JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

8 October 2008 *

In Case T-51/07,

Agrar-Invest-Tatschl GmbH, established in St. Andrä im Lavanttal (Austria), represented by U. Schrömbges and O. Wenzlaff, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Alcover San Pedro and S. Schønberg, acting as Agents, assisted by B. Wägenbaur, lawyer,

defendant,

ACTION for annulment in part of Commission Decision C(2006) 5789 final of 4 December 2006,

* Language of the case: German.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, N. Wahl and A. Dittrich (Rapporteur), Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 2 April 2008,

gives the following

Judgment

1 The applicant contests Commission Decision C(2006) 5789 final of 4 December 2006 ('the contested decision'), addressed to the Republic of Austria, to the extent that the Commission states in that decision, first, that import duties of EUR 110 937.60, owed by the applicant, Agrar-Invest-Tatschl GmbH, for the importation of sugar originating in Croatia should be entered subsequently in the accounts, and, second, that the remission of those duties is not justified.

Legal framework

2 Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the CCC'), as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17), provides:

'Except in the cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the accounts shall not occur where:

(a) …

(b) the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

Where the preferential status of the goods is established on the basis of a system of administrative cooperation involving the authorities of a third country, the issue of a certificate by those authorities, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected within the meaning of the first subparagraph.

The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where, in particular, it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

The person liable may plead good faith when he can demonstrate that, during the period of the trading operations concerned, he has taken due care to ensure that all the conditions for the preferential treatment have been fulfilled.

The person liable may not, however, plead good faith if the European Commission has published a notice in the *Official Journal of the European Communities*, stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country.'

3 Article 239 of the CCC provides:

'(1) Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:

— to be determined in accordance with the procedure of the committee;

— resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.

(2) Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.'

Facts

4 The applicant is an Austrian undertaking, specialising in trade in agricultural goods. Between 20 September 2001 and 8 August 2002, it carried out 76 import transactions relating to sugar originating in Croatia. Imports Nos 1 to 67 are not covered by the present action. The action concerns only the subsequent entry in the accounts of the customs duties for the nine import transactions Nos 68 to 76 ('the contested imports'), and the remission to which they may be subject. Those imports took place between 1 July and 8 August 2002.

5 The contested imports were carried out on the basis of the 'Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Croatia, of the other part' (OJ 2001 L 330, p. 3; 'the Interim Agreement'). That agreement provides inter alia for preferential treatment of sugar

originating in Croatia, in so far as the Croatian authorities issue a movement certificate EUR.1 ('the EUR.1 certificate'), which must be submitted to the customs authorities of the importing country.

6 On 2 April 2002, the European Anti-Fraud Office (OLAF) informed the Commission of certain suspicions regarding the use of false certificates of origin for preferential imports of sugar originating in certain countries of the Western Balkans.

7 By means of a 'Notice to importers' (OJ 2002 C 152, p. 14), the Commission announced, on 26 June 2002, that there was reasonable doubt as to the proper application of the preferential arrangements for sugar originating inter alia in Croatia. It also stated in the notice that there had been a significant increase in preferential imports of sugar from Croatia and some Balkan countries whereas the countries in question had in the recent past shown a deficit in sugar production. The Commission therefore advised Community operators to take all the necessary precautions, since the release of the goods in question for free circulation may give rise to a customs debt and lead to fraud against the Community's financial interests.

8 All the contested imports took place following publication of that notice in the Official Journal.

9 At the request of the Austrian customs administration, the Croatian customs authorities carried out, between 23 July 2002 and 16 September 2003, a subsequent verification of the EUR.1 certificates submitted by the applicant in respect of the contested imports, as provided for under Article 32 of Protocol 4 of the Interim Agreement.

10 Following those verifications, the Croatian customs administration confirmed, on 18 February 2003, the authenticity and accuracy of the EUR.1 certificates issued in respect of imports Nos 68 to 72 and, on 16 September 2003, in respect of imports Nos 73 to 76.

11 Following publication of the Notice to importers, OLAF analysed, in Greece, some sugar purporting to be Croatian and discovered that it consisted of a mixture of beet and cane sugar, ruling out completely Croatian origin. On 28 October 2002, OLAF informed the Member States of this.

