Neutral Citation: **[2022] UKUT 00312 (TCC)**

Case Number: UT/2021/000141

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: Royal Courts of Justice, London

PROCEDURE – application for direction from First-tier Tribunal seeking disclosure from the European Commission of a document in relation to an appeal against duties – appeal allowed

Heard on: 17 October 2022
Judgment date: 18 November 2022

Before

JUDGE THOMAS SCOTT
JUDGE VINESH MANDALIA

Between

PUSH ENERGY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ben Elliott, instructed by Bird & Bird LLP

For the Respondents: Mark Fell KC, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. Push Energy Limited (the "Appellant") applied to the First-tier Tribunal ("FTT") for a direction seeking disclosure from the European Commission (the "EC") of a copy of an undertaking (the "Undertaking") issued to the EC by the China Chamber of Commerce for Import and Export Machinery and Electrical Products (the "CCCME"). The FTT refused the request and the Appellant now appeals, with the permission of the FTT, against that decision (the "Decision").

2. We are grateful to Counsel for their clear and helpful submissions, although we have not found it necessary to refer to each and every point which they raised.

BACKGROUND

Legislation

3. The Appellant's substantive appeal concerns Anti-dumping Duty ("ADD") and Countervailing Duty ("CVD"). ADD is a type of customs duty imposed to protect against the "dumping" of certain goods into the EU at prices below normal value in order to prevent injury to EU industry. It is applied to specific goods originating or exported from named countries or supplied by named exporters. CVD applies in a similar fashion and is imposed on goods which have received government subsidies in the originating/exporting country.

4. Pursuant to Regulation (EU) No. 513/2013 the EC has imposed a provisional ADD on imports into the EU of certain crystalline photovoltaic modules[1] originating in or consigned from China. A group of exporting producers in China gave a mandate to the CCCME to submit a price undertaking to the EC on their behalf. The EC accepted the undertaking which was in due course submitted (being the Undertaking), and amended Regulation 513/2013 by Regulation (EU) No. 748/2013, so as to provide an exemption from ADD for the producers who had given the undertaking, subject to the satisfaction of certain conditions. One of those conditions was that the relevant imports be accompanied by an Export Undertaking Certificate in the form set out in Annex III of Regulation 748/2013.

5. Pursuant to Implementing Regulation (EU) No. 128/2013 (the "ADD Regulation"), the EC imposed a definitive ADD on the imports in question. That Regulation also contained, in Article 3, an exemption by reference to the Undertaking, and again included as a condition to that exemption the requirement that such imports be accompanied by an Export Undertaking Certificate, this time in the form set out in Annex IV of Regulation 128/2013. Annex IV included the following:

> The following elements shall be indicated in the Export Undertaking Certificate to be issued by the CCCME for each Commercial Invoice accompanying the Company's sales to the European Union of goods which are subject to the Undertaking:
>
> …
>
> 8. The number and expiry date (three months after issuance) of the certificate.

6. Implementing Regulation (EU) No. 1239/2013 imposed a definitive CVD in materially identical terms.

Factual background

7. The Appellant imported into the EU photovoltaic modules from one of the signatories to the Undertaking. The goods were accompanied by an Export Undertaking Certificate dated 16

[1] Commonly known as solar panels.

October 2014, and were exported from China on 26 October 2014. They were imported into the UK on 5 December 2014 but were then bonded into a long-term storage facility and only released into free circulation on 29 January 2015. The Export Undertaking Certificate expired on 16 January 2015.

8. HMRC concluded that the relevant goods did not benefit from the exemption under the Regulations because they were released into free circulation after the Certificate had expired. HMRC raised a post-clearance duty demand note or C18 on this basis on 11 October for ADD and CVD on the goods of £1,115.540.04[2] plus a penalty. Following a statutory review by HMRC which upheld the decisions, the Appellant appealed against the decisions to the FTT. The grounds of appeal are recorded at [10] of the Decision as follows:

> The Appellant requested a review and following the review appealed to the Tribunal on the following grounds:
>
> (1) The Appellant complied with the requirements of Regulation 1238/2013 and 1239/2013 in consequence of which no ADD or CVD is due;
>
> (2) Without prejudice to the generality of the foregoing the impugned import of goods was, at the point of entry into free circulation, accompanied by an appropriate Export Undertaking Certificate;
>
> (3) Further and without prejudice to the generality of the foregoing, the Export Undertaking Certificate is not rendered invalid as a consequence of more than three months having passed since the date of issuance of the certificate or its 'expiry date' having passed;
>
> (4) Further and without prejudice to the generality of the foregoing the relevant date for assessing the validity of the certificate is not the date on which the goods were released for free circulation but the date on which the goods arrived in the customs territory of the European Union;
>
> (5) Further and without prejudice to the foregoing, the imposition of duty and penalty in the circumstances of this case would breach the principle of proportionality in circumstances where the Undertaking price was paid (ensuring that there was no damage to the Union interests), ADD and CVD was applied as if the Undertaking price had not been paid, and the Appellant has borne the entirety of the cost of the ADD and CVD.

