Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 7 February 2019 [1]

Case C-589/17

Prenatal S.A.

(Request for a preliminary ruling from the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain))

(Preliminary reference — Import of textile products declared as originating from Jamaica — Reimbursement of customs duties — Comparable dossier pending before the Commission — Restrictive character of the Commission's communication — Competence of national authorities)

1. Having confidence in the origin of goods entering the European Union is essential to the effective functioning of the EU's customs regime. Aside from anything else, identifying the origin of goods ensures that the correct amount of customs duty is applied to the good concerned when that good crosses the customs border and that the duty is paid by the person liable. Declarations of where the good was made (its origin) are critical to that process. For example, a product from China may well attract higher duty than the same product from Jamaica and the European Union will wish to ensure that the revenue it is lawfully due is paid.

2. Given the obvious financial implications, declarations of origin can be the subject of fraud. But spotting and stopping fraud is an unenviable task. Fraud does not usually come gift-wrapped or accompanied by smoking gun evidence. The challenge for customs authorities will therefore often be to identify the appropriate time at which they must take positive steps to prevent fraud from happening or to intervene when it does. Factors such as budget, manpower and strategic priorities will all influence that decision. More fundamentally, in the context of international trade agreements, at what point does one set aside the trust one must have in customs procedures and reciprocity in order to take back control?

3. This reference arises from a situation in which customs duties have been imposed but the person liable claims it should not have to pay those duties because of fraud committed by a third party.

1 Original language: English.

Legal framework

The Cotonou Agreement

4. The partnership agreement between the members of the African, Caribbean and Pacific Group of States ('the ACP States') of the one part, and the European Community (as it then was) and its Member States, of the other part, was signed in Cotonou on 23 June 2000 ('the Cotonou Agreement').[2] It provisionally entered into effect on 2 August 2000 until 1 June 2002[3] and was then extended until it entered into force definitively on 1 April 2003.[4]

5. Article 3 of the Cotonou Agreement states that 'the Parties shall … take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement and to facilitate the attainment of the objectives thereof. ...'

6. Article 1 of Annex V to the Cotonou Agreement accords preferential treatment during the preparatory period mentioned in Article 37(1) to the import into the EU of products 'originating in the ACP States',[5] such that they shall not be subject to any duty. The details of the preferential treatment system are provided in Protocol 1 of Annex V ('Protocol 1'). Thus:

– preferential treatment is granted where an 'EUR.1' certificate is submitted;

– that certificate is issued by the exporting country's customs authorities further to a written application from the exporter or its authorised representative; and

– if requested, the exporter or his representative must provide the exporting country's customs authorities with 'all appropriate documents proving the originating status of the products concerned as well as the fulfilment of the other requirements of this Protocol'.[6]

7. After issuing the certificate, and in order to verify that the procedures have been followed correctly, the issuing customs authorities 'shall take any steps necessary to verify the originating status of the products and the fulfillment of the other requirements of this Protocol. For this purpose, they shall have the right to call for any evidence and to carry out any inspection of the exporter's accounts or any other check considered appropriate. The issuing customs authorities shall also ensure that the forms referred to in paragraph 2 are duly completed. In particular, they shall check whether the space reserved for the description of the products has been completed in such a manner as to exclude all possibility of fraudulent additions'.[7] All parties to the Agreement undertake to assist each other 'in order to ensure the proper application of this Protocol … through the competent customs administrations, in checking the authenticity of the movement certificates EUR.1, the invoice declarations or supplier's declarations and the correctness of the information given in these documents'.[8]

2 OJ 2000 L 317, p. 3.

3 Decision No 1/2000 of the ACP-EC Council of Ministers of 27 July 2000 regarding transitional measures valid from 2 August 2000 until the entry into force of the ACP-EC Partnership Agreement (OJ 2000 L 195, p. 46).

4 Information concerning the date of entry into force of the ACP-EC Partnership Agreement (OJ 2003 L 83, p. 69).

5 Article 37(1) provides that 'economic partnership agreements shall be negotiated during the preparatory period which shall end by 31 December 2007 at the latest. Formal negotiations of the new trading arrangements shall start in September 2002 and the new trading arrangements shall enter into force by 1 January 2008 unless earlier dates are agreed between the Parties'.

6 Articles 14 and 15 of Protocol 1 of Annex V to the Cotonou Agreement.

7 Article 15(5) of Protocol 1.

8 Article 31(2) of Protocol 1.

8. Once the goods in question have been imported into the EU, verification of proof of origin 'shall be carried out at random or whenever the customs authorities of the importing country have reasonable doubts as to the authenticity of such documents …'.[9] The exporting customs authorities 'shall have the right to call for any evidence and to carry out any inspection of the exporter's accounts or any other check considered appropriate …';[10] and the results of the verifications must be provided to the requesting authorities 'as soon as possible' indicating 'clearly whether the documents are authentic and whether the products concerned can be considered as products originating in the ACP States …'.[11]

9. In cases of 'reasonable doubt' and where no reply has been sent within 10 months or if that reply does not contain sufficient information to determine the authenticity of the document in question, 'the requesting customs authorities shall, except in exceptional circumstances, refuse entitlement to the preferences'.[12] Where the verification procedure or any other available information appears to indicate that the provisions of the Protocol are being contravened, 'the ACP State on its own initiative or at the request of the [EU] shall carry out appropriate enquiries or arrange for such enquiries to be carried out with due urgency to identify and prevent such contraventions and for this purpose the ACP State concerned may invite the participation of the [EU] in these enquiries'.[13]

10. Finally, the Protocol establishes a Customs Cooperation Committee ('the CCC') whose remit is to ensure, inter alia, 'the correct and uniform application of this Protocol'. The CCC is composed of 'experts from Member States and of Commission officials responsible for customs questions and … experts representing the ACP States and of officials of regional groupings of the ACP States who are responsible for customs questions ...'. Its remit is to 'examine regularly the effect on the ACP States … of application of the rules of origin and shall recommend to the Council of Ministers appropriate measures'.[14] To that end, the CCC 'shall meet regularly'.

