Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

14 April 2016 *

(Reference for a preliminary ruling — Agriculture — Common organisation of the markets — Regulation (EC) No 565/2002 — Article 3(3) — Tariff quota — Garlic of Argentinian origin — Import licences — Non-transferability of rights deriving from import licences — Circumvention — Abuse of rights — Conditions — Regulation (EC, Euratom) No 2988/95 — Article 4(3))

In Case C-131/14,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Corte suprema di cassazione (Court of cassation, Italy), made by decision of 13 January 2014, received at the Court on 21 March 2014, in the proceedings

Malvino Cervati,

Società Malvi Sas di Cervati Malvino, having ceased to trade,

v

Agenzia delle Dogane,

Agenzia delle Dogane — Ufficio delle Dogane di Livorno,

intervening parties:

Roberto Cervati,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, C. Toader, A. Rosas, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 18 November 2015,

after considering the observations submitted on behalf of:

— M. Cervati, Società Malvi Sas di Cervati Malvino and R. Cervati, by C. Mazzoni, M. Moretto and G. Rondello, avvocati,

* Language of the case: Italian.

— the Italian Government, by G. Palmieri, acting as Agent, and by A. Collabolletta, avvocato dello Stato,

— the Greek Government, by I. Chalkias, I. Dresiou, O. Tsirkinidou and D. Ntourntoureka, acting as Agents,

— the European Commission, by B.-R. Killmann and P. Rossi, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Commission Regulation (EC) No 1047/2001 of 30 May 2001 introducing a system of import licences and certificates of origin and establishing the method for managing tariff quotas for garlic imported from third countries (OJ 2001 L 145, p. 35) and Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

2 The request has been made in proceedings between Mr M. Cervati, in his capacity as general partner and legal representative of Società Malvi Sas di Cervati Malvino, a partnership having ceased to trade ('Malvi'), and the partnership itself and the Agenzia delle Dogane (Customs Authority) and the Agenzia delle Dogane — Ufficio delle Dogane di Livorno (Customs Authority — Livorno Customs Office) as well (together, 'the Customs Authority'), concerning a correction and recovery notice notified to Malvi in relation to imports of garlic of Argentinian origin subject to a preferential rate of customs duty.

Legal context

Regulation No 2988/95

3 Article 4 of Regulation No 2988/95, which falls under Title II of the regulation, entitled 'Administrative measures and penalties', provides:

'1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

— by an obligation to pay or repay the amounts due or wrongly received,

...

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the [EU] law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.

...'

Regulation (EC) No 1291/2000

4 The first subparagraph of Article 8(1) of Commission Regulation (EC) No 1291/2000 of 9 June 2000 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 2000 L 152, p. 1), provides:

'The import or export licence shall constitute authorisation and give rise to an obligation respectively to import or to export under the licence, and, except in cases of *force majeure*, during its period of validity, the specified quantity of the products or goods concerned.'

5 Article 9(1) of that regulation provides:

'Obligations deriving from licences or certificates shall not be transferable. Rights deriving from licences or certificates shall be transferable by their titular holder during the period of its validity. ...'

6 The first subparagraph of Article 15(2) of the regulation states:

'No application for a licence or certificate shall be accepted unless an adequate security has been lodged with the competent body ... on the day the application is lodged.'

7 Under Article 35(2) of the regulation:

'... where the obligation to import or export has not been met the security shall be forfeit in an amount equal to the difference between:

(a) 95% of the quantity indicated in the licence or certificate

and

(b) the quantity actually imported or exported.

...

However, if the quantity imported or exported amounts to less than 5% of the quantity indicated in the licence or certificate, the whole of the security shall be forfeit.

...'

Regulation No 1047/2001

8 Article 5(1) of Regulation No 1047/2001, entitled 'Issue of licences', provides that, 'notwithstanding Article 9 of Regulation (EC) No 1291/2000, the rights accruing from A licences shall not be transferable'.

9 Regulation No 1047/2001 was repealed, as of 1 June 2002, by Commission Regulation (EC) No 565/2002 of 2 April 2002 establishing the method for managing tariff quotas and introducing a system of certificates of origin for garlic imported from third countries (OJ 2002 L 86, p. 11).