9. The primary dispute between the parties in the substantive appeal therefore relates to the construction of the relevant Regulations, and in particular what needed to have taken place before the expiry of the three-month period of the Certificate in order for the goods to have qualified for exemption from ADD and CVD. The Appellant contends that the Undertaking is relevant to this issue of construction.

The Appellant's requests to the EC

10. Following the EC's refusal of an informal request in February 2019, on 13 March 2019 the Appellant applied to the EC for access to certain information relating to the Undertaking (the "Initial Access Application"). That application was made under Article 2 of Regulation (EC) No. 1049/2010 (the "Public Access Regulation") which deals with public access to EC documents. The EC refused, stating that the information was by its nature confidential. However, the EC also stated as follows:

[2] The FTT misstated the amount in question at [2] of the Decision by a factor of ten as being £115,540.04. This error is not the subject of any separate ground of appeal.

> By way of concluding note, my services would nonetheless like to recall that access to the information you request may be requested by a national judge under the *Zwartveld* case-law to ensure the application and enforcement of Union law in the national legal order. It arises from that line of case-law that, if a national court needs information that only the EU institutions can provide, the principle of loyal cooperation, contained in Article 4(3) TEU, in principle, requires the EU institution concerned to communicate the information when it is available to the court concerned. Naturally, when an EU institution produces, in response to such a request, documents in national proceedings, the national court is supposed to guarantee the protection of confidential information, including business secrets.

11. There followed further fruitless attempts by the Appellant to obtain from the EC information regarding the Undertaking. The Appellant then requested access to a copy of the Undertaking alone. In a lengthy response dated 9 October 2019 the EC set out its reasons for refusing this request. However, that response referred again to the possibility of a national court requesting access as follows:

> The above being said, I recall that access to the information you require may be requested by a national judge under the *Zwartveld* case-law to ensure the application and enforcement of Union law in the national legal order.

THE APPLICATION TO THE FTT AND THE FTT'S DECISION

12. References below to paragraphs in the form [x] are, unless stated otherwise, to paragraphs of the Decision.

13. The Appellant applied to the FTT for a direction seeking disclosure from the EC of a copy of the Undertaking.

14. HMRC's position was recorded at [44]:

> HMRC initially opposed the Appellant's application on the grounds of relevance. However, when invited to make written submissions for the purposes of the hearing of this matter on the papers, by letter dated 11 January 2021 they stated:
>
> > "1. As this is, in substance, an application for third party disclosure, we consider in the circumstances that we should no longer object. However, we adopt a neutral position; and
> >
> > 2. The Tribunal will be aware that the third party (the European Commissions) has repeatedly objected to the provision of the material and will undoubtedly take those objections into consideration when determining the application.
> >
> > 3. It is a matter for the Tribunal whether the Appellant has satisfied it that the direction should be made"

15. The FTT first considered various relevant authorities, beginning with *Zwartveld and Others* EUECJ C-2/881 [1990] ECR I-3365 ("*Zwartveld*"). Those authorities were the decisions of the CJEU[3] in *First NV et Franex NV* [2002] EUECJ C-275/00 ("*First NV*") and *Eurobolt BV* [2019] EUECJ C-644/17 ("*Eurobolt*") and of the VAT and Duties Tribunal in *S&S Services Ltd v Customs & Excise Comrs* [2003] VATD 4571 ("*S&S*").

16. The FTT's discussion and conclusions can be summarised as follows:

[3] We use that term, and "the Court", in this decision to refer to the Court of Justice of the European Union and its predecessors.

(1) The application was not strictly an application under Rule 5(3)(d) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "FTT Rules") but rather an invitation for the FTT to invoke the *Zwartveld* principle and make a formal application for disclosure by way of mutual co-operation. The different basis of the application influenced the approach to be taken by the FTT.

(2) The EC had "systematically and with more vehemence resisted disclosure".

(3) The FTT was unclear on what basis the Undertaking might in fact shed light on the construction question: [49].