EU law

The Customs Code

11. Article 1 of the Customs Code[15] provides that 'customs rules shall consist of this Code and the provisions adopted at Community level or nationally to implement them'. Article 2(1) establishes the principle that 'Community customs rules shall apply uniformly throughout the customs territory of the Community'.

12. Within Chapter 3 ('Recovery of the amount of the customs debt') of Title VII, Article 217 provides that 'each and every amount of import duty or export duty resulting from a customs debt … shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts)'.[16]

9 Article 32(1) of Protocol 1.

10 Article 32(3) of Protocol 1.

11 Article 32(5) of Protocol 1.

12 Article 32(6) of Protocol 1.

13 Article 32(7) of Protocol 1.

14 Article 37 of Protocol 1.

15 The version of the Customs Code in application at the relevant time was Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1). Regulation No 2913/92 was replaced and repealed on 24 June 2008 by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (OJ 2008 L 145, p. 1), itself repealed and replaced by Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1).

16 Article 4(9) of the Customs Code defines a customs debt as 'the obligation on a person to pay the amount of the import duties (customs debt on importation) or export duties (customs debt on exportation) which apply to specific goods under the Community provisions in force'.

13. Article 220(2)(b) provides that entry into the accounts shall *not* occur where 'the amount of duty legally owed failed to be 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 … 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'.[17] If the conditions of Article 220(2)(b) are fulfilled, Article 236(1) provides that import duties shall be repaid or remitted.

14. Article 239 of the Customs Code establishes another basis for the remission of import duties. It provides in paragraph 1 that '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 remissions may be made subject to special conditions'. An application to that end can be submitted as per Article 239(2). Article 905 of the Implementing Regulation[18] expands further on Article 239 by providing that the applicant can support its application under Article 239(2) with evidence 'which might constitute a special situation'.

The Implementing Regulation

15. The detailed procedures governing claims made under Article 220(2)(b) of the Customs Code are found under Title III (Articles 868 to 876a) of the Implementing Regulation. Those relating to claims made under Article 239 are found under Title IV (Articles 899 to 909). As those two sets of provisions mirror each other[19] and because the questions of the referring court mention those relating to Article 239 of the Customs Code, I shall focus here on Articles 899 to 909.

16. Article 905(1) of the Implementing Regulation provides that an applicant may submit his application for remission to a Member State's customs authorities together with evidence of a '*special situation*' resulting from circumstances in which no deception or obvious negligence may be attributed to him. Where the customs authorities 'consider that a special situation is the result of the Commission failing in its obligations …', they must transmit the application to the Commission for a decision. That obligation to transmit is no longer imposed where 'the Commission is already considering a case involving comparable issues of fact and law'.[20] If the case is nevertheless transmitted, 'the Commission shall return the dossier to the customs authority and the procedure referred to in Articles 906 to 909 shall be deemed never to have been initiated'.[21] In those circumstances, the customs authorities concerned 'may not decide to authorise repayment or remission of the duties in question until the end of the procedure initiated [in the parallel case before the Commission] in accordance with Articles 906 to 909'.[22]

17 This version of the wording of Article 220(2)(b) was inserted into the Customs Code by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 amending Regulation No 2913/92 (OJ 2000 L 311, p. 17).

18 Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 1335/2003 of 25 July 2003 (OJ 2003 L 187, p. 16) ('the Implementing Regulation').

19 They are *mutatis mutandis* identical.

20 Article 905(2).

21 Article 905(6).

22 Article 899(2), second indent.

17. The final decision is taken by the Commission after consulting a group of experts.[23] That decision is notified to the Member State concerned and also to all other Member States 'in order to help customs authorities reach decisions in situations involving comparable issues of fact and law' (Article 908(1)).

18. During the procedure of transmission and decision, the applicant will be requested to confirm that it has read the dossier and has either added to it as appropriate or has nothing further to add. If, after reviewing the dossier, the Commission intends adopting an unfavourable decision, the applicant is given the opportunity to submit comments before the final decision is taken.[24]

Facts and procedure

19. Jamaica is a signatory of the Cotonou Agreement.

20. Between 1 January 2002 and 31 December 2004 ('the relevant period'), Prenatal S.A. ('Prenatal') imported clothing from Jamaica into Spain relying on EUR.1 certificates of origin attracting a preferential 0% common external tariff at the time of customs clearance.

21. In the period February to March 2005, the Jamaican authorities, the European Anti-Fraud Office of the European Commission (OLAF) and the Spanish customs authorities conducted an on-site investigation to establish whether the clothing imported was correctly covered by the EUR.1 certification. In summary, their joint report concluded that the imported goods could not receive preferential treatment because they had been manufactured using components from China or Hong Kong and thus were not of Jamaican origin. The Jamaican authorities invalidated the EUR.1 certificates for the relevant period and, as a result, the Spanish authorities entered on their accounts the customs duties owed by Prenatal for the imports it had made during that period.

22. On 10 May 2006, Prenatal applied to the Regional Customs Office of the Special Delegation of Catalonia for repayment of the customs debt on the basis of Article 239 of the Customs Code.[25] According to the order for reference, the application was referred to the Commission on 23 May 2006 pursuant to Article 905(1) of the Implementing Regulation as it concerned failings with regard to the actions of the Commission's services, represented by OLAF. The Commission concluded that Prenatal's case was comparable in fact and law to another case (REM 03/07, concerning El Corte Inglés SA; 'ECI') and accordingly returned the dossier pursuant to Article 905(6).

