could not actually benefit from preferential treatment. That is why it was considered to be appropriate to introduce a new, simpler and more flexible rule which focused on whether the goods presented to customs for release for free circulation in the European Union are the same ones that left the beneficiary country of export, the essential issue being that those goods have not been altered or transformed in any way *en route*.

6. Article 72 of Regulation No 2454/93 provides:

‘The following products shall be considered as originating in a beneficiary country:

(a) products wholly obtained in that country within the meaning of Article 75;

(b) products obtained in that country incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing within the meaning of Article 76.’

7. Article 74 of Regulation No 2454/93 states:

‘1. The products declared for release for free circulation in the European Union shall be the same products as exported from the beneficiary country in which they are considered to originate. They shall not have been altered, transformed in any way or subjected to operations other than operations to preserve them in good condition, prior to being declared for release for free circulation. Storage of products or consignments and splitting of consignments may take place where carried out under the responsibility of the exporter or of a subsequent holder of the goods and the products remain under customs supervision in the country(ies) of transit.

2. Compliance with paragraph 1 shall be considered as satisfied unless the customs authorities have reason to believe the contrary; in such cases, the customs authorities may request the declarant to provide evidence of compliance, which may be given by any means, including contractual transport documents such as bills of lading or factual or concrete evidence based on marking or numbering of packages or any evidence related to the goods themselves.’

II – **Facts, procedure and the questions referred**

8. On 11 August 2011, ADM Hamburg imported a number of consignments of crude palm kernel oil from Ecuador, Colombia, Costa Rica and Panama to Germany for release for free circulation in the European Union. All those countries are GSP (5) exporting countries. The oil was

transported in different tanks of a cargo vessel. To benefit from preference, ADM Hamburg submitted preferential treatment certificates issued by the abovementioned countries.

9. The case before the referring court concerns only one of those consignments ('the consignment at issue'). The consignment at issue contained a mixture of crude palm kernel oil originating in different beneficiary countries.

10. On 8 December 2011, the Hauptzollamt Hamburg-Stadt issued an import duty notice. As regards the consignment at issue, it calculated the import duties on the basis of the duty rate for third countries, that is, without granting the consignment the requested preferential treatment. The reason for denying preferential treatment was, in essence, that, crude palm kernel oil from different import consignments from different countries of origin had been mixed together in a single tank.

11. After an unsuccessful administrative appeal, ADM Hamburg brought an action before the Finanzgericht Hamburg. Since it had doubts as to the correct construction of the relevant provision of EU law, the Finanzgericht Hamburg decided to stay the proceedings and to request a preliminary ruling on the following question:

'Is the factual condition laid down in the first sentence of Article 74(1) of [Regulation No 2454/93] whereby the products declared for release for free circulation in the European Union must be the same products as exported from the beneficiary country in which they are considered to originate, fulfilled in a case such as the present case, where several part-consignments of crude palm kernel oil are exported from different GSP exporting countries, in which they are considered to originate, and imported into the European Union not as physically separate consignments, but are all exported after being poured into the same tank of the cargo vessel and imported as a mixture in that tank into the European Union, such that it can be ruled out that other products (not enjoying preferential treatment) have been put into the tank of the cargo vessel during the time the products were being transported until they were released for free circulation?'

12. Written observations have been presented by ADM Hamburg, Hauptzollamt Hamburg-Stadt and the Commission. With the exception of Hauptzollamt Hamburg-Stadt, those parties also presented oral argument at the hearing held on 11 June 2015.

III – **Analysis**

A – *The issue*

13. Is the requirement of identity between the products that left the beneficiary country and those presented to customs upon declaration for release for free circulation in the European Union, as laid down in Article 74(1) of Regulation No 2454/93, fulfilled where crude palm kernel oil originating in several countries benefiting from the same preferential tariff has been poured into the same tank of a cargo vessel and imported as a mixture in that tank? That is, in essence, what the referring court requests the Court to clarify in the present case. The referring court has been prompted to ask the Court to provide guidance on this issue not only because the Court has not, to date, had the opportunity to clarify the meaning of Article 74 of Regulation No 2454/93, but also because customs authorities in the Member States take divergent views on this matter.