(4) Importantly, the FTT concluded at [50]:

> The line of cases starting with *Zwartveld* establishes that the Tribunal is entitled to request documents and information where those documents are "essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned". Thus, if the Tribunal can reach a conclusion on the issue before it without the document or information it will never be "essential".

(5) The FTT also concluded that "the scope of a valid request would appear to be limited to documentation/information regarding the validity of an EU act": [52]. The Appellant had not fully pleaded its position as regards this issue.

(6) The Appellant had also appealed on the ground of proportionality, but its case was unclear. The tribunal hearing the substantive appeal would be best placed to determine this question: [53].

(7) The FTT's critical reasoning and conclusions were as follows, at [54]-[56]:

> 54. The Appellant indicates that the anticipated refusal to disclose by the Commission is not reason to refuse making the request of them. The Tribunal agrees however, in this case, the Commission has been expansive as to the basis on which it considers that the Undertaking should not be disclosed, it has provided the level of particularisation which seems to have been missing in other cases. The clearly stated position of the Commission cannot therefore be ignored completely particularly in the context that enforcing a request, if refused by the Commission, is via the CJEU, an action which, post Brexit, likely to be fraught with difficulty if permitted at all.
>
> 55. As indicated at paragraph 46 above the Appellant considers that the approach to be adopted in determining this application is not exactly as for a conventional disclosure application. It will certainly be the case that the Tribunal should act in accordance with the overriding objective and that whether a document is relevant will lie at the heart of the application. However, relevant or potential relevance is not, in the Tribunal's view, enough. The document must be relevant and essential to the Tribunal's determination of the issues before it.
>
> 56. On balance the Tribunal is not satisfied that the Appellant has established a case for the Tribunal making a *Zwartveld* application now. It may be that the Tribunal hearing the case, having heard legal argument on the text of the Regulation, by reference to the relevant Council Decisions and any other publicly available traveaux preparatoir feels able to reach a conclusion on the case without the Undertaking or the minimum import price/annual level information. In which case the evidence will not be essential and there will be no need for the application to be made. If however, the Tribunal reaches a view on the legal argument before it that further documents/information is required it will be appropriate for the Tribunal to make its application then at

which point it will then be in a position to more completely assess the Commission's response. It appears that the Commission are responsive on these applications and that an application by the hearing judge would not substantially delay the final outcome of the appeal.

GROUNDS OF APPEAL

17. The Appellant appeals on three grounds:

(1) **Ground 1**: The FTT misstated and misapplied the *Zwartveld* principle in holding that a request could only be made in the course of a challenge to the validity of an EU act.

(2) **Ground 2**: The FTT misstated and misapplied the *Zwartveld* principle in holding that a request could only be made if the disclosure was relevant and essential, in the sense of being decisive, to the FTT's determination of the issues before it.

(3) **Ground 3**: In any event, the FTT erred in failing to apply the ordinary principles on disclosure in order to decide whether to make the request to the EC and let the EC decide whether or not to accede to it. Instead, the FTT effectively determined the application by reference to the likely unwillingness of the EC to comply with the request.

DISCUSSION

18. Before we turn to these grounds of appeal, it is convenient to consider three preliminary issues, namely the nature of the application before the FTT, territoriality, and the threshold for a successful challenge by the Appellant to the Decision.

Nature of the Appellant's application

19. The application to the FTT was made under Rule 5(3)(d) of the FTT Rules. The parties differed in this appeal as to which of the FTT Rules conferred the necessary jurisdiction to make the request of the EC.

20. Rule 5 contains the following relevant powers:

> **Case management powers**
>
> **5.**—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> …
>
> (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

21. Rule 16 contains the following powers:

> **Summoning or citation of witnesses and orders to answer questions or produce documents**
>
> 16.—(1) On the application of a party or on its own initiative, the Tribunal may—
>
> (a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation;

> (b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.
>
> …
>
> (3) No person may be compelled to give any evidence or produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law in the part of the United Kingdom where the proceedings are due to be determined.

22. We consider it clear that the FTT has jurisdiction under one or both of Rules 5 and 16 to make the request of the EU applied for by the Appellant. We do not consider that much turns on which of the general or specific powers is in point, although, as we discuss below, specific practice guidance exists in relation to territoriality in respect of Rule 16.

23. A separate question is whether the FTT was correct in concluding that the application was "not strictly" being made under Rule 5(3)(d) at all, so that different principles applied in determining it. We discuss this below.

Territoriality

24. In this appeal, though not before the FTT, HMRC raised as a problem for the Appellant's application the fact that the FTT would likely lack power under Rule 5(3)(d) to direct the EC to disclose the Undertaking, because the EC is a non-party based in a territory outside the UK.