23. On 3 November 2008, the Commission adopted Decision C(2008) 6317 final finding that post-clearance entry in the accounts of import duties is justified and remission of those duties is not justified in a particular case, REM 03/07 ('Decision REM 03/07'). It concluded that the relevant authorities had committed no error in terms of Article 220(2)(b) of the Customs Code, and that ECI was not otherwise in a special situation in terms of Article 239 of the Customs Code. On 30 January 2009 ECI sought to annul that decision before the General Court.[26]

24. In parallel, ECI (which had invoked the existence of a special situation within the meaning of Article 239 of the Community Customs Code before the national customs authorities) brought proceedings before the Spanish courts seeking annulment of the customs notice demanding payment of the customs duties owed. By judgment of 20 October 2008 the Audiencia National (National High Court, Spain) annulled that notice. The appeal in cassation to the Tribunal Supremo (Supreme Court,

23 Article 907.

24 Article 905(3) and Article 906a.

25 Prenatal notes in its written observations that it submitted two applications, the first based on Article 239 of the Customs Code which it submitted on 8 May 2006 and the second based on Article 220(2)(b) which it submitted on 23 January 2009.

26 Order of 9 December 2013, *El Corte Inglés* v *Commission*, T-38/09, not published, EU:T:2013:675.

Spain) was declared inadmissible by order of 4 February 2010. The judgment of the Audiencia National (National High Court) therefore became definitive and ECI's debt was cancelled.[27] On 9 December 2013, the General Court decided that ECI's action for the annulment of Decision REM 03/07 had become devoid of purpose despite arguments to the contrary from both parties who wished the General Court to rule on the validity of that decision.[28]

25. No challenge at national level appears to have been raised by Prenatal against the equivalent decision of the Spanish authorities. On 12 May 2009, applying Decision REM 03/07, the Spanish authorities rejected Prenatal's application for remission. Prenatal challenged that decision before the Tribunal Económico Administrativo Regional de Cataluña ('the TEARC') (Regional Tax Administrative Court, Catalonia, Spain). The TEARC dismissed that appeal. Prenatal then appealed to the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain; 'the referring court').

26. The referring court considers it necessary to seek guidance from this Court. It recalls that Commission Decision REM 03/07 formed the basis of the TEARC's judgment, whereas Prenatal maintains that the conditions of Articles 220(2)(b) and 239 of the Customs Code are fulfilled and that it is therefore entitled to remission or repayment of the customs duties at issue.

27. Accordingly, the referring court asks:

'(1) Is Commission Decision C(2008) 6317 final of 3 November 2008 finding that post-clearance entry in the accounts of import duties is justified and remission of those duties is not justified in a particular case, relating to the importation of textile products declared to originate in Jamaica (Case REM 03/07) contrary to EU law, particularly Article 220(2)(b) and Article 239 of the Community Customs Code?

(2) Where an application for remission has been made and the Commission notifies its decision that the present case has elements of fact and law similar to a previous case already resolved by the Commission or its decision that there is a comparable case pending resolution, is either of those decisions to be regarded as an act with legal content which is binding on the authorities of the Member State in which application for remission is made and is therefore open to appeal by the person seeking remission [Article 239 of Regulation No 2913/92] or requesting that there be no entry in the accounts (Article 220(2)(b) of the Community Customs Code)?

(3) If it is not to be regarded as a Commission decision with binding legal content, is it then for the national authorities to evaluate whether there are comparable elements of fact or law in the case?

(4) In the event of an affirmative reply, if that analysis has been made and led to the conclusion that such elements are not present, is it necessary to apply Article 905(1) of [Regulation No 2454/93], therefore, must the Commission issue a decision with legal content binding on those national authorities?'

27 For an account of the rather convoluted parallel proceedings, see order of 9 December 2013, *El Corte Inglés* v *Commission*, T-38/09, not published, EU:T:2013:675, paragraphs 6 to 9 and 17.

28 See the order of 9 December 2013, *El Corte Inglés* v *Commission*, T-38/09, not published, EU:T:2013:675, paragraphs 26 to 41. At paragraphs 42 to 84, the General Court then examined and rejected the seven arguments (presented variously by ECI, by ECI and the Commission, and by the Commission alone) put forward to justify continuing with the action, before ruling that it had become devoid of purpose and ordering each party to bear its own costs.

28. Prenatal, the Spanish Government and the Commission submitted written observations. In accordance with Article 61(1) of the Court's Rules of Procedure, the parties were requested by the Court to address three issues at the oral hearing: (i) the interpretation of the extent of the duties falling to the Jamaican authorities under Articles 15 and 32 of the Protocol; (ii) the extent to which a new argument concerning the Commission's failure to ensure correct application of the Agreement could be entertained; and (iii) the admissibility of the second to fourth questions. The parties made oral submissions and answered questions at the hearing held on 25 October 2018.

Assessment

Admissibility

29. The Spanish Government maintains that all four questions are admissible. The Commission, however, doubts the relevance of the second, third and fourth questions. It observes that those questions concern the discretion of the national authorities to come to a different conclusion for Prenatal from that reached by the Commission for ECI. However, it appears clear that both the referring court and the TEARC applied the Commission's conclusion as to ECI to Prenatal because they considered Prenatal's situation to be comparable (indeed identical) in fact and law. Questions as to whether national authorities can exercise any discretion are therefore moot.

30. I do not (entirely) share the Commission's doubts. I will take each question in turn.

31. There are two separate aspects to Question 2: first, the legal effect of the renvoi of the dossier by the Commission under Article 905(2) of the Implementing Regulation, and second, whether Prenatal could have challenged that renvoi at that time (in 2006). With regard to the latter, unquestionably Prenatal cannot now challenge the renvoi letter; and it is not obvious what relevance any answer to that question could have for the current proceedings.[29] In contrast, the extent of the discretion that Member State authorities enjoy when faced with a renvoi decision is clearly relevant. Indeed Questions 3 and 4 are linked to Question 2 and ask whether the Member State authorities may reach their own conclusions on the application for remission, depending on whether or not that decision formally binds them.

