

## **Information paper on the application of Articles 220(2)(b) and 239 of the Community Customs Code**

<b>1. APPLICATION OF ARTICLE 220(2)(B) OF THE COMMUNITY CUSTOMS CODE</b> .....	4
1.1. The error on the part of the customs authorities themselves .....	4
1.1.1. Principle.....	4
1.1.2. Examples .....	5
1.2. Is the error reasonably detectable? .....	8
1.2.1. Principle.....	8
1.2.2. The nature of the error .....	8
1.2.3. The operator's professional experience .....	9
1.2.4. The diligence of the operator.....	10
1.2.5. Examples of cases concerning the detectability of the error .....	11
1.2.5.1. Errors in national user tariffs.....	11
1.2.5.2. Tariff classification errors since the establishment of binding tariff information.....	12
1.2.5.3. Incorrect preferential certificates.....	12
1.2.5.4. Economic situation of the person concerned.....	13
1.3. Provisions relating to the customs declaration .....	13
1.4. The operator's good faith.....	13
<b>2. APPLICATION OF ARTICLE 239 OF THE COMMUNITY CUSTOMS CODE</b> .....	14
2.1. The concept of a special situation .....	14
2.1.1. Principle.....	14
2.1.2. Examples of special situations.....	15
2.2. The absence of deception or obvious negligence .....	18
2.2.1. Principle.....	18
2.2.2. Examples .....	19
2.3. Examples taken from sectors which have given rise to a number of decisions .....	19
2.3.1. Transit.....	19
2.3.2. Failure by the competent authorities to fulfil their obligations .....	21
2.3.2.1. Examples of failings .....	22
2.3.2.2. Examples of non-recognition of failure.....	24

## **Information paper on the application of Articles 220(2)(b) and 239 of the Community Customs Code**

### **Introduction**

Pursuant to Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 (hereinafter "the Community Customs Code"), post-clearance entry in the accounts of import or export duties is waived where there is an active error on the part of the competent customs authorities which could not reasonably be detected by the person liable for payment who acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration (REC decision).

Pursuant to Article 239 of the Community Customs Code, import or export duties may be repaid or remitted in special situations in which no deception or obvious negligence may be attributed to the operator (application of the principle of equity) (REM decision).

The possibility of waiving post-clearance entry in the accounts or of remitting/repaying duties for reasons of equity has now existed for over 20 years and has led to many Commission decisions and a good deal of case-law in the EC Court of Justice and, more recently, the EC Court of First Instance.

In the context of the discussions on amending Commission Regulation (EEC) No 2454/93 of 2 July 1993 (hereinafter "the Customs Code implementing provisions" or "IP") in relation to the management of REM/REC procedures (doc. TAXUD/4829/2002) and with a view to facilitating uniform interpretation in the Community of the rules on waiving entry in the accounts, repayment and remission, the principles which have guided REM/REC cases in recent years need to be reviewed both as regards the decisions adopted by the Commission and the Community case-law. That is the purpose of this document. It is only a first draft and will obviously need to be supplemented and refined.

This paper simply describes the current case-law of the EC Court of Justice and the EC Court of First Instance and the most important decisions adopted by the Commission. Rather than detailing the approach followed in individual cases, it sets out the criteria on which decisions are reached. The individual decisions generally take several criteria (positive and/or negative) into account and thus provide an overall assessment adapted to the particular case in hand. It therefore refers to the judgments of the Community courts and the Commission decisions in which those criteria are applied. The context of those judgments and decisions is not without relevance either. This text is obviously not intended to be set in stone; it may well evolve over time to take account of new practices, new rules, new judgments by the Community courts or just changing business practices.

In addition to the case-law of the Court of Justice and the Court of First Instance, this paper is based on the most significant decisions adopted by the Commission. It does not however cover all the decisions adopted by the Commission. It excludes:

\* all decisions on cases submitted to the Commission before 1990, as most earlier decisions are no longer relevant;

\* decisions relating to aspects of customs legislation which have since been revised or which were of only temporary interest. This is the case, for example, of many decisions concerning the working of customs procedures with economic impact before they were reformed in 2001. It also applies to decisions relating to matters now directly governed by the IP (e.g. Articles 900 to 904) or decisions of transitory interest, e.g. those relating to the difficulty of incorporating the Harmonised System into the Combined Nomenclature at the end of the 1980s.