25. In relation to Rule 16 of the FTT Rules, there is a Practice Statement issued on 15 June 2022 by the Chamber President which gives guidance on the practice to be adopted by the FTT in relation to the issue of witness summonses and orders to produce documents. The guidance contains the following statement under the heading "Territorial limitation":

> 3. The Tribunal cannot issue a witness summons to an individual unless that individual is in the UK or otherwise has a presence in the UK, such as a residential address or place of business. The Tribunal may issue a summons to an individual who normally lives outside the UK but is temporarily in the UK however it will exercise caution before doing so. The Tribunal will take account of the requirement for the efficient conduct of the proceedings.

26. Although this guidance is contained under the section headed "Application for a witness summons", the guidance makes clear that the Practice Statement is generally to apply equally to orders for the production of documents[4].

27. The Practice Statement relates to Rule 16, but there would seem no good reason not to regard it as guidance also applying in relation to orders for the production of documents under Rule 5.

28. In any event, in practice we do not foresee this issue as a bar to the Appellant's application, were the FTT to accede to it. Any request by the FTT could be made to the EC's representative in London. This was the course followed by the tribunal in *S&S*, in exercise of a power under what was (broadly) a predecessor to Rule 16, delivering a witness summons to produce documents to the Head of Representation of the EC in the UK. The EC in Brussels responded, treating the application as one made under the *Zwartveld* principle. We see no reason why that procedure could not be followed if the application in this case was accepted by the FTT, with the request presumably being made of what is now (following the UK's withdrawal) the Delegation of the EU to the UK.

[4] Paragraph 2 of the Practice Statement.

Case management decision

29. The FTT's decision was made in exercise of its case management powers. It is well established that this Tribunal will be slow to interfere with the proper exercise by the FTT of its discretion in case management decisions. The position was summarised by Sales J, as he then was, in *HMRC v Ingenious Games LLP* [2014] UKUT 0062 (TCC) ("*Ingenious Games*"), at [56]:

> The proper approach for the Upper Tribunal on an appeal regarding a case management decision of the FTT is familiar and is common ground. The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT: *Walbrook Trustees v Fattal* [2008] EWCA Civ 427, [33]; *Atlantic Electronics Ltd v HM Revenue and Customs Commissioners* [2013] EWCA Civ 651, [18]. The Upper Tribunal should exercise extreme caution before allowing appeals from the FTT on case management decisions: *Goldman Sachs International v HM Revenue and Customs Commissioners* [2009] UKUT 290 (TCC), [23]-[24].

GROUND 1: *ZWARTVELD* LIMITED TO CHALLENGE TO VALIDITY OF EU ACT

30. Having considered certain of the relevant authorities, the FTT stated at [52] as follows:

> Further the scope of a valid request would appear to be limited to documentation/information regarding the validity of an EU act. In this regard the Appellant has not fully pleaded its position as to the relevance of the information/documentation in the context of an EU act. Implicitly, but without particularising the relevant EU act, the Appellant appears to want the information to contend that had they had a certificate with validity on 29 January 2014 that certificate would have been in the same terms as the certificate actually issued and that they therefore should fall within the Exemption despite not having a valid certificate. If that is the Appellant's position it may be feasible to proceed on an assumption that that may have been the case in order to test the legal argument and if relevant to then seek to establish the factual position. Again however, this should be a matter for the Tribunal actually hearing the case.

31. The FTT's reasoning for its conclusion that a request may only be made in relation to a challenge to the validity of an EU act is not articulated. It is evidently based on its conclusion at [50] that "[T]he line of cases starting with *Zwartveld* establishes that the Tribunal is entitled to request documents and information where those documents are "essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned" ". This indicates strongly that the conclusion is based on the use of that precise wording at paragraph 30 of *Eurobolt*.

32. We consider that this conclusion was an error of law. It so happened that *Eurobolt* was a decision which related to a challenge to the validity of an EU act. However, although the passage in that decision on which the FTT appears to have relied was expressed in general terms, it was not laying down for the first time a restriction on the application of the *Zwartveld* principle. Such a significant development of that long-standing doctrine, not found or alluded to in any of the relevant CJEU authorities in the thirty years preceding *Eurobolt* (or since), would have required some discussion and an explicit finding by the Court to that effect.