14. More specifically, there is uncertainty as to whether the mixing of products — which in this case are interchangeable and materially, in terms of being crude palm kernel oil, the same — originating in different beneficiary countries excludes preferential treatment. For the reasons provided below, it is my opinion that that is not the case.

B – *A new, more flexible rule*

15. Let me begin by recalling that prior to the amendment made by Regulation No 1063/2010 to Article 74 of Regulation No 2454/93, in order for an importer to benefit from preference, evidence of direct transport to the European Union was required, a requirement often difficult to fulfil. As recital 16 in the preamble to Regulation No 1063/2010 explains, Article 74 of Regulation No 2454/93 was designed to introduce a new, simpler and, fundamentally, more flexible rule, which focuses on the aim that the declared goods are the same as the exported ones.

16. At the outset, I would also point out that the requirement of identity as laid down in Article 74(1) of Regulation No 2454/93 ought not to be considered in isolation, but as a part of a whole, namely in conjunction with Article 74(2), which states that compliance with the requirement of identity *is to be regarded as satisfied unless the customs authorities have reason to believe the contrary*. In other words, if the customs authorities have no reason to believe that the products declared for free circulation are not the same products as those exported, those authorities are to accept that they are dealing with the same products.

17. In the case before the referring court, the origin of the products is not in dispute. Nor is it in dispute that the oil in the contested consignment would, had it not been mixed together, benefit from beneficial treatment. In addition, the products at issue are interchangeable and materially, in terms of being crude palm kernel oil, the same. The presumption of identity laid down in Article 74(2), together with the fact that there is no doubt as to the origin of the products, should, as I see it, be sufficient in itself to resolve the issue underlying the case before the referring court.

18. True, one might argue that the customs authorities are less able to examine and take samples of products that are imported where products of different origin are imported as a mixture. Indeed, the aim of facilitating the customs authorities' task of verifying the origin of products that are imported should not be overlooked here. Rather, it should be regarded as one of the guiding principles of interpretation of the Customs Code as well as of Regulation No 2454/93, which is designed to implement the Customs Code. This is so not least because the Customs Code seeks, inter alia, to guarantee rapid and efficient procedures for the release of products for free circulation. (6) Undeniably, it is of paramount importance that customs authorities should be able, if necessary, to examine the products in order to verify that they correspond to the certificate of origin.

19. For the purposes of preferential treatment, therefore, it is essential that a link can be established between the product, the originating status thereof and a particular certificate of origin. In establishing that link, the certificates of origin play a crucial role. (7) The importance of a formal proof of origin (certificate of origin) has been highlighted by the Court: it is in fact settled law that the requirement of valid proof of origin issued by the competent authority cannot be considered to be a mere formality that may be overlooked as long as the place of origin is established by means of other evidence. (8)

20. As regards the case before the referring court, it emerges from the order for reference that ADM Hamburg has submitted preferential treatment certificates in the form of certificates of origin for all five consignments (Form A), which are not as such in dispute here.

21. In that regard, the provisions relating to certificates of origin in Article 47(b) of Regulation No 2454/93 state that the certificate is to contain all the particulars necessary for identifying the product to which it relates, in particular the number of packages, the gross and net weight of the product or its volume. Moreover, Annex 17 to Regulation No 2454/93 describes the contents of a 'Form A'. In fields 5, 6 and 9 of the form, the item number, the marks and number of packages and

the gross weight or other quantity is to be indicated. On the other side of the form, headed ‘Notes’, under II ‘General conditions’, point (b) further states that each article in a consignment must qualify separately in its own right.

22. At first sight, the mixing of products of different origin admittedly sits somewhat uneasily with the requirements pertaining to the content of the relevant certificates, not least as regards weight and quantity but also as regards the requirement that each article must qualify separately in its own right. In that sense, where a product is mixed together with a product of another origin in a way that makes it impossible to physically separate the two products again, one could argue that it is no longer the same product as it was before it was mixed together with the other one. Accordingly, the argument that the mixing would make the verification of origin more difficult for the customs authorities has a certain appeal. Seen in that light, Article 74(1) of Regulation No 2454/93 could be understood as requiring that products corresponding to a specific certificate of origin are transported in a manner ensuring their physical separation.