- decisions subsequently repealed by the Commission or annulled by the Community courts;
- decisions of too specific a nature which say little about the criteria used to decide.

This document is not a legal instrument. It is intended as a brief guide for Member States to the way in which Articles 220(2)b and 239 of the Customs Code have been applied in certain previous cases, in order to contribute to uniform application of these provisions.

References to previous Commission REM/REC decisions are given in the footnotes. They provide examples to illustrate the criteria set out in the draft communication. However, the list is not exhaustive. As the Community case-law sometimes establishes links between the criteria applicable to REC cases and those to REM cases (e.g. the criteria applying to the detectability of the error in REC cases and obvious negligence in REM cases), REM decisions may sometimes be used to illustrate criteria elaborated in the REC part of the draft.

## Information paper on the application of Articles 220(2)(b) and 239 of the Community Customs Code

### 1. APPLICATION OF ARTICLE 220(2)(B) OF THE COMMUNITY CUSTOMS CODE.

Article 220(2)(b) is intended to protect the legitimate expectations of the person liable for payment that all the information and criteria on which the decision to recover or not to recover duties is based are correct (1).

(1) Judgment of 27.6.1991 in Case [C-348/89](#), Mecanarte, para.19.

Under this Article, the post-clearance entry of the import or export duties in the accounts is waived when four cumulative conditions are met:

- the amount of duty was not entered in the accounts as a result of an error on the part of the customs authorities themselves;
- this error could not reasonably have been detected by the person liable for payment;
- the person liable for payment must have complied with all the provisions laid down by the legislation in force as regards the customs declaration;
- the person liable for payment acted in good faith.

Since its amendment by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (2), Article 220(2)(b) has also addressed the issue of incorrect certificates where the preferential status of the goods was established on the basis of a system of administrative cooperation involving the authorities of a third country. This point is enlarged upon at 1.2.5.3 below.

(2) OJ L 311, 12.12.2000, p. 17.



#### 1.1. The error on the part of the customs authorities themselves

##### 1.1.1. Principle

The customs authorities are defined as the authorities responsible, inter alia, for applying customs rules (Article 4(3) of the Community Customs Code).

Any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of duties and which may thus cause the person liable for payment to entertain legitimate expectations must be regarded as a customs authority within the meaning of Article 220(2)(b) of the Code (3). That authority may be a Member State authority or even a third country authority (case of competent third country authorities issuing origin certificates, certificates allowing free movement of goods in the Community or certificates of authenticity) (4).

(3) Mecanarte op. cit., para. 22.  
(4) Judgment of 14.5.1996 in Joined Cases [C-153/94](#) and C-204/94, Faroe Seafood, para. 90.

The error must be caused by an act of the customs authorities themselves, the only error which can cause the person liable for payment to entertain legitimate expectations (5).

(5) Mecanarte op. cit., para. 23 and judgment of 14.11.2002 in Case [C-251/00](#), Illumitronica, para. 42.

However, some “passive” acts are also deemed errors within the meaning of Article 220(2)(b) of the Community Customs Code. For example, where the customs authorities have raised no objection concerning the tariff classification of goods imported in large numbers over a long period of time (6), even though a comparison between the tariff heading declared and the explicit description of the goods in accordance with the indications of the nomenclature would have disclosed the incorrect tariff classification (7).

(6) The expressions “long period of time”, “large numbers” and “objections” must be defined in each individual case.  
(7) Judgment of 1.4.1993 in Case [C-250/91](#), Hewlett-Packard, para. 21.



### 1.1.2. Examples

(A) The following are regarded as errors on the part of the customs authorities within the meaning of Article 220(2)(b) of the Code:

- misinterpretation or misapplication of the applicable rules of law (8). Such errors may occur at various stages:

(8) Mecanarte op. cit., para. 20; judgment of 26.6.1990 in [Case C-64/89](#), Deutsche Fernsprecher GmbH; judgment of 12.12.1996 in Case [C-38/95](#), Foods Import Srl; judgment of 12.12.1996 in Cases [C-47/95](#) to C-50/95, C-60/95, C-81/95, C-92/95 and C-148/95, Olasagasti; judgment of 19.10.2000 in Case [C-15/99](#), Hans Sommer GmbH.

