Keep an eye on customs case law or Who has enough money to throw away?

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'Compliance' with statute law has given rise to a lot of publications and debates. However, when considering compliance, it should not be forgotten that case law also influences a company's organisation and processes. Can you think of any court cases which are having an effect on your internal operations? Using the current proceedings on 'reimbursement interest' as an example, this contribution shows that court rulings can influence customs practice in companies and so it is important that you follow court proceedings from the outset. This is because even pending proceedings may enable you to earn money with customs or at least avoid throwing it away. Court judgements do not always operate to the detriment of the economic participant.

If customs duties are collected unlawfully, Art. 117 of the Union Customs Code (UCC; Art. 236 CC, former edition) provides for their **reimbursement**. However, it is disputed if the customs debtor should also receive **interest** on the customs debt paid.

In 'Wortmann', the **European Court of Justice (ECJ)** decided as follows:

"Where import duties, including anti-dumping duties, are reimbursed on the ground that they have been levied in breach of EU law, […] there is an obligation on Member States, arising from EU law, to pay to individuals with a right to reimbursement the corresponding interest which runs from the date of payment by those individuals of the duties."

According to the ECJ, therefore, there is also a right to **interest payments** which results directly from Union law and exists alongside the general prohibition on interest payments as provided for in the old edition of the Customs Code (and now the UCC) in the classic case of unlawfully levied import duties. This particularly applies if the nation-al interest regime does not order interest to be calculated from the date of the undue payment, thereby denying the customs debtor reasonable compensation for the loss suffered by paying the unlawful customs duties. This is the situation in Germany because, according to § 236 para. 1 AO, interest will only start to run once proceedings are pending (i.e., once the action has been initiated in the fiscal courts). The reimbursement of interest does not cover the period before this (i.e., from the payment of the customs duties).

Since the Wortmann judgement, there has been a debate with Customs over its application in cases where import duties were unlawfully levied. Irrespective of the fact that Customs regards interest as 'hard cash', the (legal) background is that the Wortmann judgement dealt with cases involving a legislative defect. Wortmann KG paid anti–dumping duties on the basis of an Anti–Dumping Regulation which the ECJ had declared unlawful. Since the matter concerned a legislative defect, Customs challenged interest payments in all cases which did not involve the unlawfulness of the Anti–Dumping Regulation but rather errors in the application of customs law (i.e., the application of law in daily import clearance).

However, is it fair that only legislative defects justify the payment of interest under Union law and not the incorrect application of the law?

Following the Wortmann judgement, the Federal Fiscal Court ('Bundesfinanzhof', hereinafter 'BFH') similarly decided in March 2021, that a company could claim the reimbursement of interest on the payment of unlawfully levied import duties. This case concerned the importation of LCD monitors and reversing video systems for which the claimant had received Binding Tariff Information (BTI), which it objected to but declared in order to prevent negative consequences on importation. Parallel to the objection proceedings, a Classification Regulation was enacted in the claimant's favour. This led to the latter claiming the reimbursement of interest on the duties reimbursed. Customs refused to pay reimbursement interest. However, both the Düsseldorf Fiscal Court ('Finanzgericht', hereinafter 'FG') and the BFH upheld the claim for interest referring to the ECJ's judgement.

In practice, this means that:

"An unlawful BTI means that there is no legal basis for establishing import duties. If a company pays excessive im–port duties on the basis of a BTI, then it can demand that Customs reimburse the excess amount paid and the interest thereon."

However:

According to the BFH, interest can only be claimed if customs duties have been reimbursed owing to the loss of legal justification. As far as 'typical errors in import clearance' are concerned, the BFH observed that the customs authorities, owing to the high volume of imports, examine most cases retroactively. If Customs determines, retroactively, that the duties levied are excessive, they will correct the original ruling and reimburse the excess amount paid. Accordingly, if Customs has not checked the customs declaration before acceptance and the unlawful duty ruling is due to the speed of the clearance procedure there will be no right to the payment of interest. The 'usual case' is due to the fallibility of the clearance system and does not indicate any arbitrariness on the part of Customs when determining the customs duties. However, the situation would be different if import clearance were based on an 'incorrect' BTI which had to be cancelled owing to a Classification Regulation. If, after submission of the customs declaration, the Combined Nomenclature (CN) were amended, resulting in the imported goods being subject to a different customs tariff number, then the customs tariff rate determining the calculation of customs duties would also change.

What now?

Parallel to the judgement of the BFH, the Hamburg FG referred three cases to the ECJ which concerned interest payments on unlawfully levied customs duties in which BTIs had not played a role.

The Hamburg FG stated that the Wortmann–Judgement and other related judgements were similar in that *inter alia* a Regulation had been declared unlawful, a Directive incorrectly transposed or national legislation enacted in contravention of European law (i.e., that reimbursement was due to a legislative defect). However, it was unclear whether a claim for interest also extended to cases involving the incorrect application of customs law by Customs

(i.e., whether reimbursement should be granted owing to errors when applying the law). The ECJ has not yet answered this question.

Specifically, the referral procedure concerns the following disputes which should be known to all:

- Interest payments on unlawfully established anti–dumping duties are reimbursed after final judgement.
- Interest payments on duties which customs levied ex–post because it took a different view of classification but reimbursed after final judgement.
- Interest payment on export refunds was wrongfully denied.

What this means for you:

If you think you have paid excessive duties or that your export refunds have been wrongly denied and you are challenging the lawfulness of Customs' ruling, you should also apply for the payment of interest on the duties you think should be repaid or the export refunds denied and keep an eye on the relevant case law.

However, bear in mind that:

Since it is likely that your claim will be denied, you should apply for a suspension of your interest claim (until the ECJ and subsequently the Hamburg FG have made a judgement), referring to proceedings pending before the ECJ.

Regardless of the formal claim, you must of course examine whether the facts of your case correlate to the cases before the court or whether they constitute a new claim for reimbursement interest – which, if denied, may also have to be resolved before the courts.

We will inform you about the decision of ECJ. In January 2022 the Advocate General has given his opinion. This opinion is giving hope to economic operators.

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