23. None the less, I do not believe that to constitute a sufficient ground for requiring physical separation of consignments linked to a particular certificate of origin during transport. There are several reasons why I take that view.

24. First of all, it is important to bear in mind that Article 74 forms part of Chapter 2 of Title IV of Part I of Regulation No 2454/93, which deals with preferential origin. More specifically still, that provision constitutes a part of subsection 2 of Section 1 of that chapter, which deals with the definition of the concept of ‘originating products’, namely products originating in a beneficiary country for the purposes of the application of a preferential tariff. (9)

25. As the whole of subsection 2 deals with the definition of what constitutes an originating product, I find little (if any) evidence to suggest that the requirement of identity is intended to ensure anything other than that the products declared for free circulation are in fact originating products, that is, products originating in a beneficiary country and not in a third country for the purpose of fixing an import duty (higher, or lower, depending on the origin of the product). That is the sole purpose of Article 74 of the regulation. To state the obvious, that provision is not concerned with labelling of products that are intended to be sold to consumers, for example. (10)

26. As mentioned above, there seems to be no disagreement between the parties about the fact that the products declared for release actually correspond to the certificates of origin produced by ADM Hamburg. No claim to the contrary, let alone any evidence to suggest that products from third countries have been added to the consignment at issue, has been presented before the referring court.

27. Secondly — and most importantly — liquids and bulk products are a case apart. As I understand it, so far as those types of product are concerned, it is common practice to issue certificates of origin for a specific period and for a particular quantity of a product, which are assigned a bill of lading. Those documents are irrelevant for the purpose of transport and, in particular, actual loading of a cargo vessel, which obeys a completely different rationale. (11) That is why it appears to be in no way unusual for several certificates of origin to be linked to products transported in a single tank or a cargo hold including in a situation where all those products originate in one and the same country.

28. In that regard, it was explained at the hearing that not only the consignment at issue, but also other consignments of crude palm kernel oil imported by ADM Hamburg, were de facto mixtures, albeit mixtures of oil originating in a single beneficiary country. Bearing that in mind, reading into Article 74(1) of Regulation No 2454/93 a requirement for physical separation of liquid or bulk products can only lead to an unwarranted distinction. A requirement for physical separation

during transport (based on a criterion such as country of origin or certificate of origin) for liquid and bulk goods would result in the unfavourable treatment, as regards the application of the preferential tariff, of products which are difficult, if not impossible, to separate once put into the same cargo hold (or tank). I fail to see how that could be justified: why would the mixing in a tank or a cargo hold of products that are materially, in terms of being crude palm kernel oil, the same and interchangeable constitute 'alteration or transformation' contrary to Article 74(1) of Regulation No 2454/93 where the products mixed together originate in several beneficiary countries, but not where the products originate in one country?

29. As concerns the need to verify origin, which, as I see it, constitutes the only viable argument that could at first sight be employed to justify physical separation, I will simply note the following: I cannot see why it would be easier to verify origin on the basis of certificates of origin in a situation where interchangeable products (liquid or bulk) originating in one country are transported as a mixture, and more difficult in a situation where, as here, several certificates of origin are linked to a consignment containing interchangeable products originating in several beneficiary countries. In both situations, we have several certificates of origin linked to a mixture of liquid or bulk products.

30. That leads me to my concluding observation. To my mind, the first sentence of Article 74(2) of Regulation No 2454/93 introduces a presumption in favour of originating status. It is only where the customs authorities have reason to believe that the products do not have originating status that the declarant must show that the consignment in fact contains the same products as those that were originally exported. This can be done, as that provision clearly explains, by any means, either by contractual transport documents such as bills of lading, or factual or concrete evidence based on marking or numbering of packages or any evidence related to the products themselves. In that sense, transport of products as a mixture does not preclude preferential treatment. Yet, at the risk of stating the obvious, it is the importer (declarant) who bears the risk of a higher import duty, should the customs authorities not be convinced by the evidence it has provided as to the originating status of the products.