32. Thus, as I read them, the first part of the second question together with the third and fourth questions essentially seek to establish the extent to which the Spanish authorities (customs and judicial) can come to a different conclusion in Prenatal's case from that reached by the Commission in relation to ECI. They would be particularly pertinent should the Court rule, in answer to the first question, that Decision REM 03/07 is invalid.

33. I therefore consider that the first part of the second question and the third and fourth questions should enjoy the usual presumption of relevance.[30]

29 Thus, it has *not* been suggested in these proceedings that Prenatal had an opportunity to challenge an EU measure directly under Article 263 TFEU and therefore should not now be able to challenge validity through an Article 267 TFEU reference. Decision REM 03/07 concerned ECI. It is debatable (to say the least) whether Prenatal would have had *locus standi* to challenge the renvoi letter.

30 Judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 36 and the case-law cited.

The 'new' argument

34. As part of its submissions on Article 239 of the Customs Code, Prenatal claims that the Commission failed in its obligations to ensure the correct implementation of the Cotonou Agreement. This is a new argument in the sense that that argument was neither expressly considered in Decision REM 03/07 [31] nor in the action for annulment brought before the General Court. [32] The Commission submitted at the hearing that it could not be criticised for not having addressed the new argument prior to these proceedings as that argument had not been raised by ECI in its application for remission. Prenatal considered that the Commission had, in effect, addressed the argument at paragraph 70 in Decision REM 03/07 where it stated that it 'has not identified any other factors likely to constitute a special situation'. Moreover, there is no impediment to raising the argument in the context of an Article 267 TFEU reference procedure and the Commission must in any event consider whether its conduct has contributed to the special situation.

35. In my view, it is possible for this 'new' argument to be raised in these proceedings. At no point in the process of the ECI application for remission did Prenatal have the right or opportunity to make any argument. Such right was ECI's alone. [33] The Article 267 TFEU procedure now affords parties who find themselves in Prenatal's situation the opportunity to advance their cause and to do so without restriction to the arguments they may submit. [34]

First question

36. I shall deal first with the claim under Article 220(2)(b) of the Customs Code, which involves considering the interpretation of Articles 15 and 32 of the Protocol, and then turn to examine the alleged 'special situation' under Article 239 thereof. [35]

Article 220(2)(b) of the Customs Code

37. For an applicant to succeed in obtaining remission or repayment of duties pursuant to Article 220(2)(b), three cumulative conditions must be fulfilled. [36] First, it must be shown that the error on the certificates is due to the fact that the customs authorities 'were aware or should have been aware' that the goods did not satisfy the conditions for preferential treatment. Second, the applicant must have acted in good faith or it must not have been reasonably able to detect the error of the authorities. Third, the applicant must have complied with all the provisions laid down by the legislation in force so far as its customs declaration was concerned.

38. It is only the first of these conditions that is at issue here in assessing the validity of Decision REM 03/07. The second and third conditions are necessarily individual to Prenatal and were not considered by the Commission in Decision REM 03/07, which focused only on ECI.

31 At paragraph 60 of Decision REM 03/07, it appears that ECI had argued that the Commission failed to inform Community importers of the doubts it harboured but that is in my view a different argument in substance from that currently advanced.

32 Order of 9 December 2013, *El Corte Inglés* v *Commission*, T-38/09, not published, EU:T:2013:675, paragraphs 59 and 60.

33 See, inter alia, Article 906a of the Implementing Regulation and point 18 above.

34 Order of 9 December 2013, *El Corte Inglés* v *Commission*, T-38/09, not published, EU:T:2013:675, paragraph 57 and the case-law cited.

35 That separate approach is, in my view, appropriate because each article seeks different aims: Article 220(2)(b) seeks to protect a trader's *legitimate expectation* that the decision to collect or forego post-clearance customs duty is based on correct information or criteria (judgment of 14 May 1996, *Faroe Seafood and Others*, C-153/94 and 204/94, EU:C:1996:198, paragraph 87) whilst the latter is a '*general equitable provision*' (judgment of 25 July 2008, *C.A.S.* v *Commission*, C-204/07 P, EU:C:2008:446, paragraph 85 and the case-law cited).

36 Judgment of 15 December 2011, *Afasia Knits Deutschland*, C-409/10, EU:C:2011:843, paragraph 47 and the case-law cited.

39. In the context of a preliminary reference questioning the validity of an EU act such as Decision REM 03/07, the Court's review is limited. The Commission enjoys a wide discretion in assessing the evidence that was submitted to it by the Spanish customs authorities and by ECI. Accordingly, unless there was a manifest error of assessment, such as a failure to review 'carefully and impartially all the relevant facts of the individual case on which that assessment was based', the Court cannot and will not substitute its own assessment for that of the Commission. [37]

40. Prenatal claims [38] that the Commission committed a manifest error when it concluded that the Jamaican authorities *were not aware* of the EUR.1 certificate irregularities. In support of that assertion, it argues that awareness is evidenced by (i) a 1998 'JAMPRO' [39] audit report of the exporting companies at issue which showed a glaring discrepancy between production capacity and volume of goods exported; (ii) the fact that, in 1998, Italian and United Kingdom authorities had requested *ex posteriori* control of certificates issued — requests to which the Jamaican authorities replied (if they did at all) in 2000 with explanations for the discrepancies which lacked credibility; and (iii) a report from a Spanish tax administration official who participated in the OLAF investigation in 2005 to the effect that, inter alia, officers in the customs export zone in Jamaica spoke to the lack of relevant work undertaken on the imports from China prior to their onward export.