33. We intend no disrespect to Mr Fell when we observe that his defence of the FTT's conclusion on this issue was somewhat less than whole-hearted. He pointed out that the FTT

only said that the scope of a *Zwartveld* request would "appear" to be limited in this way, and argued that this was not essential to the FTT's reasoning. However, it was expressed by the FTT in terms which show that it was an additional reason for its decision to refuse the application, and there is no indication in the Decision that it was not an operative reason for that conclusion. It may not have been, but that is speculation.

34. We conclude that Ground 1 succeeds, and the FTT erred in law by misdirecting itself as to the law in this conclusion. We discuss below what this means for the disposition of the appeal.

GROUND 2: *ZWARTVELD* APPLICABLE ONLY WHERE DOCUMENT IS ESSENTIAL TO FTT DETERMINATION OF APPEAL

35. As we have described, the FTT determined that in considering the application, the normal rules governing disclosure were not applicable, so that (in particular) it was not enough for the Appellant to satisfy the FTT that the Undertaking was relevant. Rather, it was necessary to pass a higher hurdle, namely that the Undertaking was "essential" to the FTT's determination of the substantive appeal. The FTT decided that this more stringent test was not met, and this was a reason for refusing the application.

36. In this context, the FTT explained what it understood by the "essential" requirement, at [50]:

> Thus, if the Tribunal can reach a conclusion on the issue before it without the document or information it will never be "essential".

37. The FTT emphasised the test it was applying at [55]:

> …the Appellant considers that the approach to be adopted in determining this application is not exactly as for a conventional disclosure application. It will certainly be the case that the Tribunal should act in accordance with the overriding objective and that whether a document is relevant will lie at the heart of the application. However, relevant or potential relevance is not, in the Tribunal's view, enough. The document must be relevant and essential to the Tribunal's determination of the issues before it.

38. HMRC say that the FTT was right to have reached this conclusion and applied this test, on the basis of the relevant CJEU case law, particularly *Eurobolt*. The Appellant says that the FTT was wrong and the case law does not support this view.

HMRC's submissions

39. Mr Fell submitted that the CJEU authorities show that in applying the *Zwartveld* practice, it is necessary to consider and evaluate separately the positions of the national court making the request and the EC. He said that it is only the decisions in *Eurobolt* and *First NV* which address the position of the national court, and these both support the "essential" threshold. The other authorities, said Mr Fell, focus on the position of the EC in receipt of a request, and are therefore of no material assistance in relation to the test to be applied by the national court making the request. In particular, he argued, the two *Zwartveld* decisions offer no guidance as to the threshold to be applied by the national court.

40. In relation to *First NV*, Mr Fell relied on the use of the word "needs", which he said was the same test as essentiality, at paragraph 49 of the decision (emphasis added to original):

> …it should be remembered that relations between the Member States and the Community institutions are governed, under Art.10 EC, by a principle of loyal co-operation. That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, but also imposes on the Community institutions and the

> Member States mutual duties of loyal co-operation. Therefore, if a national court **needs** information that only the Commission can provide, the principle of loyal co-operation laid down in Art.10 EC will, in principle, require the Commission when requested to do so by the national court to provide that information as soon as possible, unless refusal to provide such information is justified by overriding reasons relating to the need to avoid any interference with the functioning and independence of the Community or to safeguard its interests.

41. In relation to *Eurobolt*, Mr Fell relied on passages in both the Opinion of Advocate General Hogan and the decision of the CJEU. He referred to the following passage from the Advocate General's Opinion, at paragraph 35:

> In that context, as the national judge must have all the information necessary to guarantee the application and effectiveness of EU law, he must also have all the information necessary to proceed to the preliminary examination of legality and evaluate the necessity to make a preliminary ruling on the ground of article 267FEU.

42. In the Court's decision, he relied on the following passages:

> 30 That being said, a national court or tribunal is entitled to approach an EU institution, prior to the bringing of proceedings before the Court of Justice, in order to obtain specific information and evidence from that institution which that court or tribunal considers essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned and, thus, avoid making a reference to the Court of Justice for a preliminary ruling for the purpose of assessing validity.
>
> 31 In that regard, it is apparent from the case law of the Court of Justice that the EU institutions are under a duty of sincere co-operation with the judicial authorities of the member states, which are responsible for ensuring that EU law is applied and respected in the national legal system. On that basis, those institutions must, pursuant to article 4(3)EU, provide those authorities with the evidence and documents which have been asked of them in the exercise of their powers, unless the refusal to provide these is justified by legitimate reasons based, inter alia, on protecting the rights of third parties or the risk of an impediment to the functioning or the independence of the Union (see *In re Zwartveld* (Case C-2/88 Imm) [1990] ECR I-4405, paras 10—11).
>
> 32 Consequently, the answer to indent (b) of the first question is that article 267FEU, read in conjunction with article 4(3)EU, must be interpreted as meaning that a national court or tribunal is entitled, prior to bringing proceedings before the Court of Justice, to approach the EU institutions that have taken part in drawing up a piece of secondary EU legislation, the validity of which is being contested before that court or tribunal, in order to obtain specific information and evidence from those institutions which it considers essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned and so that it may avoid referring a question to the Court of Justice for a preliminary ruling for the purpose of assessing the validity of that act.