12 In June 2003, OLAF undertook investigations at the offices of the Croatian sugar producer IPK Tvornica Šećera Osijek d.o.o. and found that that undertaking, from which the applicant had purchased sugar, also used imported cane sugar in its production processes, without it being possible to distinguish between the different batches of sugar concerned.

13 The Croatian authorities therefore withdrew all the EUR.1 certificates drawn up between 14 September 2001 and 17 September 2002. On 30 June 2004, the Austrian authorities informed the importers concerned of the withdrawal of the certificates.

14 Following that withdrawal, the competent Austrian customs authority sent the applicant, on 9 August 2004, a notice for post-clearance recovery of EUR 916 807.21.

15 The applicant appealed against that decision to the competent Austrian authority and requested, under Article 220(2)(b) of the CCC, that the amount of customs duties referred to in the recovery notice not be entered subsequently in the accounts and, in the alternative, on the basis of Article 239 of the CCC, that those duties be remitted.

16 By letter of 1 June 2005, the Republic of Austria requested the Commission to decide, under the abovementioned articles, if it was justified, in the applicant's case, to waive subsequent entry of the amount of the customs duties in the accounts and, in the alternative, to decide whether the remission of those duties was justified.

17 In the contested decision, the Commission stated that it was appropriate to waive subsequent entry in the accounts of the duties for imports Nos 1 to 67, but it rejected such a waiver, and the grant of remission, for the contested imports, that is, for a total of EUR 110 937.60.

18 In essence, the Commission maintained that the competent Croatian authorities knew, or at least, should reasonably have known that the goods did not satisfy the conditions for entitlement to the preferential treatment provided for in the Interim Agreement and that, accordingly, they had made an error within the meaning of Article 220(2)(b) of the CCC. Nevertheless, given the fact that a Notice to importers had been published on 26 June 2002, the applicant may not, according to the Commission, rely on its good faith with regard to imports carried out after that date. The fact that the Croatian authorities confirmed the validity of certain EUR.1 certificates after publication of the Notice is not relevant in that regard. When it carried out the contested imports, the applicant knew, according to the Commission, the risks it was running, and the confirmation of the validity of the certificates concerned could not subsequently give it a legitimate expectation, without rendering the fifth subparagraph of Article 220(2)(b) of the CCC completely meaningless.

Procedure and forms of order sought by the parties

19 By application lodged at the Registry of the Court of First Instance on 22 February 2007, the applicant brought the present action.

20 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Eighth Chamber) decided to open the oral procedure.

21 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 2 April 2008.

22 The applicant claims that the Court of First Instance should:

— annul Article 1(2) and Article 1(3) of the contested decision;

— order the Commission to find that a subsequent entry in the accounts of customs duties amounting to EUR 110 937.60 on the contested imports should not be made;

— in the alternative to the second head of claim, order the Commission to find that customs duties amounting to EUR 110 937.60 on the contested imports should be remitted.

23 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

24 In support of its action, the applicant claims in essence an infringement by the contested decision of Articles 220(2)(b) and 239 of the CCC, inasmuch as the Commission refused to waive subsequent entry in the accounts of the import duties relating to the contested imports and/or to remit those duties.

Admissibility of the second and third heads of claim

Arguments of the parties

25 The Commission, without formally raising the plea of inadmissibility, points out that it is not the role of the Community judicature, in the context of its review of legality, to issue directions to the authorities or institutions or to replace them. Accordingly, the second and third heads of claim, which seek to require the Commission to carry out certain actions, are inadmissible.

26 At the hearing, the applicant nevertheless reiterated its claims, maintaining that, in the present case, the Commission did not enjoy any discretion and that, therefore,

there was no reason precluding the Court, once the contested decision was found to be unlawful, from enjoining the Commission to adopt a decision in accordance with its claims.