41. Prenatal claims in the alternative that the Commission was wrong not to conclude that the Jamaican authorities *should have been aware* of the EUR.1 certificate irregularities. Here, it interprets the obligations imposed on the Jamaican authorities by Articles 15(5) and 32 of Protocol 1 of Annex V to the Agreement to the effect that those authorities were required, but failed, to undertake physical inspections of goods exported. Had they done so, they would have discovered the irregularities. Prenatal primarily relies on a set of minutes of January 2006 of the Jamaican Trade Board confirming, inter alia, that no system of physical inspections was in place at the relevant time.

42. An applicant seeking to prove that the customs authorities concerned *were aware* has to discharge a heavy burden. He must show that those authorities *actually* knew of the error. [40] The evidence of that state of knowledge must be of a high standard of probity and clarity; it cannot be merely suggestive. The quality of the evidence must be such as to displace a presumption that the authorities were *not* aware. Absent some documentary evidence which in effect amounts to an institutional confession, that high burden of proof will rarely be discharged.

43. The evidence that ECI relied upon in its application for remission, and which Prenatal advances again before the Court, is not of a nature that is likely to discharge that burden of proof. A JAMPRO report relating to a two-week period in July 1998 cannot be relied on to establish the state of actual knowledge of the customs authorities over the entire period between January 2002 and March 2005. The fact that the Jamaican customs authorities had knowledge of the JAMPRO report but satisfied themselves that they need only account for an 8% discrepancy between export volumes and production capacity (as opposed to the discrepancy of between 252% and 559% as reported by JAMPRO) [41] is in my view inconclusive. And the (disputed) views of two officers, whose exact status within the Jamaican customs authorities hierarchy is not established, cannot reasonably be taken to represent the specific knowledge of those customs authorities *as a whole*.

37 See, inter alia, judgments of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 13; of 9 November 1995, *France-Aviation* v *Commission*, T-346/94, EU:T:1995:187, paragraph 34; of 8 July 2010, *Afton Chemical*, C-343/09, EU:C:2010:419, paragraph 28 and the case-law cited; and of 19 February 1998, *Eyckeler & Malt* v *Commission*, T-42/96, EU:T:1998:40, paragraphs 77 and 140.

38 I limit myself in this Opinion to the arguments developed by Prenatal in its written observations and at the hearing. The referring court summarised a wider range of arguments in its order for reference.

39 'JAMPRO' was the acronym given to the 'Jamaica Promotions Corporation' which, I understand, was an agency of the Jamaican Government. Its role was transferred to the 'Jamaica Trade Board' in 2002.

40 The applicant for remission bears the burden of proof that it was 'evident' that the authorities which issued the certificate were aware or should have been aware: judgment of 9 March 2006, *Beemsterboer Coldstore Services*, C-293/04, EU:C:2006:162, paragraph 45.

41 As expressed in their February 2000 replies to Italy and the United Kingdom. The fact that these letters appear to have been sent tardily in alleged contravention of Article 32(5) of Protocol 1 of Annex V to the Agreement is irrelevant to the Jamaican authorities' state of knowledge at the relevant time.

44. I therefore reject the argument that the Commission committed a manifest error of assessment in concluding, in the light of the JAMPRO audit report of 1998,[42] the Jamaican customs authorities' responses to the requests for *ex posteriori* controls[43] and the evidence of certain officials,[44] that the Jamaican authorities were not aware of the EUR.1 certificate irregularities.

45. I reach the same conclusion with regard to the alternative claim that the Jamaican customs authorities *should have been aware* of those irregularities.

46. Prenatal's argument here depends on the Jamaican customs authorities being under a positive, legal duty to conduct *physical* inspections of goods exported, as opposed to paper-based only verifications. Prenatal reads that obligation into Articles 15 and 32 of the Protocol of Annex V to the Agreement.

47. I do not read those provisions in that way.

48. First, Article 15 of the Protocol describes the procedure by which an exporter obtains a EUR.1 certificate. It places emphasis on a paper trail. Duties and obligations are shared out between exporters and issuing customs authorities. Thus, exporters are required to complete EUR.1 movement certificates and application forms (Article 15(2)) and to 'be prepared to submit at any time, at the request of the exporting customs authorities … all appropriate documents proving the originating status of the products concerned …' (Article 15(3)). Customs authorities require to 'take any steps necessary' to verify the origin of products and 'shall have the right to call for any evidence and to carry out any inspection of the exporter's accounts or any other check considered appropriate' (Article 15(5)).

49. Nothing within Article 15, in particular paragraph 5, obliges customs authorities to take any specific or particular type of steps or measures, a fortiori to conduct physical inspections whether frequently or otherwise. The obligation imposed on the authorities in the first line of Article 15(5) is tempered by the word 'necessary' in the same sentence. The judgment as to what is required is thus left entirely to those authorities. That discretion is emphasised by the inclusion of the words 'any' and 'steps necessary'. That reinforces the measure of discretion that the authorities have, rather than suggesting that any particular type of verification procedure must be undertaken. I thus agree with the Commission that Article 15(5) merely entitles the Jamaican customs authorities to conduct physical inspections should they deem them necessary.[45] Against that background, the fact that the Jamaican customs authorities appear to have preferred a paper-based verification process cannot be criticised.[46]

50. Second, Article 32 of Protocol 1 requires that verifications be undertaken by the customs authorities issuing the EUR.1 certificates (i) randomly and also (ii) further to a request from a Member State. If the Member State makes such a request, it is to return all relevant documentation to assist the issuing authorities in their verification (Article 32(2)). Once equipped with that documentation, the authorities 'shall have the right to call for any evidence and to carry out any inspection …' (Article 32(3)). Should that verification subsequently 'indicate that the provisions of the Protocol are being contravened', Article 32(7) states that 'appropriate enquiries' (inter alia) shall be carried out.