- when documents are checked:

- \* acceptance of a declaration without presentation of a document (an authorisation, certificate, etc.) (9) provided for in the Community legislation;

(9) [REC 3/91](#), [REC 2/94](#), [REC 6/97](#), [REC 10/99](#), [REC 1/00](#), [REC 4/00](#), [REC 4/01](#).

- \* acceptance of overall origin certificates where not allowed by the rules (10);

(10) [REC 5/92](#).

- \* acceptance of a declaration despite failure to comply with the conditions laid down in the rules to qualify for duty exemption (11);

(11) [REC 1/97](#).

- \* granting of preferential tariff treatment when the eligibility conditions had yet to be laid down in Community legislation (12);

(12) [REC 8/93](#).

- \* granting preferential tariff treatment before the beneficiary country authorities had notified the Commission of the names and addresses of the bodies authorised to issue the certificates and specimen stamps to be used, when implementation of the preferential measure was conditional upon notification (13);

(13) [REC 4 to 7/94](#).

- \* a customs office corrects the rate of duty on a declaration without informing the interested party or their representative and that correction is incorrect (14);

(14) [REC 2/98](#), [REC 10/99](#).

- during physical checks on goods at the customs office or on the company's premises (15);

(15) [REM 4/92](#), [REC 6/96](#), [REC 3/97](#), [REC 4/97](#), [REC 9/01](#).

- during a post-clearance check (16) or audit of the company (17);

(16) [REC 1/91](#), [REC 17/98](#), [REC 1/00](#).  
(17) Hans Sommer GmbH op. cit., [REC 3/92](#).

- in correspondence between the competent authorities and the person liable for payment where the competent authority takes a decision on the application of the rules in force (18);

(18) [REM 6/96](#), [REC 11/98](#), [REC 15/98](#).

- when documents are issued by competent third country authorities (19);

(19) [REC 11/99](#).

- publication of national tariffs containing erroneous information (20);

(20) Judgment of 12.7.1989 in [Case 161/88](#), Binder, and judgement of 28.6.1990 in [Case C-80/89](#), Behn, [REC 2/91](#), [REC 5/91](#), [REC 7/93](#), [REC 11/98](#), [REC 4/95](#), [REC 4/00](#), [REC 4/01](#).

- publication of national instructions containing erroneous information (21);

(21) [REC 3/90](#).

- publication in the Official Journal of the European Union of legislation where one of the language versions contains an error (22);

(22) [REC 1/94](#), [REM 1/94](#).

- failure of the customs authorities to raise objections to large numbers of customs declarations incorrectly lodged over a long period of time (23) when the fact that they were incorrect was apparent from the particulars given in them (24);

(23) The expressions “long period of time”, “large numbers” and “objections” must be defined in each individual case.

(24) Hewlett-Packard op. cit.; [REC 10/96](#), [REC 5/98](#), [REC 11/98](#), [REC 15/98](#), [REC 3/99](#), [REC 1/00](#), [REC 7/00](#), [REC 3/01](#).

- the issue of an incorrect certificate by a third country's authorities where the preferential status of the goods is established on the basis of a system of administrative cooperation involving the said authorities. Even if those authorities are misled by an incorrect account of the facts provided by the exporter, they have nevertheless made an error if they were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment (25).

(25) Article 220(2)(b), second and third subparagraphs; see also Faroe Seafood op. cit.

(B) The following are not regarded as errors of the customs authorities within the meaning of Article 220(2)(b) of the Code:

- erroneous information given by the authorities of a Member State which is not binding on the competent authority of the Member State where the duties are entered in the accounts (26);

(26) Hewlett-Packard op. cit., para. 16; [REC 4/96](#).

- erroneous information communicated by word of mouth, including by telephone, which is not binding on the competent authority (27);

(27) [REM 13/92](#), [REC 4/00](#).

- errors which have no bearing on the recovery of the duties in question, e.g. alleged errors in the national authorities' management of the tariff quota even though the goods were ineligible for the quota because they did not satisfy the eligibility requirements (28);

(28) [REC 6/91](#).

- acceptance of incorrect customs declarations without objection (29), save in cases concerning large numbers of declarations submitted over a long period of time, particularly if the errors could have been detected from the details of the declarations (29);

(29) [REC 4/96](#), [REM 9/95](#).