Discussion

43. The case law of the CJEU makes it clear that the *Zwartveld* practice results from the interest of the EC in assisting a national court to reach a proper and compliant determination of matters of EU law before the national court. That is, of course, entirely consistent with the principle of sincere co-operation. In *Zwartveld* itself, the Court described the principle in the following terms:

> 17 In that community subject to the rule of law, relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treaty, by a principle of sincere cooperation. That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law…but also imposes on Member States and the Community institutions mutual duties of sincere cooperation (see the judgment in Case 230/81 *Luxembourg v European Parliament* [1983] ECR 255, paragraph 37).
>
> 18 This duty of sincere cooperation imposed on Community institutions is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system.
>
> …
>
> 22 In this case, the request has been made by a national court which is hearing proceedings on the infringement of Community rules, and it seeks the production of information concerning the existence of the facts constituting those infringements. It is incumbent upon every Community institution to give its active assistance to such national legal proceedings, by producing documents to the national court and authorizing its officials to give evidence in the national proceedings; that applies particularly to the Commission, to which Article 155 of the EEC Treaty entrusts the task of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied.

44. Confining the principle to a situation where the document or information is essential to the national court's determination would be a significant limitation. As Mr Elliott pointed out, it could be extremely difficult in practice for a national court to determine with any certainty whether the information sought would be decisive in the sense that it could not decide the case without it. That may well be apparent only when and if the information was available, and in light of the court's eventual conclusion.

45. We do not accept Mr Fell's submissions. The authorities as a whole, considered against the purpose of the practice as first articulated in *Zwartveld*, do not indicate that the CJEU has approached that practice as involving two distinct positions or stages, namely those applicable to the national court and the EC. That is an over-complication or at least a restatement of the principle which is nowhere set out in those authorities. So, we do not accept Mr Fell's basic proposition that the various *Zwartveld* authorities which do not mention a test of essentiality can simply be ignored because they are dealing with the position of the EC as recipient of a request. In any event, we do not consider that *Eurobolt*, which is the foundation stone for HMRC's position, supports a generally applicable test of essentiality.

46. We begin by considering the most relevant authorities other than those relied on by HMRC. In *Zwartveld* itself, although the request from the authorities in the Netherlands did state that they considered the documents sought to be "essential" to their investigation, there is no mention or indication in the CJEU's decisions[5] of any requirement that the document or information sought from the EC must be essential to the national court's determination of the relevant EU law issue. In *Stergios Delimitis v Henninger Brau AG* (Case C-234/89), the Court described *Zwartveld* as permitting the national court to request information from the EC "where the concrete application of [the relevant EU legislation] raises particular difficulties"[6]. In *SFEI*

[5] There were in fact two decisions.
[6] Paragraph 53 of the decision.

and others v La Poste and others (Case C-39/94), the Court described the *Zwartveld* practice as follows at paragraph 50 (emphasis added to original):

> Where the national court **entertains doubts** as to whether the measures at issue should be categorized as State aid, it may seek clarification from the Commission on that point. In its notice on cooperation between national courts and the Commission in the State aid field (OJ 1995 C 312, p. 8), the Commission expressly encouraged national courts to make contact with it when they **encounter difficulties** in the application of Article 93(3) of the Treaty and explained what kind of information it was able to supply. It should be noted, in that regard, that as a consequence of the duty of sincere cooperation between the Community institutions and the Member States resulting from Article 5 of the Treaty (Case C-2/88 Imm. *Zwartveld and Others* [1990] 1-3365, paragraphs 17 and 18), the Commission must respond as quickly as possible to requests from national courts.

47. In *Postbank NV v Commission of the European Communities* [1997] 4 CMLR 33, the Court said that the national court "will be able to use [the requested documents] when deciding whether or not there has been any infringement of [the relevant Articles]"[7].

48. These authorities[8] do describe the nature of the *Zwartveld* process from the perspective of a national court, although that may not have been among the questions referred to the Court, and in doing so they do not do so by reference to a threshold of essentiality.