Regulation No 565/2002

10 Recitals 1, 3 and 5 to 7 of Regulation No 565/2002 state:

‘(1) ... Since 1 June 2001 the normal customs duty for imports of garlic falling within CN code 0703 20 00 has consisted of an *ad valorem* customs duty of 9.6% and a specific amount of EUR 1 200 per tonne net. However, a quota of 38 370 tonnes free of specific duty was opened by the Agreement concluded with Argentina, approved by [Council] Decision 2001/404/EC [of 28 May 2001 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Community and the Argentine Republic pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 for the modification of concessions with respect to garlic provided for in Schedule CXL annexed to the GATT (OJ 2001 L 142, p. 7)], hereafter called the “GATT quota”. The Agreement stipulates that the quota is to be divided up into 19 147 tonnes for imports from Argentina (serial number 09.4104) ...

...

(3) The method for managing the GATT quota was established by … Regulation [No 1047/2001] ... Experience shows however that this management could be improved and simplified. In particular, the need for import licences for imports carried out outside the GATT quota should be abolished, and the conditions for access by importers to this quota should be adapted to take better account of traditional trade flows.

...

(5) In view of the existence of a specific duty for non-preferential imports outside the GATT quota, management of the quota requires the introduction of a system of import licences. The detailed rules of that system must be complementary to, or derogate from, those laid down by … Regulation [No 1291/2000] ...

(6) Measures are needed to keep to a minimum speculative applications for import licences which are not linked to a genuine commercial activity on the fruit and vegetable market. To that end special rules should be laid down on applications for and the validity of licences.

(7) Given that the Agreement concluded with Argentina provides for the management of the GATT quota on the basis of a system of traditional and new importers, the concept of traditional importers should be defined and the quota allocated between the two categories of importer, while allowing optimum use of the quota.’

11 The first paragraph of Article 2 of Regulation No 565/2002 contains the following definitions:

‘For the purposes of this Regulation:

(a) “import period” means a period of one year running from 1 June of one year to the following 31 May;

...

(c) “traditional importers” mean[s] importers who have imported garlic into the Community in at least two of the three previous import periods, irrespective of the origin and date of these imports;

(d) “reference quantity” means the maximum quantity of annual imports of garlic carried out by a traditional importer during the 1998, 1999 and 2000 calendar years. Where the importer in question has not imported any garlic during at least two of these three years, the reference quantity shall be the maximum quantity of annual imports of garlic during the three import periods preceding that for which a licence application has been presented;

(e) “new importers” mean[s] importers who are not traditional importers.

...’

12 Article 3 of Regulation No 565/2002, entitled ‘System of import licences’, provides:

‘1. All imports under the [tariff] quotas [for garlic falling within CN code 0703 20 00, opened by Decision 2001/404] shall be subject to the presentation of an import licence, hereafter called the “licence”, issued in accordance with Regulation [No 1291/2000], subject to the provisions of this Regulation.

...

3. Notwithstanding Article 9 of Regulation [No 1291/2000], the rights accruing from licences shall not be transferable.

4. The amount of the security referred to in Article 15(2) of Regulation [No 1291/2000] shall be EUR 15 per tonne net.’

13 Article 5 of Regulation No 565/2002, entitled ‘Licence applications’, provides:

‘1. Licence applications may be lodged only by importers.

...

Where new importers have obtained licences pursuant to this Regulation or to Regulation [No 1047/2001] during the previous import period, they must produce proof that at least 90% of the quantity allocated to them has actually been released into free circulation.

...

3. Licence applications lodged by traditional importers may cover, by import period, a quantity no more than the reference quantity for those importers.

4. For each of the three origins and for each of the quarters indicated in Annex I, licences applications lodged by new importers may cover no more than 10% of the quantity referred to in Annex I for that quarter and for that origin.

...’

14 Under Article 6 of the regulation, entitled ‘Maximum quantity to be issued’:

‘1. For each of the three origins and for each of the quarters indicated in Annex I, licences shall be issued only up to a maximum quantity equal to the sum of:

(a) the quantity indicated in Annex I for that quarter and for that origin;

(b) the quantities not applied for during the previous quarter for that origin;

(c) the unused quantities notified to the Commission from licences previously issued for that origin.