(30) Hewlett-Packard op. cit., para. 19, [REC 2/93](#), [REC 5/98](#), [REC 17/98](#), [REM 34/99](#).

- where the preferential status of the goods is established on the basis of a system of administrative cooperation involving the authorities of a third country, the issue of an incorrect certificate by those authorities if the latter were misled by misrepresentation of the facts by the exporter (31).

(31) Article 220(2)(b), third subparagraph; see also *Faroe Seafood op. cit.*



## 1.2. Is the error reasonably detectable?

### 1.2.1. Principle

In order to determine whether an error made by the customs authorities could reasonably have been detected by the person liable for payment acting in good faith, regard must be had in particular to the nature of the error, the professional experience of the person liable for payment and the degree of care which he exercised. To do so it is necessary to look specifically at all the circumstances of the case (32). The fact that the customs authorities made an error is not in itself sufficient to prove that the error could not reasonably have been detected by the trader.

(32) *Deutsche Fernsprecher GmbH op. cit.*, para. 18 et seq.



### 1.2.2. The nature of the error

As regards the precise nature of the error, the question to be determined each time is whether the rules concerned are complex (33) - or simple enough - for examination of the facts to make an error easily detectable. Rules can be regarded as complex:

(33) *Hewlett-Packard op. cit.*, para. 23; *Faroe Seafood op. cit.*, para. 100; *Ilumitrónica op. cit.* para. 56; *Deutsche Fernsprecher GmbH, op. cit.* para. 20.

- if the terminology used may have caused confusion or is not clear as regards the objective pursued by the rules in question (34),

(34) *Foods Import Srl op. cit.*, para. 30; [REC 15/98](#), [REC 17/98](#), [REC 3/99](#), [REC 6/00](#).

- if a change of rule is not apparent and the competent authorities themselves took time to realise that a change had been made (35),

(35) *Foods Import Srl op. cit.*, paras 30 and 31; [REM 12/01](#).

- if after the operations in question took place, the rule was amended, owing to its lack of clarity (36),

(36) [REC 1/97](#).

- if different or divergent interpretations of a rule by the competent authorities of Member States led to discussions in the relevant bodies at Community or international level (37), the adoption of a classification regulation (38) or a judgment of the EC Court of Justice or the EC Court of First Instance concerning the tariff classification of goods (39),



(37) [REC 2/94](#), [REC 1/95](#), [REC 4/97](#), [REC 5/97](#), [REC 6/97](#).

(38) [REC 1/90](#).

(39) [REC 3/93](#), [REC 1/01](#).

- if the customs authorities repeated their error (40),

(40) Foods Import Srl op. cit., para. 30; Illumitrónica op. cit., para. 56; [REC 1/93](#), [REC 11/98](#), [REC 15/98](#), [REC 11/99](#), [REC 1/00](#), [REC 3/01](#).

In the following cases, the rules concerned cannot be considered complex:

- the error by the customs authorities could have been detected simply by reading the texts published in the Official Journal of the European Union (41);

(41) See point 1.2.5.1 below on the subject of errors in national tariffs; see also [REC 5/92](#) (clarity of the rules on the issue of origin certificates), [REC 7/00](#) (clarity of articles in the Community Customs Code on outward processing) and [REC 4/01](#) (clarity of the rules on the obligation to present an import certificate).

- the goods could have been classified with little difficulty simply by following the normal tariff classification rules (42).

(42) [REC 1/91](#).

Note that, according to the Community case-law, the nature of the error should be assessed inter alia in the light of the amount of time (43) during which the authorities persisted in their error (44).

(43) Deutsche Fernsprecher GmbH op. cit., para. 21.

(44) Judgment of [10.5.2001](#) in Cases 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, Kaufring, para. 282.



### 1.2.3. *The operator's professional experience*

As regards the professional experience of the operator, the issue is whether or not the trader involved is a professional economic operator whose activity essentially consists in import and export operations and whether he already has some experience of trading in the goods in question and in particular whether he had in the past carried out similar operations on which duties had been correctly calculated. Thus, the following can be regarded as inexperienced operators:

- private individuals,
- very small businesses (45),

(45) [REM 12/01](#). In this case the party concerned was a micro-enterprise of one person. Note, however, that the Commission's recommendation of 6 May 2003 (OJ L 124) refers in the definition of this category of trader to an enterprise which employs fewer than 10 persons.