49. HMRC relied on the reference in the passage we set out above from *First NV* to a situation where a national court "needs" the requested information. We consider that in context that language is simply referring to a national court's decision that it requires the requested information from the EC, rather than in passing laying down a threshold for that decision. In any event, we do not accept that the word "needs" in this context equates to "essential". It is quite possible for a court to "need" material to assist in the interpretation of a relevant provision without that material being "essential".

50. HMRC support the FTT's decision to refuse the application partly because the Undertaking was not essential, in the sense that the FTT could not decide the appeal without it. The FTT's decision in this respect appears to rest on the passages we have set out from *Eurobolt*. However, we consider that that ignores the context in which those comments were made, and was a misdirection.

51. The issue which was referred in *Eurobolt* was a challenge to the validity of an EU regulation concerning anti-dumping duty. In particular, the CJEU was asked to determine the approach which a national court should take in considering whether to make a reference to the Court for a preliminary ruling regarding validity. The CJEU held that:

> (1) If the national court was convinced on the basis of the grounds put forward by the applicant that the relevant legislation was invalid, then it should, solely on that basis and without investigating further, make a reference for a preliminary ruling as to validity. However,
>
> (2) Prior to the making of such a reference, the national court was entitled to approach the EC in order to obtain specific information and evidence which the national court considered essential in order to dispel all doubts which it might have regarding the validity of the legislation concerned, and so that it could avoid making a reference.

[7] Paragraph 63 of the decision.
[8] Including, in the domestic context, *S&S*.

52. We consider that it is the latter point which was being made at paragraphs 30 and 32 of the Court's decision in *Eurobolt* (set out above at [42] of this decision) and at paragraph 35 of the Advocate General's Opinion (set out at [41] of this decision). In other words, *Eurobolt* suggests that a test of essentiality applies when a national court is determining whether information or documents are needed in order to decide whether to make a reference for a preliminary ruling as to the validity of EU legislation. Contrary to the FTT's assumption, it does not suggest that such a test applies to a *Zwartveld* request made outside that situation.

53. The conclusion that *Eurobolt* was not for the first time imposing a general restriction on the long-standing *Zwartveld* principle is shown by paragraph 31 of the decision, which in describing the general *Zwartveld* principle refers to the duty on the EC to "provide [the national authorities] with the evidence and documents which have been asked of them in the exercise of their powers".

54. For these reasons, we consider that the FTT erred in law and that Ground 2 succeeds. We consider below what his means for the disposition of the appeal.

GROUND 3: THE EC'S POSSIBLE REACTION TO A REQUEST FROM THE FTT

55. By this ground, the Appellant asserts that the FTT erred in law by acting in a procedurally unfair manner in giving significant weight to what it judged to be the likely refusal of the EC if the FTT were to have granted the application and requested the Undertaking from the EC.

56. It is clear from the Decision that the FTT did afford this factor material weight.

57. However, we agree with Mr Fell that, applying the overriding objective, it cannot fairly be said that this was clearly an irrelevant factor in the FTT's consideration of the application. In our view, the FTT afforded it too much weight, but we are mindful of the approach which we should take to an appeal against a case management decision of the FTT, as set out above. In *BPP Holdings Ltd & Ors v HMRC* [2017] UKSC 55, at [33] Lord Neuberger quoted with approval the passage we have cited above from *Walbrook Trustee*, and added:

> In other words, before they can interfere, appellate judges must not merely disagree with the decision: they must consider that it is unjustifiable.

58. So, we should not and would not disturb the FTT's reasoning in this respect on the ground that we consider that it afforded the perceived position of the EC too much weight in reaching its decision. Weight was a matter for the FTT.

59. However, we do consider that the FTT made an *Edwards v Bairstow*[9] error in relation to the relevance of the likely EC position to its decision. Such an error can occur where the FTT makes a finding where the evidence contradicted the finding or where the FTT failed to take into account a relevant factor in reaching a finding.

60. That is because, having decided that the likely reaction of the EC was a material factor in deciding the application, the FTT took an irrational decision by taking into account the EC's previous refusals to deliver the Undertaking to the Appellant while failing to take into account at all the fact that the EC had twice reminded the Appellant of the alternative route of a *Zwartveld* request. Put another way, the EC's prior position looked at in the round was that it had steadfastly refused to deliver the requested information or Undertaking **to the Appellant**, but had explicitly pointed out the alternative route of production **to the national court** under the *Zwartveld* principle. If the EC's position was to be given weight—and the FTT decided that it was—then its references to that alternative route could not rationally be entirely ignored in reaching a decision.