...

2. For each of the three origins and for each of the quarters indicated in Annex I, the maximum quantity calculated in accordance with paragraph 1 shall be allocated as follows:

(a) 70% to traditional importers,

(b) 30% to new importers.

However, the quantities available shall be allocated to each of the two categories of importers without discrimination from the first Monday of the second month of each quarter.'

15 The second paragraph of Article 13 of Regulation No 565/2002 states that that regulation is to apply, in essence, to licences applied for from 8 April 2002 and to releases into free circulation effected from 1 June 2002.

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

16 Malvi was an undertaking active in the fruit and vegetable import and export market as a traditional importer within the meaning of Article 2(c) of Regulation No 565/2002. Through another undertaking, which itself used other operators, Malvi bought garlic of Argentinian origin imported in February and March 2003 under the tariff quota provided for in that regulation and thereby eligible for a preferential customs duty ('the imports at issue'), although it no longer held the necessary import licence for doing so, since its own licences had been exhausted.

17 Considering that Malvi had unlawfully evaded customs duties and value added tax by means of a fraudulent mechanism whereby L'Olivo Maria Imp. Exp. ('L'Olivo'), which was a new importer within the meaning of Regulation No 565/2002 and had carried out the imports at issue, acting as a shell company, and considering the former company joint and severally liable with that importer, the Customs Authority — Livorno Customs Office sent Malvi a correction and recovery notice.

18 The mechanism called into question by the Customs Authority as fraudulent may be described as follows. First, L'Olivo, holder of the import licences necessary for eligibility for the preferential customs duty, would buy the consignments of garlic of Argentinian origin in transit at the bonded warehouses belonging to Bananaservice Srl ('Bananaservice'), managed by Mr R. Tonini, which did not hold such licences. At the second stage, L'Olivo would import the garlic consignments into the European Union under the preferential customs duty, then, once the consignments had been released for free circulation, it would sell them on to Tonini Roberto & C. Sas ('Tonini'). At the final stage, Tonini would sell the consignments on to Malvi.

19 The Corte suprema di cassazione (Court of Cassation) states, first, that only L'Olivo held import licences in its own right and, second, the garlic consignments were sold for an appropriate price, which was nevertheless less than the specific duty for imports not falling within the GATT quota.

20 Malvi brought an action contesting the correction and recovery notice before the Commissione tributaria provinciale di Livorno (Provincial Tax Court of Livorno) which upheld the action by decision of 15 November 2006.

21 The Customs Authority appealed against that decision before the Commissione tributaria regionale della Toscana (Regional Tax Court of Tuscany), which amended the order in a judgment of 7 September 2010. That court held that it is fraudulent for a traditional importer which does not itself

hold an import licence under the GATT quota, rather than buying goods directly from an exporter and importing the goods outside the quota directly, and thereby paying the specific customs duty, instead to buy the goods when they have already been cleared through customs by another operator, which, on instructions from the traditional importer, has acquired them with a view to selling them on to the latter through an undertaking which holds the licences under the quota, for an appropriate price in light of the service provided.

22 As a general partner of Malvi, Mr M. Cervati brought an appeal on a point of law against that judgment before the Corte suprema di cassazione (Court of Cassation).

23 In support of his appeal, Mr M. Cervati claims, inter alia, that Regulations No 1047/2001 and No 565/2002 have been infringed, on the basis that it is not unlawful for a traditional importer which does not hold a licence under the GATT quota to use another traditional importer, which acquires goods from a third-country supplier and then transfers them as foreign goods to a third operator, which, without transferring its own licence, introduces the goods into the European Union and sells them on to the second traditional importer for an appropriate price in light of the service provided, which then sells them on to the first. Mr M. Cervati also claims that the essential purpose of the GATT quota is to ensure the supply needs of the EU market while maintaining the balance of the market. It is, in fact, the loss of quotas previously attributed to specified importers and, consequently, the non-fulfilment of the quota which would have the effect of increasing prices through speculation. In cases such as those of this case there can, therefore, be no circumvention of the law.