- traders importing for the first time (46),

(46) [REC 3/90](#).

- traders who have imported previously but are using new customs procedures for the first time (e.g. the end-use procedure) (47),

(47) [REC 15/98](#).

- traders who have carried out several identical or similar operations in the past on which duties were never correctly calculated, where the customs authorities have never indicated to them that the operations they were carrying out were not correct (48).

(48) [REM 6/99](#).

The following are regarded as experienced operators:

- professional specialists in customs clearance or international trade (49),

(49) [REC 8/91](#), [REC 7/00](#).

- holders of authorisations for simplified customs clearance (or transit) procedures, customs procedures with economic impact or end-use procedures, insofar as possession of these authorisations implies a certain amount of professional experience in the customs field (50),

(50) [REM 9/90](#), [REM 14/93](#), [REM 18/00](#), [REM 9/01](#).

- operators who had carried out several similar import operations in the past on which duties had been correctly calculated (51).

(51) [REC 4/00](#), [REC 4/01](#).



#### 1.2.4. *The diligence of the operator*

As a rule operators are responsible for finding out which rules (in particular those published in the Official Journal of the European Union, see, for example, point 1.2.5.1 below) apply to the operation they are carrying out and which duties are payable (51). It is the trader's responsibility, for example, to check for published Community legislation laying down the implementing conditions and criteria to be met to qualify for preferential tariff treatment (52) or to check whether anti-dumping duties are payable on the goods concerned (53).

(52) Binder op. cit. and Behn op. cit.; [REM 9/96](#), [REC 4/00](#).

(53) [REC 8/93](#).

(54) [REC 8/91](#).

Likewise, when traders are uncertain as to the accuracy of the information and statements required to draw up the customs declaration or the documents attached to the declaration or about the compliance of the operations with the rules in force, it is their responsibility to obtain information in writing and to seek the greatest clarification possible in order to ascertain whether their doubts are well founded (55).

(55) Deutsche Fernsprecher GmbH op. cit., para. 21; [REC 15/98](#).

However, a trader should be regarded as diligent when the error by the customs authorities relates to matters of which professionals are not normally kept informed (56). For example, when preferential tariff treatment is subject to the condition that the authorities of the beneficiary country must first have notified the Commission of the names and addresses of the bodies authorised to issue the certificates and specimen stamps to be used, the trader cannot be blamed for not knowing that no such notification had taken place and consequently not detecting the error of the national authorities which had granted the preferential treatment (57).

(56) [REC 16/98](#).  
(57) [REC 4 to 7/94](#).

Similarly, the obligation on traders to show due diligence does not extend to the requiring them to compare the different language versions of texts published in the Official Journal of the European Union to check whether they are indeed the same (58).

(58) [REC 1/94](#).



### 1.2.5. *Examples of cases concerning the detectability of the error*

#### 1.2.5.1. Errors in national user tariffs

Errors in national user tariffs must be regarded as errors of the customs authorities within the meaning of Article 220(2)(b) (59).

(59) [REC 2/91](#).

However, if the operator concerned is experienced, the error must be considered as detectable by the operator. The Community tariff provisions applicable are, as of their publication in the Official Journal of the European Union, the only substantive law in the matter. All are deemed to know that law. A working tariff produced by the national authorities is merely a manual to help in clearance operations and is intended purely as a guide. By reading the Official Journal of the European Union, in which the relevant provisions are published, an attentive operator should therefore detect errors contained in the working tariffs (60).

(60) Binder op. cit., and Behn op. cit.; judgment of 26.11.1998 in Case [C-370/96](#), Covita AVE, [REC 5/91](#), [REC 7/93](#), [REC 4/95](#), [REC 4/00](#), [REC 4/01](#).

Nevertheless, if the customs authorities use a national user tariff to calculate duties or to repay or remit duties in respect of import operations identical or similar to the ones in question, then errors made by the customs authorities (incorrect user tariffs and incorrect written decision) can be regarded as undetectable even by an experienced operator.



### 1.2.5.2. Tariff classification errors since the establishment of binding tariff information

Since it was established, binding tariff information (BTI) is the only protection operators have against tariff classification errors. Consequently, in cases where the customs authorities make an error within the meaning of Article 220(2)(b) of the Community Customs Code and that error relates to a tariff classification problem (e.g., acceptance of numerous incorrect declarations over a long period of time although the particulars on the declarations might have led to the conclusion that the tariff classification was incorrect), two situations may arise (61):

(61) Hewlett-Packard op. cit., [REC 5/98](#), [REM 34/99](#), [REM 5/00](#).