31. On the basis of the above, I take the view that in circumstances such as those underlying the present case where (i) the products which have been mixed together are materially, in terms of being crude palm kernel oil, the same and interchangeable, (ii) they originate in countries benefiting from the same preferential treatment, and (iii) there is no doubt as to their originating status, the requirement of identity between the products exported and those declared for release for free circulation in the European Union, as laid down in Article 74(1) of Regulation No 2454/93, is fulfilled.

IV – **Conclusion**

32. In light of the foregoing considerations, I propose that the Court answer the question referred by the Finanzgericht Hamburg as follows:

The requirement of identity as laid down in the first sentence of Article 74(1) 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, as amended by Commission Regulation (EU) No 1063/2010 of 18 November 2010, whereby the products declared for release for free circulation in the European Union are to be the same products as exported from the beneficiary country in which they are considered to originate, is fulfilled in circumstances such as those underlying the present case where several consignments of crude palm kernel oil originating in different countries benefiting from the same preferential treatment have not been physically separated for the purpose of transport, but have been poured into the same tank of a cargo vessel and, as a result, have been imported as a mixture in that tank into the

European Union.

1 – Original language: English.

2 – Commission Regulation (EEC) 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 (EU) No 1063/2010 of 18 November 2010 (OJ 2010 L 307, p. 1).

3 – **Council Regulation of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007 (OJ 2008 L 211, p. 1).**

4 – Council Regulation (ECC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the Community Customs Code') (OJ 1992 L 302, p. 1), as amended. That regulation puts together in one single code a large number of Community regulations and decisions regarding customs legislation.

5 – Generalised system of preferences.

6 – Judgment in *Derudder*, C?290/01, EU:C:2004:120, paragraph 45. To that effect, several provisions of the Community Customs Code, as amended, deal with the examination of goods. For example, in accordance with Article 68(b) thereto, to verify declarations, the customs authorities may examine the goods and take samples for analysis or for detailed examination.

7 – Although not pertinent to the present case, it is interesting to note that more flexibility has been introduced to the system also in this regard and certificates of origin are no longer to be used. Commission Implementing Regulation (EU) 2015/428 of 10 March 2015 amending Regulation (EEC) No 2454/93 and Regulation (EU) No 1063/2010 as regards the rules of origin relating to the scheme of generalised tariff preferences and preferential tariff measures for certain countries or territories (OJ 2015 L 70, p. 12) introduced a new system for certifying the origin of goods. This is done by dint of a system of self-certification where exporters are registered in an electronic system, the so-called REX-system.

8 – See, recently, judgment in *Helm Düngemittel*, C?613/12, EU:C:2014:52, paragraph 32 and case-law cited.

9 – See for example Articles 72, 75 and 78 of the regulation. In accordance with those provisions, products wholly obtained in a beneficiary country (such as vegetables grown in that country) are considered to be originating products, while products not wholly obtained in that country may obtain originating status provided that they are subsequently processed sufficiently in a beneficiary country. It further transpires from Articles 79 and 83 of the regulation that non-originating material can be used in the manufacturing if it does not exceed certain percentages of the product, while, for example, the origin of machines or fuel employed in the manufacture of a product is not relevant for determining the originating status of that product.

10 – As recital 7 in the preamble to Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ 2012 L 303, p. 1) explains, preferential access to the EU market is put in place to assist developing countries in their efforts to reduce poverty and promote good governance and sustainable development by helping them to generate additional revenue through international trade, which can then be reinvested for the benefit of their

own development and, in addition, to diversify their economies. Mixing of interchangeable products of different countries belonging to the same group of GSP countries does not alter that.

11 – In that regard, security issues may require that the goods to be transported are loaded in a manner which does not correspond to the bills of lading. In any event, it seems unlikely that the number of tanks or cargo holds in a vessel would correspond to the number of consignments transported at a given time.