24 Against that view, the Customs Authority claims that part of the quota allocated to another operator has been used and, consequently, that there was customs fraud intended to circumvent the system for the protection of the internal market. It considers the fraud to be blatant in the present case on the basis, inter alia, that Malvi ordered the consignments of garlic of Argentinian origin in advance, those consignments being subsequently imported by L'Olivo, that Malvi provided advance payment to Tonini, which has the same manager as Bananaservice, and that L'Olivo made a profit of EUR 0.25 per kilo. The Customs Authority adds that Mr M. Cervati has not explained what benefit he gains from such a mechanism other than the tax benefit consisting of the payment of the preferential rate of duty.

25 On the basis that the case-law of the Court does not provide a solution to the case brought before it and the finding that the applicable EU legislation has been given different interpretations in national case-law, the Corte suprema di cassazione (Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'On a proper construction of Regulations No 1047/2001 and No 2988/95, is conduct such as that engaged in by Community operator A ([Malvi]) prohibited, and does it constitute an abuse of rights and conduct designed to evade tax, where Community operator A ([Malvi]), which does not hold an import licence or which has exhausted its own quota share, buys certain consignments of goods from another Community operator B ([Tonini]), which in turn has bought them from a third-country supplier ([Bananaservice]), the goods being sold as foreign goods to another Community operator C ([L'Olivo]), which holds a licence under the quota because it meets the requisite criteria and which, without transferring its own licence, releases the goods for free circulation in the European Union in order to transfer them after customs clearance and for an appropriate price, lower than the specific duty for imports outside the quota, to operator B ([Tonini]), which finally sells them to operator A ([Malvi])?'

The question referred for a preliminary ruling

26 As a preliminary point, it must be observed that, under the procedure laid down by Article 267 TFEU, providing for cooperation between referring courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may, where appropriate, reformulate the questions referred to it. The Court may extract from all the information provided by the referring court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (judgments in *Fuß*, C-243/09, EU:C:2010:609, paragraphs 39 and 40, and *Cimmino and Others*, C-607/13, EU:C:2015:448, paragraphs 37 and 38 and the case-law cited).

27 In the present case, first, the order for reference states that the imports at issue were made in February and March 2003. However, Regulation No 1047/2001, referred to by the referring court in the question it referred for a preliminary ruling, was repealed by Regulation No 565/2002 with effect from 1 June 2002. The second paragraph of Article 13 of Regulation No 565/2002 states, in addition, that the regulation is to apply to licences applied for from 8 April 2002 and to releases into free circulation effected from 1 June 2002. It is therefore Regulation No 565/2002, not Regulation No 1047/2001, which applies *ratione temporis* to the case in the main proceedings.

28 Next, it appears from the order for reference that the undertaking at issue in the main proceedings is considered to have unlawfully supplied itself with imports of garlic under the GATT quota despite the fact that it had already exhausted its own licences to import under that quota. The customs authorities therefore accuse the undertaking of thereby having unlawfully used, in order to acquire the goods imported at a preferential rate of duty, part of the quota allocated to another operator, contributing to the circumvention of the non-transferability of the rights accruing from the licences, set out in Article 3(3) of Regulation No 565/2002.

29 Last, although, as stated in its title, Regulation No 2988/95, also referred to by the referring court in the question referred for a preliminary ruling, concerns the protection of the European Union's financial interests in general, it is Article 4(3) of Regulation No 2988/95 that addresses specifically the issue of abuse of rights.

30 In those circumstances, it is appropriate to consider that, by its question, the referring court asks, in essence, whether Article 3(3) of Regulation No 565/2002 and Article 4(3) of Regulation No 2988/95 must be interpreted as meaning that they preclude a mechanism, such as that at issue in the main proceedings, by which, following an order placed by an operator, a traditional importer within the meaning of the former regulation, having exhausted its licences to import at a preferential rate of duty, with a second operator, also a traditional importer not holding such licences,

— goods are, first of all, sold, outside the European Union, by an undertaking connected with the second operator, to a third operator, a new importer within the meaning of the former regulation, holding such licences,

— the goods are, then, released for free circulation in the European Union by the third operator at the preferential rate of customs duty, subsequently sold on by the third to the second operator and

— the goods are, finally, sold by the second to the first operator,

on the ground that such a mechanism, in so far as it allows the first operator to acquire goods imported under the tariff quota set out in the former regulation despite the fact that the first operator does not hold the necessary licences for so doing, amounts to abuse of rights by the first operator.