- either the operator, in view of his professional experience and the difficulty of the classification in question, had or should have had reason to doubt the correctness of the classification, in which case the error must be considered detectable because the operator, by not applying for a BTI to protect himself, did not act in a diligent way (62);

(62) [REC 10/96](#), [REM 12/97](#), [REC 5/98](#).

- or the operator had no reason to doubt the correctness of the tariff classification in so far as he could rely on a number of material elements confirming its classification and in so far as the classification did not appear complicated, in which case the error can be considered undetectable because the operator cannot be regarded as having failed to act in a diligent way (63).

(63) Hewlett-Packard op. cit.; [REC 2/97](#), [REC 3/97](#).



### 1.2.5.3. Incorrect preferential certificates

Since the amendment of Article 220(2)(b) of the Community Customs Code by Regulation (EC) No 2700/2000, the situation with regard to cases in which the operator, for the purposes of obtaining preferential treatment, submitted an incorrect origin or movement certificate issued by the authorities of a third country in the framework of a system of administrative cooperation is as follows.

Where the competent authorities of a third country issue an incorrect certificate, that this error is not considered to be reasonably detectable (64).

(64) Illumitronica op. cit.

If the certificate was incorrect because the exporter misrepresented the facts to the third country authorities, then there is no error.

Even if it results from misrepresentation of the facts by the exporter, the issuing authorities are held to have made an error which could not reasonably have been detected by the person liable for payment if they were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

Where the error is considered not reasonably detectable, the post-clearance entry of the duties in the accounts is only waived if the operator acted in good faith. The operator must demonstrate that he has taken due care to ensure that all the conditions for the preferential treatment were fulfilled. If a notice stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country is published in the Official Journal of the European Union, the operator cannot plead good faith for operations carried out after publication of that notice.

These rules apply only if the preferential treatment is granted on the basis of a certificate issued by the competent authorities of a third country. They are therefore applicable neither to false or falsified certificates nor to cases in which the exporter himself certifies that all the conditions for the preferential treatment have been fulfilled (approved exporters).



#### 1.2.5.4. Economic situation of the person concerned

As a rule, the economic situation of the person concerned (65) (risk of bankruptcy or liquidation if the duties are recovered, for example) should not be taken into account for the purposes of Article 220(2)(b) of the Community Customs Code.

(65) [REC 3/91](#).

### 1.3. Provisions relating to the customs declaration

The declarant must have complied with all the provisions laid down by the legislation in force as regards the customs declaration.

The declarant must therefore have supplied the customs authorities with all the necessary information provided for by the Community rules and national rules supplementing or transposing the Community rules, as appropriate, in relation to the customs treatment requested for the goods in question. However, that obligation is confined to the production of information and documents that the declarant may reasonably be expected to possess and obtain. It follows that if the declarant produces in good faith information which, although incorrect or incomplete, is the only information which he could reasonably have knowledge of or obtain, the requirement of compliance with the provisions in force concerning the customs declaration must be considered to have been fulfilled (66).

(66) See judgment of 23.5.1989 in [Case 378/87](#), Top Hit, (in which the condition relating to the customs declaration was considered not to have been met) and Mekanarte op. cit.



### 1.4. The operator's good faith

The operator must have acted in good faith. Perpetrators of fraud are therefore clearly excluded from the provisions of Article 220(2)(b) of the Community Customs Code.

If there is any evidence of fraud, operators are responsible for demonstrating that they have acted in good faith and that they were not involved in fraud if it is proven.

## 2. APPLICATION OF ARTICLE 239 OF THE COMMUNITY CUSTOMS CODE

In accordance with Article 239 of the Community Customs Code, import duties or export duties may be repaid or remitted in special situations other than those referred to in Articles 236, 237 and 238 resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

This provision constitutes a general equity clause.

According to Community case-law, if the person liable for payment can demonstrate both the existence of a special situation and the absence of deception and obvious negligence on his part, he is entitled to the repayment or remission of the amount of duty legally owed (67).