Findings of the Court

27 According to well-established case-law, the Court of First Instance has no jurisdiction to issue directions to the Community institutions (see, to that effect, Case 225/82 *Verzyck* v *Commission* [1983] ECR 1991, paragraph 19; order of the Court of First Instance in Case T-47/96 *SDDDA* v *Commission* [1996] ECR II-1559, paragraph 45). Under Article 231 EC, the Court may only declare the contested act to be void. It is then for the institution concerned, in application of Article 233 EC, to take the measures needed to comply with the Court's judgment (see, to that effect, Case T-74/92 *Ladbroke* v *Commission* [1995] ECR II-115, paragraph 75, and T-127/98 *UPS Europe* v *Commission* [1999] ECR II-2633, paragraph 50).

28 Regarding the argument concerning the Commission's lack of discretion, it should be added that that limitation of the scope of judicial review applies to all types of contentious matters that might be brought before the Court (Case T-204/99 *Mattila* v *Council and Commission* [2001] ECR II-2265, paragraph 26, upheld in Case C-353/01 P *Mattila* v *Council and Commission* [2004] ECR I-1073, paragraph 15).

29 Therefore, the second and third heads of claim are inadmissible.

Subsequent entry in the accounts of the import duties

Arguments of the parties

30 The applicant points out that, according to Article 220(2)(b) of the CCC, subsequent entry in the accounts is not to occur where, first, the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities themselves, second, that error could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith, and third, all the provisions laid down by the legislation in force as regards the customs declaration were complied with.

31 In the present case, the relevant question is whether publication in the Official Journal of the Notice to importers, on 26 June 2002, ruled out good faith on the part of the applicant as regards the authenticity and accuracy of the EUR.1 certificates submitted in respect of the contested imports.

32 According to the applicant, the Commission disregards the fact that it was after publication of the Notice to importers and because of that notice that the Austrian customs authorities sent their Croatian counterparts requests for inspection of all the EUR.1 certificates submitted in respect of the contested imports.

33 Consequently, the applicant's good faith does not relate to the authenticity and accuracy of the EUR.1 certificates issued in respect of the contested imports. The existence of good faith in relation to those documents was ruled out by the Notice to importers. By contrast, it was not ruled out with regard to the subsequent confirmation of the

EUR.1 certificates following the inspections carried out by the Croatian customs administration, which were initiated precisely because of the Notice to importers.

34 The last subparagraph of Article 220(2)(b) of the CCC does not generally and entirely rule out good faith on the part of the applicant, but excludes it only with regard to the authenticity and accuracy of the documentary proof of origin submitted at the time of importation of the goods entitled to preferential treatment.

35 According to the applicant, if the economic operator takes supplementary measures in order to ensure the authenticity and accuracy of the certificate issued with a view to securing preferential treatment, and if the effect of those measures is that the certificate is authentic and accurate as to its substance, then its good faith is re-established. That good faith relates not only to the certificate issued with a view to securing preferential treatment which was submitted initially, but also to that certificate in connection with the subsequent confirmation of its validity and accuracy by means of an inspection showing that the conditions for issue of the certificate of origin are satisfied.

36 In that regard, the applicant also refers to the wording of the Notice to importers which advised Community operators to 'take all the necessary precautions'. The Commission thus indicated that the initial certificates issued with a view to securing preferential treatment were no longer valid and that it expected the economic operators to take supplementary measures in order to guarantee their validity and accuracy.

37 Therefore, after the confirmation by the Croatian customs administration of the authenticity and accuracy of the certificates issued with a view to securing preferential treatment, the good faith of the economic operators with regard to their authenticity and accuracy was restored.

38 In its reply, the applicant explains that, if, on account of publication of the Notice, it could not be said to have been acting in good faith at the time of the contested imports, it was the subsequent inspections, the positive results of which enabled its good faith to be restored, which matter in the present case.

39 The Commission contests the applicant's arguments.

Findings of the Court

40 Under Article 220(2)(b) of the CCC, subsequent entry in the accounts of duty resulting from a customs debt is not to occur where the following conditions are cumulatively satisfied (see, to that effect, Case C-419/04 *Conseil général de la Vienne* v *Directeur général des douanes et droits indirects* [2006] ECR I-5645, paragraph 38, and case-law cited):

— the amount of duty legally owed has not been entered in the accounts as a result of an error on the part of the customs authorities;

— that error could not reasonably have been detected by the person liable for payment;

— the latter acted in good faith;

— all the provisions laid down by the legislation in force as regards the customs declaration were complied with.