31 In that regard, the Court notes that, in the case in the main proceedings, only goods have been sold and that, furthermore, those goods have been imported into the European Union under licences the validity of which has not been called into question. There has therefore, in a strict sense, been no infringement of the requirement prohibiting the transfer of the rights accruing from licences, laid down in Article 3(3) of Regulation No 565/2002. In addition, it is common ground that, taken individually, the buying, importing and selling transactions at issue in the main proceedings fulfil the formal requirements with regard to the preferential rate of duty.

32 However, it is settled case-law of the Court that EU law may not be relied on for abusive or fraudulent ends. The application of EU legislation may not be extended to cover abusive practices by economic operators, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages under EU law (see, inter alia, judgments in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraphs 68 and 69 and the case-law cited, and *SICES and Others*, C-155/13, EU:C:2014:145, paragraphs 29 and 30).

33 According to equally settled case-law of the Court, a finding of abusive practices requires, first, an objective element, resulting from the fact that it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved (see, to that effect, inter alia, judgments in *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 52, and *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 32).

34 Such a finding also requires, second, a subjective element to the effect that it must be apparent from a number of objective circumstances that the essential aim of the transactions concerned is to obtain an undue advantage by the artificial creation of the conditions necessary for its achievement. The prohibition of abusive practices is not relevant where the transactions at issue carried out may have some explanation other than the mere attainment of an advantage (see, to that effect, inter alia, judgments in *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 53, and *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 33). The existence of that subjective element must, furthermore, be established on the part of the entity concerned (see, to that effect, judgment in *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 55).

35 Although the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the referring court guidance in its interpretation, it is nevertheless for the referring court to establish whether the factors constituting such abuse are present in the case before it. In establishing such abuse, the referring court must take into account all the facts and circumstances of the case, including the commercial transactions preceding and following the import at issue (judgments in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 34 and the case-law cited, and *Cimmino and Others*, C-607/13, EU:C:2015:448, paragraph 60).

36 In that light, as far as, in the first place, the objectives of Regulation No 565/2002 are concerned, it is stated in recitals 6 and 7 of the regulation that the regulation aims to manage tariff quotas provided for by allotting the quota allocated between traditional importers and new importers, while allowing optimum use of the quota and keeping to a minimum speculative applications for import licences which are not linked to a genuine commercial activity on the fruit and vegetable market.

37 However, unlike the regulations at issue in the cases which gave rise to the judgments in *SICES and Others* (C-155/13, EU:C:2014:145) and *Cimmino and Others* (C-607/13, EU:C:2015:448), which, in essence, reserved part of the quotas managed by those regulations to new importers, Regulation No 565/2002 does not reserve, unconditionally, any part of the GATT quota to new importers.

38 It is true, first, that Article 5(3) of Regulation No 565/2002 provides that licence applications lodged by traditional importers may cover, by import period, a quantity no greater than the reference quantity for those importers, which helps limit the expansion of the import operations of traditional importers.

Second, in accordance with the objective of keeping to a minimum speculative applications for import licences not linked to a genuine commercial activity on the fruit and vegetable market, as stated in recital 6 of Regulation No 565/2002, the third subparagraph of Article 5(1) of that regulation requires new importers that have obtained licences pursuant to the regulation and that wish to lodge a new licence application to produce proof that at least 90% of the quantity allocated to them has actually been released into free circulation.

39 Nevertheless, although the first subparagraph of Article 6(2) of Regulation No 565/2002 states that, for each given origin and for each quarter, the maximum quantity of goods for which import licences are granted is to be allocated at 70% to traditional importers and at 30% to new importers, the second subparagraph of that provision expressly provides that, 'from the first Monday of the second month of each quarter', 'the quantities available shall be allocated to each of the two categories of importers without discrimination'.