[9] [1956] AC 14.

61. We therefore conclude that the FTT erred in law by failing to take into account both aspects of the EC's previous responses in predicting and taking into account their likely response to a request from the FTT for the Undertaking.

CONCLUSION AND DISPOSITION

62. We have concluded that the FTT erred in law in reaching its decision. Therefore, we may, but need not, set aside the decision: section 12(2)(a) Tribunals, Courts and Enforcement Act 2007 ("TCEA"). We are satisfied that the errors were material, taking into account that this was a case management decision, so we set the decision aside.

63. Having set the decision aside, we may either remit it to the FTT with directions for its reconsideration, or re-make it: section 12(2)(b) TCEA. We consider that the appropriate course is for the decision to be remitted with directions. It is the FTT which should make any request for a copy of the Undertaking from the EC, since it is the FTT, not this Tribunal, which still has to hear and case manage the substantive appeal. We understood both parties to agree with this course, should we decide to set the decision aside.

64. In giving directions to the FTT, we consider that we should decide whether to direct the FTT which hears the remitted case to grant the application which was before it. We have decided that it should be so directed, for the following reasons, which reflect the findings we have made above in respect of the Appellant's grounds of appeal:

(1) The FTT has jurisdiction to make the request under the FTT Rules.

(2) A *Zwartveld* request is not limited to a situation in which the validity of an EU act is being challenged.

(3) It is not necessary for the Undertaking to be "essential" in the sense of being decisive to the determination of the substantive appeal. It is sufficient that it is relevant to the issues in the appeal. That question is to be determined by applying the normal principles in relation to orders for the disclosure of documents by the FTT[10], including taking into account the pleaded cases of the parties. It is apparent from those pleaded cases that the FTT will be called on to construe purposively the relevant exempting legislation. In so doing, the purpose and context of the exemption will be particularly important given the teleological approach applying to the construction of EU legislation. While we accept HMRC's submission that the Undertaking may not shed any light on the primary issues in the appeal, we also accept Mr Elliott's submission that it is clearly a document which may shed light on the context in which the regulation was enacted. As such, it is on balance preferable for the FTT to have requested sight of it before the substantive appeal is heard.

(4) We disagree with the FTT that the better course would be to refuse the application and leave it to the FTT hearing the substantive appeal to decide whether it considers it appropriate during or after the hearing to make a *Zwartveld* request for the Undertaking. That would lead either to the Undertaking not being taken into account by the FTT in reaching a decision, even though the FTT would not know whether it did or did not assist to any degree in resolving the issues of construction before it, or to further delay and a further hearing if it was decided that a request should be made. Neither outcome would best further the overriding objective.

(5) We do not consider that it is fruitful to speculate as to the EC's likely reaction to the request. In any event, the possibility of an unhelpful response by the EC is not in our opinion a good reason to refuse the Appellant's application.

[10] For a discussion of some of the general principles, see *McCabe v HMRC* [2020] UKUT 0266 (TCC).

65. The impact on the *Zwartveld* practice of the UK's withdrawal from the EU was not discussed before the FTT, although the FTT did consider that "enforcing a request, if refused by the Commission, is via the CJEU, an action which, post Brexit, [is] likely to be fraught with difficulty if permitted at all"[11]. We consider that, whether or not that comment is correct, speculation as to steps which might or might not follow if the EC refused a request is again not material to the decision whether to grant the application in the first place. As to the current status of the *Zwartveld* practice following withdrawal from the EU, we agree with Counsel that in this decision we need not resolve that question, given that the parties were in broad agreement that although the position was complicated there are grounds to consider that the practice survives the UK's withdrawal. We observe that given that the purpose of the principle of sincere co-operation in this context is that the EC has an interest in helping national courts to reach an informed decision about EU legislation, since the substantive appeal relates to matters prior to withdrawal and to the interpretation of EU law, there are grounds for optimism that the principle should apply in this case. Regardless, speculation as to whether the EC might take a point in this respect is ultimately not fruitful; if the FTT makes the application, the EC's position will become apparent in due course.

66. We therefore remit this decision to the FTT. We see no reason why the same tribunal judge should not decide the remitted case. The decision is remitted on terms that the application should be granted, with the FTT hearing submissions from both parties as to the terms of the request to be made of the EC, including as to whether it should be delivered to the EC's Delegation to the UK.

JUDGE THOMAS SCOTT
JUDGE VINESH MANDALIA

Release date: 21 November 2022

[11] [54].