41 In the present case, the parties are in dispute concerning the condition relating to the good faith of the applicant. Given the legal effect of the Notice to importers, it can in fact be ruled out that that condition is satisfied.

42 In that regard, it must be held that the wording of the fifth subparagraph of Article 220(2)(b) of the CCC is clear and unequivocal. It provides that the person liable may not plead his good faith if the European Commission has published in the Official Journal a notice to importers stating that there are grounds for doubt, and does not provide the possibility for the person liable to prove his good faith by taking supplementary measures in order to ensure the authenticity and accuracy of the certificates issued with a view to securing preferential treatment. That wording was introduced in the CCC by Regulation No 2700/2000, the 11th recital of which is drafted as follows:

'The person liable for payment can plead his good faith where he can demonstrate that he has taken due care, except when a notice stating that there are grounds for doubt has been published in the *Official Journal of the European Communities*.'

43 In addition, as the Commission points out, the absolute exclusion of good faith where a notice to importers has been published ensures a very high level of legal certainty.

44 It must be concluded that in the present case the Notice to importers does not contain any reference back to the fifth subparagraph of Article 220(2)(b) of the CCC and that it is not very clear as to its legal consequences. In particular, it does not state that its publication renders it impossible for importers to rely on their good faith. After pointing out that there is reasonable doubt as to the proper application of the preferential arrangements for sugar originating inter alia in Croatia, the Commission concludes simply that 'Community operators … are therefore advised to take all the necessary precautions'.

45 At the hearing, the Commission admitted that it cannot be excluded that, in exceptional circumstances, it could be prompted to adjust its position regarding the absolute effect of a notice to importers where an economic operator claims that, following publication of such a notice, but before importation, it carried out supplementary verification measures which confirmed the origin of the goods.

46 However, it is not necessary to examine whether, and under what conditions, such an exception would be possible, because, in any case, the applicant has not acted in good faith in the present case.

47 In its reply, the applicant indeed explicitly acknowledges that, at the time of the contested imports, it was not acting in good faith on account of the Notice to importers. It claims that its good faith was 'restored' by the subsequent confirmation of the authenticity and accuracy of the EUR.1 certificates following the inspections carried out by the Croatian customs administration. However, the fourth subparagraph of Article 220(2)(b) of the CCC provides that the person liable may plead his good faith only 'when he can demonstrate that, during the period of the trading operations concerned, he has taken due care to ensure that all the conditions for the preferential treatment have been fulfilled'. It follows from that provision that the person liable must imperatively have been of good faith during the period of the trading operations concerned. Therefore, the decisive date for taking into account the good faith of the person liable is the date of importation.

48 In its written pleadings, the applicant has however failed to provide any information concerning the efforts undertaken by it before or after the date of each contested import, in order to ensure, within the meaning of the fourth subparagraph of Article 220(2)(b) of the CCC that — despite the publication of the Notice to importers — all the conditions necessary for the preferential treatment of the goods were complied with.

49 On the contrary, in contending that its good faith was 'restored' by the subsequent inspections, the applicant implicitly confirms that it did not act in good faith until the time when the subsequent checks confirmed the authenticity and accuracy of the EUR.1 certificates issued in respect of the contested imports, that is to say, several months after those imports took place.

50 To the extent that the applicant claims that, with regard to its good faith as to the authenticity and accuracy of the EUR.1 certificates concerning the contested imports, it is the subsequent inspection procedure, and not the original import procedure, which matters, since its positive outcome enabled it to 'restore' its good faith, it must be held simply that that contention has no basis in Article 220(2)(b) of the CCC.

51 Even on the assumption that the applicant had acted in good faith so far as the outcome of the subsequent inspections was concerned, the fact remains that it was not acting in good faith 'during the period of the trading operations concerned'. The applicant cannot claim that its good faith was in some way retroactively restored as a result of events subsequent to those imports. In fact, the concept of good faith 'with regard to the authenticity and accuracy of the preferential certificates inspected and confirmed subsequently' makes no sense.