40 In those circumstances, the Court finds that a mechanism such as that at issue in the main proceedings does not appear to compromise the aims pursued by Regulation No 565/2002.

41 First, the first buyer of goods in the European Union, which is also a traditional importer, does not, by buying such goods from a new importer holding import licences, acquire the right to have its reference quantity, as defined in Article 2(d) of Regulation No 565/2002, calculated on a basis including the quantities of goods it bought from the new importer, any more than the second buyer in the European Union, also a traditional importer, acquires the right to have its reference quantity calculated on a basis including the quantities of goods it bought from the first importer in the European Union.

42 Second, it is true that such a mechanism allows the first and second buyers in the European Union, which are also traditional importers, to be supplied with garlic which has been imported at a preferential rate of duty despite the fact that they no longer hold the requisite import licences for so doing and thereby reinforce their share in the garlic market above that of the part of the tariff quota which has been allocated to them. However, as stated in paragraph 37 above, Regulation No 565/2002 does not reserve, unconditionally, any part of the GATT quota to new importers. Nor does it aim to regulate the market for the sale of garlic within the European Union or to maintain the positions of the various market participants, even if they are also traditional importers within the meaning of the regulation, by prohibiting market participants being supplied with goods from another operator solely on the ground that such goods have previously been imported at a preferential rate of duty.

43 In order for such a mechanism for the sale and resale of goods between operators not to result in either an operator unduly influencing the market and, in particular, circumvention by traditional importers of Article 5(3) of Regulation No 565/2002, or an obstacle to the objective of licence applications being linked to a genuine commercial activity, it is nevertheless necessary for each stage of that mechanism to involve a price corresponding to the market price and for imports at a preferential rate of duty to be carried out, by means of lawfully-obtained import licences, by the holder of those licences. It is, inter alia, for the referring court to establish whether each of the operators involved received an appropriate price on importing the goods at issue, on their sale or resale, allowing each of the operators to maintain the market position attributed to it in managing the quota.

44 In the present case, in so far as the referring court states that the goods at issue have been sold 'for an appropriate price' and it is common ground that the imports at issue were carried out by L'Olivo and by means of import licences that it obtained lawfully, that condition appears to be satisfied, a matter which it is nevertheless for the referring court to determine.

45 Nor, third, given that it is common ground that the new importer at issue in the main proceedings undertook, on its own account, to have the goods at issue released for free circulation, does a mechanism such as that at issue in the main proceedings compromise the objective of keeping to a minimum speculative applications for import licences or that of the genuine entry of new operators into the garlic import market.

46 As regards, in the second place, the subjective element referred to in paragraph 34 above, the Court notes, as a preliminary point, that it is relevant to search for such a subjective element, in the case in the main proceedings, only in the event that the referring court were to find that the mechanism at issue in the main proceedings compromises the objectives pursued by Regulation No 565/2002, the finding of abusive practice requiring the combination of both objective and subjective elements (see, to that effect, judgment in *SICES and Others*, C-155/13, EU:C:2014:145, paragraphs 31 to 33).

47 As regards the circumstances that would allow for a finding of such a subjective element, it is clear from the case-law of the Court that, in order for it to be considered that the essential aim of a mechanism such as that at issue in the main proceedings is to confer an undue advantage on the second buyer in the European Union, it is necessary that the imports be intended to confer such an advantage on that buyer and that the transactions be devoid of any economic and commercial justification for the importers and the other operators involved in the mechanism, a matter which it is for the referring court to establish (see, by analogy, judgments in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 37, and *Cimmino and Others*, C-607/13, EU:C:2015:448, paragraph 65).

48 The finding, by the referring court, that such a mechanism is not devoid of any economic and commercial justification could, for example, be based on the fact that the sale price of the goods was fixed at a level that allowed the importer and the other operators to derive normal or ordinary profit, in the relevant market, from the type of goods and transactions at issue (see, to that effect, judgment in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 37). In that regard, the referring court states that the goods at issue were sold 'for an appropriate price'. Against that background, the mere fact that such a price is lower than the specific duty owed for imports outside the quota is irrelevant, if that price may be considered as normal or ordinary, in the relevant market, for the type of goods and transactions at issue, a matter which it is for the referring court to establish.