42 See paragraphs 38 to 42 of Decision REM 03/07.

43 See paragraphs 27 to 34, in particular 31 to 33, of Decision REM 03/07.

44 See paragraphs 52 and 53 of Decision REM 03/07. I pause here to note that, at paragraph 59 of its observations, the Commission refers to the written pleadings it submitted to the General Court for the purposes of the proceedings that led to the order of 9 December 2013, *El Corte Inglés* v *Commission*, T-38/09, not published, EU:T:2013:675. I have taken no account of them. All arguments should be in the body of the observations submitted to this Court and not smuggled in via annexes which, in this case, would total over 70 pages of *additional* argumentation (in Spanish).

45 See, by analogy, judgment of 17 July 1997, *Pascoal & Filhos*, C-97/95, EU:C:1997:370, paragraphs 65 and 66, interpreting similar provisions.

46 Prenatal highlighted the 'Approved Exporter' status that can be obtained under Article 20 of the Protocol. That status effectively permits exporters to self-certify their goods for preferential treatment. The existence of that status does not, however, mean that *all other* verifications must involve physical inspections.

51. I do not consider that Article 32 imposes either an absolute or a positive obligation on the Jamaican customs authorities to carry out physical inspections, a fortiori not at any particular time or with any particular regularity. Whilst they were indubitably entitled to conduct a physical inspection, nothing obliged them to do so. Upon receipt of the requests sent by Member State customs authorities pursuant to Article 32, it was permissible for the Jamaican customs authorities to fulfil their obligation to verify the transactions in question on the basis of the available documentary evidence, supplemented by appropriate enquiries.

52. It follows that I reject Prenatal's argument that the Jamaican customs authorities were unaware of the irregularities because they had failed to fulfil their legal obligation to conduct physical inspections. Notwithstanding the (isolated) statement in the Jamaican Trade Board's minutes that 'a system of checks was never implemented' the Commission did not therefore commit a manifest error of assessment in that regard. In so concluding, I am not saying that there may never come a moment when the weight of evidence brought to the attention of the customs authorities in the exporting State tips the balance in favour of deeming a physical inspection to be necessary. That is not, however, how I assess the material placed before the Court in the present case.

Article 239 of the Customs Code

53. In order to make good a claim that a special situation exists for the purposes of Article 239 of the Customs Code, an applicant must show that it 'is in an exceptional situation as compared with other operators engaged in the same business and that, in the absence of such circumstances, [it] would not have suffered the disadvantage caused by the subsequent entry in the accounts of customs duties'.[47] The applicant therefore bears the burden of proof.

54. As this argument is being considered for the first time in the present proceedings, the Court's judicial control is not confined to establishing whether the Commission has committed a manifest error of assessment. Rather, the Court will have to determine whether the Commission balanced, 'on the one hand, the Community interest in full compliance with the provisions of customs legislation, whether that be Community legislation or other legislation binding on the Community, and, on the other hand, the interest of an importer acting in good faith not to suffer harm which goes beyond the normal commercial risk'.[48]

55. The Court has held that a special situation can arise where the Commission has failed to monitor 'adequately' the proper implementation of an international agreement.[49] As guardian of the Treaties and of the agreements concluded thereunder, the Commission must ensure that a third country is implementing correctly the obligations that the latter has assumed under an agreement concluded with the EU, using the means provided for by the agreement or by the decisions taken pursuant thereto.[50]

56. Part of that duty involves balancing two competing principles. On the one hand, there is the principle of *mutual trust* which underpins international trade agreements. In consequence, the Commission (and Member State authorities) — initially at least — are bound to accept at face value statements made by the authorities of an exporting State such as Jamaica.[51] On the other hand, the

47 Judgment of 25 July 2008, *C.A.S.* v *Commission*, C-204/07 P, EU:C:2008:446, paragraph 88 and the case-law cited. A 'special situation' can be claimed by more than one trader at the same time: see, inter alia, judgment of 17 February 2011, *Bolton Alimentari*, C-494/09, EU:C:2011:87, paragraphs 55, 56 and 61.

48 Judgment of 25 July 2008, *C.A.S.* v *Commission*, C-204/07 P, EU:C:2008:446, paragraph 93.

49 Judgment of 25 July 2008, *C.A.S.* v *Commission*, C-204/07 P, EU:C:2008:446, paragraph 92.

50 Judgment of 25 July 2008, *C.A.S.* v *Commission*, C-204/07 P, EU:C:2008:446, paragraph 95, and Article 211 TFEU.

51 On the Cotonou Agreement specifically, see judgment of 15 December 2011, *Afasia Knits Deutschland*, C-409/10, EU:C:2011:843, paragraphs 28 and 29 and the case-law cited. By analogy, also see judgment of 25 July 2018, *Commission* v *Combaro*, C-574/17 P, EU:C:2018:598, paragraphs 50, 55 and 56 and the case-law cited.

Cotonou Agreement is one which is primarily of financial benefit to one party (the ACP States) and whose system of preferential treatment inevitably tempts the unscrupulous to circumvention and abuse. It follows that the Commission must be particularly attentive in its duty to monitor and supervise.

57. Prenatal argues generally that the Commission was required to put in place measures in order to prevent fraudulent activity; and specifically that it should have monitored the Jamaican authorities. Prenatal thus focuses on monitoring and prevention rather than mere ex post investigation and intervention. In short, the Commission is accused of *passivity*, whereas *activity* was legally required of it.

58. Prenatal offers evidence indicating that the Commission undertook no monitoring activity, relying on statements in two Commission Communications and a report of the Court of Auditors.[52] Prenatal points to the CCC established under Article 37 of the Protocol, whose general task is to ensure the 'correct and uniform application of the Protocol' and of which the Commission is a member, and relies in particular on Article 37(2), which requires that Committee to 'examine regularly the effect on the ACP States … of application of the rules of origin'. Prenatal likewise invokes Article 31(2) of the Protocol which requires the EU, the Overseas Countries and Territories and the ACP States to 'assist each other through the competent customs administrations in checking the authenticity of the movement certificates EUR.1, the invoice declarations or supplier's declarations'.