52 As a result, the application for annulment of Article 1(2) of the contested decision must be dismissed.

Refusal to grant remission of the import duties

Arguments of the parties

53 With regard to the refusal to grant subsequent remission of import duties under Article 239 of the CCC, the applicant refers in its application, and only in the context of its third head of claim, to 'previous explanations', without further specification.

54 The Commission points out that the conditions for the grant of remission of import duties, laid down in Article 239 of the CCC, differ from those contained in Article 220(2)(b) of the CCC. However, instead of demonstrating that the conditions of Article 239 of the CCC are satisfied in the present case, the applicant refers back generally and without more detailed explanation to its arguments concerning Article 220(2)(b) of the CCC. It is therefore doubtful whether its application would on that point comply with the requirements of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance. In any case, the applicant's account of the facts is not convincing, which is sufficient for it not to be accepted, given the fact that Article 220(2) and Article 239 of the CCC are two discrete provisions the conditions for the application of which are therefore likewise different.

Findings of the Court

55 It should be pointed out at the outset that the arguments capable of being relied upon in support of the third head of claim, the inadmissibility of which has been established, are equally relevant to the first head of claim, in so far as it seeks the

annulment of Article 1(3) of the contested decision, under which the remission of import duties pursuant to Article 239 of the CCC is not justified in the present case.

56 Nevertheless, it must be held that the applicant does not provide further reasons for its application. It confines itself to referring back in its application to the explanations regarding Article 220(2)(b) of the CCC. Equally, in its reply the applicant does not elaborate on its observations on that point. At the hearing, it stated that a customs inspection took place on the occasion of each importation. It maintained that samples were then taken on each occasion and sent to the Austrian office for technical verification. According to the applicant, that office identified the samples as 100% sugar beet, confirming the sugar to be of Croatian origin.

57 In accordance with Article 48(1) of the Rules of Procedure, the offers of further evidence referred to in the preceding paragraph cannot be taken into account. Although the parties may, under that provision, offer further evidence in support of their arguments in reply or rejoinder, the Court allows the lodging of evidence offered after the rejoinder only in exceptional circumstances, that is, if the person offering the evidence was unable, before the end of the written procedure, to obtain possession of the evidence in question, or if evidence produced belatedly by the other party justifies completing the file so as to ensure observance of the rule that both parties should be heard (Case T-172/01 *M* v *Court of Justice* [2004] ECR II-1075, paragraph 44). In any case, Article 48(1) of the Rules of Procedure provides that the parties must give reasons for the delay in submitting further evidence. While the applicant admitted at the hearing that it had not referred to those circumstances in the written procedure, it did not provide any justification for that delay. Consequently, those offers of further evidence cannot be taken into account.

58 With regard to the reference back in the application to the explanations concerning Article 220(2)(b) of the CCC, it should be pointed out that, while it is true that that provision pursues the same goal as Article 239 of the CCC, the two provisions are not coterminous. The first article has a more limited objective than the second, since it aims only to protect the legitimate expectation of the person liable that all the

information and criteria used in the decision whether or not to make a subsequent entry in the accounts of import duties are correct. By contrast, Article 239 EC is a general hardship clause (see, to that effect, with regard to equivalent provisions in force at the time, Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 87, and Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraphs 136 to 139).

59 Therefore, Article 220(2)(b) of the CCC and Article 239 of the CCC are two discrete provisions the criteria for the application of which are different. In those circumstances, applying Article 44(1)(c) of the Rules of Procedure, the applicant may not confine himself to referring back to the explanations relating to Article 220(2)(b) of the CCC in order to justify its arguments regarding Article 239 of the CCC.

60 It follows that the application for annulment of Article 1(3) of the contested decision must be dismissed as inadmissible.

61 None of the pleas having been accepted, the action must be dismissed in its entirety.

Costs

62 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since

the applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the Commission's costs.

On those grounds,

THE COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Agrar-Invest-Tatschl GmbH to bear the costs.

Martins Ribeiro Wahl Dittrich

Delivered in open court in Luxembourg on 8 October 2008.

Registrar President

E. Coulon M.E. Martins Ribeiro