49 In order to support such a finding, the referring court could also take account of the fact that it follows from recital 5 and Article 3(1) and (4) of Regulation No 565/2002 read in conjunction with Articles 8(1) and 35(2) of Regulation No 1291/2000, that importers are obliged to use the import certificates which were issued to them, subject to penalties, and therefore have a genuine interest in importing, including new importers in a transaction such as that at issue in the main proceedings (see, by analogy, judgment in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 37).

50 In that context, even if the establishment of a mechanism such as that at issue in the main proceedings is based on the desire of the first or second buyer in the European Union to benefit from the preferential rate of duty, and thus to be supplied with goods cheaper than goods imported outside of the quota, and even if the importer and the other operators concerned are aware of that, such transactions may not a priori be regarded as being devoid of economic and commercial justification for that importer and the other operators as a whole (see, to that effect, judgments in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 38, and *Cimmino and Others*, C-607/13, EU:C:2015:448, paragraph 65).

51 It cannot, however, be excluded that, in certain circumstances, a mechanism such as that at issue in the main proceedings could have been established with the essential aim of artificially creating the requisite conditions for the application of the preferential rate of duty. Amongst the factors that could allow the artificial nature of such a mechanism to be established are the facts that the importer holding the import licences did not accept any commercial risk or that the importer's profit margin is insignificant or that the price of the garlic sold by the importer to the first buyer in the European

Union, then by the latter to the second buyer in the European Union, is lower than the market price (see, to that effect, judgments in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 39, and *Cimmino and Others*, C-607/13, EU:C:2015:448, paragraph 67).

52 Furthermore, in so far as the question referred for a preliminary ruling concerns Article 4(3) of Regulation No 2988/95, it is sufficient to note that that provision provides, in substance, for the same criteria set out in the settled case-law of the Court as set out in paragraphs 32 to 34 above, whilst adding that the acts fulfilling those criteria, namely, those which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the EU law applicable in the case by artificially creating the conditions required for obtaining that advantage, are to result, as the case may be, either in failure to obtain the advantage or in its withdrawal.

53 Having regard to all of the foregoing considerations, the answer to the question referred is that Article 3(3) of Regulation No 565/2002 and Article 4(3) of Regulation No 2988/95 must be interpreted as meaning that they do not, in principle, preclude a mechanism, such as that at issue in the main proceedings, whereby, following an order placed by an operator, a traditional importer within the meaning of the former regulation, having exhausted its licences to import at a preferential rate of duty, with a second operator, also a traditional importer not holding such licences,

— goods are, first of all, sold, outside the European Union, by an undertaking connected with the second operator, to a third operator, a new importer within the meaning of the former regulation, holding such licences,

— the goods are, then, released for free circulation in the European Union by the third operator at the preferential rate of customs duty, subsequently sold on by the third to the second operator and

— the goods are, finally, sold by the second to the first operator, which thereby acquires goods imported under the tariff quota set out in the former regulation despite the fact that the first operator does not hold the necessary licences for so doing.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 3(3) of Commission Regulation (EC) No 565/2002 of 2 April 2002 establishing the method for managing tariff quotas and introducing a system of certificates of origin for garlic imported from third countries and Article 4(3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests must be interpreted as meaning that they do not, in principle, preclude a mechanism, such as that at issue in the main proceedings, whereby, following an order placed by an operator, a traditional importer within the meaning of the former regulation, having exhausted its licences to import at a preferential rate of duty, with a second operator, also a traditional importer not holding such licences,

— **goods are, first of all, sold, outside the European Union, by an undertaking connected with the second operator, to a third operator, a new importer within the meaning of the former regulation, holding such licences,**

— **the goods are, then, released for free circulation in the European Union by the third operator at the preferential rate of customs duty, subsequently sold on by the third to the second operator and**

— **the goods are, finally, sold by the second to the first operator, which thereby acquires goods imported under the tariff quota set out in the former regulation despite the fact that the first operator does not hold the necessary licences for so doing.**

[Signatures]