59. It seems to me that Prenatal is reading too much into the provisions on which it relies. Article 31(2) requires that the authenticity of the documentation be assured 'through the competent customs administrations'. The task is a shared one. That said, the Commission does not itself administer the EU's customs regime. Primary responsibility inevitably lies with the customs authorities of the exporting and importing Member States. Much of the surveillance and monitoring work is therefore done by Member States' customs authorities. Article 32 of the Protocol grants those authorities the right to demand specific types of action from their counterparts in the ACP States and indeed to withdraw preferential treatment if, for example, they have 'reasonable doubt' and if replies to their letters requesting verification come late (Article 32(6)). The Commission will nevertheless be failing in its duty if it omits to inform itself of relevant developments at Member State level, and thereafter fails to take appropriate action. In the present case, however, the limited evidence available to the Court suggests that the Commission *was* in communication with Member State customs authorities. Thus, the Commission stated at the hearing that Germany informed it in 2003 of the Member States' letters requesting verification. The OLAF procedure was commenced in March 2004, leading to on-site visits in Jamaica in February and March 2005. Meetings did take place at least in September 2004 to discuss matters. Against that background, whilst additional or more rapid action would, with hindsight, have been desirable, it cannot fairly be said that the Commission sat back in absolute passivity.[53] I also note that Article 37(2) requires the CCC to consider the 'effect' on states such as Jamaica of the application of the rules of origin, not to monitor actively the application of those rules.

52 Communication from the Commission to the Council, Action plan for monitoring the functioning of preferential trade arrangements, COM(2014) 105 final, 26 February 2014; Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee — The rules of origin in preferential trade arrangements — Orientations for the future, COM(2005) 100 final, 16 March 2005; Special Report No 2/2014, European Court of Auditors, 'Are preferential trade arrangements appropriately managed?'.

53 For convenience, I attach as Annex I a table giving the chronology of the principal developments as described by the parties, as I have understood them.

60. It follows from this that I do not consider that the Commission breached its specific obligations under the Cotonou Agreement. I do not think that a general 'duty of good administration' suffices to impose on the Commission the positive obligations which would have been required to create a 'special situation' for the purposes of Article 239 of the Customs Code.[54]

61. The legal requirements applicable in the present case are thus significantly different from those which have led the Court in previous instances to confirm the existence of a special situation. In *C.A.S.* v *Commission*, for example, the Commission had failed to inform itself fully of matters despite being legally obliged to do so under the specific terms of the agreement between the EU and Turkey.[55] Similarly, in *Eyckeler & Malt* v *Commission*, the Commission was under an express duty to monitor imports of beef from Argentina every 10 days to ensure that the quota for beef in place was correctly applied. Not only did the Commission know that the quota had been exceeded but it failed to implement any monitoring measures that could have detected the excess, such failure constituting a 'serious infringement'.[56] And in *Kaufring and Others* v *Commission*, the General Court listed a series of known failures by Turkey over a sustained period of time to satisfy obligations under the specific terms of the Agreement establishing an Association between the European Economic Community and Turkey and 'the various decisions adopted by the Association Council on the application of Articles 2 and 3 of the Additional Protocol', and recorded the Commission's omission to challenge those failures despite having the power to do so.[57]

62. I therefore propose to answer the first question to the effect that examination of the material before the Court has disclosed no factor affecting the validity of Decision C(2008) 6317 final concerning Decision REM 03/07.

Second to fourth questions

The second question

63. The Commission's decision to reject the transmission of a dossier under Article 905 of the Implementing Regulation has the effect of freezing the relevant customs authorities' discretion to act on the application for remission or repayment pending the outcome of the Commission's assessment of the parallel dossier.[58] To that specific and limited extent, therefore, the renvoi decision does have a legal suspensive effect.

64. Prenatal could not, however, challenge that decision and/or its communication to the Spanish customs authorities. For Prenatal to challenge a letter/communication addressed to someone else, it would have to show that the letter was both of direct[59] and individual concern[60] to it. On direct concern, I do not see what legal effect the renvoi letter has on Prenatal's situation. The customs authorities retained their right to appraise the dossier submitted to them, albeit that it was temporarily suspended.[61] I also do not see how Prenatal could have claimed to be individually concerned by the

54 Thus I read the references in the judgment of 10 May 2001, *Kaufring and Others* v *Commission*, T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, EU:T:2001:133, paragraph 257 and the case-law cited, as buttressing the conclusion the Court had already reached on the specific wording of the agreements at issue in that case.

55 Judgment of 25 July 2008, C-204/07 P, EU:C:2008:446, paragraphs 97 to 100, 112 and 117 to 120.

56 Judgment of 19 February 1998, T-42/96, EU:T:1998:40, paragraphs 162 to 190.

57 Judgment of 10 May 2001, *Kaufring and Others* v *Commission*, T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, EU:T:2001:133, paragraphs 257 to 273.

58 Order of 21 April 2016, *Makro autoservicio mayorista and Vestel Iberia* v *Commission*, C-264/15 P and C-265/15 P, not published, EU:C:2016:301, paragraph 47.

59 Judgment of 13 March 2008, *Commission* v *Infront WM*, C-125/06 P, EU:C:2008:159, paragraph 47.

60 Judgment of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107.

61 Order of 21 April 2016, *Makro autoservicio mayorista and Vestel Iberia* v *Commission*, C-264/15 P and C-265/15 P, not published, EU:C:2016:301, paragraphs 47 to 49.

renvoi letter: the potential for other traders to have found themselves in a similar situation is evident. Moreover, the Commission's renvoi of the dossier is not a decision as defined by Article 4(5) of the Customs Code as that definition applies only to acts of 'customs authorities' which themselves are defined at Article 4(3) as 'the authorities responsible inter alia for applying customs rules'. In the context of the Customs Code, the Commission is not responsible for 'applying customs rules'.

65. Whilst the decision eventually adopted by the Commission under Article 907 of the Implementing Regulation is evidently challengeable by the applicant concerned, the applicant in the parallel dossier which has been frozen cannot raise such a challenge. Its rights of defence are, however, protected through the Article 267 TFEU reference procedure. [62]

66. The answer to the second question should therefore be that the decision of the Commission taken under Article 905(6) of Regulation No 2454/93 to reject the dossier transferred by the Spanish customs authorities has no effect on the legal situation of the applicant concerned and is not challengeable by that applicant under the Treaty on the Functioning of the European Union.

Third and fourth questions

67. I shall examine these questions together and consider the two hypotheses advanced.

68. If the Court upholds the validity of Decision REM 03/07, as I have suggested that it should, that decision will continue to bind the Spanish customs and judicial authorities in respect of ECI. [63] The Spanish customs authorities then need to take into account 'any particularity of fact or of law that characterises the specific situation' of Prenatal so as to determine whether its situation is 'sufficiently dissimilar from that of [ECI] to justify a different outcome'. [64]

69. If, on the other hand, Decision REM 03/07 were held by the Court to be invalid, the Commission would be required to take remedial action in application of its obligations under Article 266 TFEU. The Spanish customs authorities cannot restart their assessment of Prenatal's application until the Commission properly and lawfully concludes the 'Article 906 to 909 procedure' in respect of ECI's dossier. [65]

70. It is, of course, possible, having assessed Prenatal's application, that the Spanish authorities (and courts) may consider that its situation is *not* the same as that of ECI and is, accordingly, *not* covered by the Commission's (new) decision regarding the latter's customs claim.

62 Order of 9 December 2013, *El Corte Inglés* v *Commission*, T-38/09, not published, EU:T:2013:675, paragraph 57.

63 Before the Commission issues its REM decision, a national court is only bound to avoid 'giving decisions which would conflict with a decision contemplated by the Commission' to the extent that it becomes 'aware in the course of the proceedings before it that the matter has been referred to the Commission pursuant to Article 220 or Article 239 of the Customs Code': see judgment of 20 November 2008, *Heuschen & Schrouff Oriental Foods Trading*, C-375/07, EU:C:2008:645, paragraph 66. Absence of awareness might explain why the the national court annulled the Spanish authorities' decision to make a subsequent entry in the accounts of import duties against ECI: see points 23 to 24 above. It is clear that, in any event, no further action can now be taken against ECI to recover the customs duties in question. The matter is res judicata.

64 Order of 21 April 2016, *Makro autoservicio mayorista and Vestel Iberia* v *Commission*, C-264/15 P and C-265/15 P, not published, EU:C:2016:301, paragraphs 48 and 49, and Article 908(1) and (2) of the Implementing Regulation.

65 See, by analogy, judgment of 7 September 1999, *De Haan*, C-61/98, EU:C:1999:393, paragraph 48.

71. Are the Spanish authorities then required to re-initiate the Article 905 procedure by transferring the dossier to the Commission for a second assessment? In my view, they must do so in order to ensure uniform application of the conditions permitting remission and repayment of duties.[66] That reflects the division of roles under the Implementing Regulation. The national customs authorities take decisions on the debt owed by the person liable, whilst the Commission decides on applications for remission or repayment where a special situation is invoked.

72. I therefore suggest that the Court should answer the third and fourth questions to the effect that a decision taken by the Commission under Article 907 of Regulation No 2454/93 binds the national customs and judicial authorities and must be applied to a claim for remission or repayment lodged by another applicant unless there is some particularity of fact and law that characterises its situation as sufficiently dissimilar to justify a different outcome. In that event, the national authorities must transmit that applicant's dossier to the Commission for a further decision in accordance with Article 905(1) of Regulation No 2454/93.

Conclusion

73. Accordingly, I propose that the Court should give the following answer to the questions referred for a preliminary ruling by the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain):

(1) Examination of the material before the Court has disclosed no factor affecting the validity of Decision C(2008) 6317 final finding that post-clearance entry in the accounts of import duties is justified and remission of those duties is not justified in a particular case, relating to the importation of textile products declared to originate in Jamaica (Case REM 03/07).

(2) The decision of the Commission taken under Article 905(6) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, as amended by Commission Regulation (EC) No 1335/2003 of 25 July 2003, to reject the dossier transferred by the Spanish customs authorities has no effect on the legal situation of the applicant concerned and is not challengeable by that applicant under the Treaty on the Functioning of the European Union.

(3) A decision taken by the Commission under Article 907 of Regulation No 2454/93 binds the national customs and judicial authorities and must be applied to a claim for remission of repayment lodged by another applicant unless there is some particularity of fact and law that characterises its situation as sufficiently dissimilar to justify a different outcome. In that event, the national authorities must transmit that applicant's dossier to the Commission for a further decision in accordance with Article 905(1) of Regulation No 2454/93.

66 Judgment of 20 November 2008, *Heuschen & Schrouff Oriental Foods Trading*, C-375/07, EU:C:2008:645, paragraphs 62 to 63; see also Article 2(2) of the Customs Code.

Annex I: Chronology of Principal Steps and Developments

July 1998	JAMPRO Reports
May and October 1998	Letters sent by Italian and United Kingdom customs authorities to Jamaican customs authorities
February 2000	Replies from Jamaican customs authorities to Italian and United Kingdom customs authorities
October 2003	Post import verification reply to the Italian customs authorities from Jamaican authorities
2003	Commission becomes aware of letters from Member State customs authorities
March 2004	OLAF investigation initiated
July 2004	Post import verification reply to the German customs authorities from Jamaican authorities
September 2004	Meeting between EU Member States and Commission (OLAF) in which the matter of the letters was raised
March 2005	OLAF investigation in Jamaica
January 2006	Trade Board Minutes