(67) Judgment of 10.5.2001 in *Kaufring AG op. cit.*

Before deciding whether to grant repayment or remission of the duties to the person liable for payment, the competent authority must take into account all the relevant factual data and circumstances.

The deciding authority is also required to exercise its power by balancing, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the operator acting in good faith in not suffering harm which goes beyond normal commercial risks (68). In this respect, it cannot take account only of the conduct of operators but must also take account of the conduct of the Community or customs authorities concerned.

(68) Judgment of 19.2.1998 in [Case T-42/96](#), *Eyckeler & Malt v. the Commission*, para. 133, and *Kaufring op. cit.*, para. 225.



### 2.1. The concept of a special situation

#### 2.1.1. Principle

According to Community case-law, the existence of a special situation is established where it is clear from the circumstances of the case that the person liable for payment is in an exceptional situation as compared with other operators engaged in the same business and that, in the absence of such circumstances, he would not have suffered disadvantage caused by the entry in the accounts of duties (69).

(69) Judgment of 26.3.1987 in [Case 58/86](#), *Coopérative agricole d'approvisionnement des Avirons*, para. 22; judgment of 25.2.1999 in [Case C-86/97](#), *Trans-Ex-Import*, paras 21 and 22; judgment of 7.9.1999 in [Case C-61/98](#), *De Haan*, paras 52 and 53; *Kaufring AG op. cit.*, para. 218.

In other cases, the payment of duties legally owed must be regarded as forming part of the normal commercial risk to be borne by the operator.

A declarant normally assumes liability for the payment of import duties and due presentation of the proper documents to the customs authorities (70). It follows that the damaging consequences of its contractual partners' incorrect behaviour cannot be borne by the Community (71). For instance, the fact that documents are subsequently found to be falsified or inaccurate represents part of the professional

and commercial risk inherent in the work, in particular of a customs agent (72), who can attempt to obtain compensation from the businesses implicated in the fraudulent use of the documents concerned.

(70) Eyckeler & Malt op. cit., para. 162.  
(71) Judgment of 17.7.1997 in Case [C-97/95](#), Pascoal e Filhos, para. 55.  
(72) See inter alia the judgment of 18.1.2000 in Case [T-290/97](#), Mehibas Dordtselaan, para. 83, and the judgment of 13.11.1984 in [Cases 98/83 and 230/83](#), Van Gend & Loos, para. 16.

A prudent trader aware of the rules must assess the risks inherent in the market which he is prospecting and accept them as normal trade risks. Post-clearance checks would be rendered almost useless if the use of forged, falsified or invalid documents could, of itself, justify repayment or remission. Such a situation could also discourage traders from exercising proper vigilance and shift to the public purse a risk that should be borne by traders. It is therefore the responsibility of traders to take the necessary steps in the context of their contractual relations to guard against the risks of post-clearance recovery.

However, if serious shortcomings on the part of the competent customs authorities or of the Commission contributed to the improper use of documents, the repayment or remission of the duties may be allowed provided that no deception or obvious negligence may be attributed to the person liable for payment (see point 2.3.2) (73).

(73) Judgment of 17.9.1998 in Case [T-50/96](#), Hilton Beef, para. 163.

#### 2.1.2. *Examples of special situations*

(A) The following situations which lie outside the normal professional and commercial risk of an operator may be regarded as special situations within the meaning of Article 239 of the Code:

- the situations referred to in Articles 900, 901 and 903 IP,
- errors of the customs authorities within the meaning of Article 220(2)(b) of the Community Customs Code (74) (see point 1.1.),

(74) E.g. [REM 12/92](#) in relation to national user tariffs which contain errors. See also case [REM 10/92](#) in which the customs authorities obliged a trader to enter goods for free circulation even though they could have been placed in a customs warehouse, as the trader had requested, and re-exported without prior payment of import duties. See too cases [REM 21/99](#), [REM 26/99](#), [REM 34/99](#), [REM 10/00](#), [REM 18/00](#), [REM 8/01](#), [REM 12/01](#).

- serious failings on the part of the competent customs authorities or the Commission when applying the rules in force and monitoring their implementation, where such errors are such as to contribute to irregularities (75) (see point 2.3.2),

(75) Eyckeler & Malt v. Commission op. cit. and Kaufring AG op. cit. For cases in which errors have not been proven, see [REM 5/00](#), [REM 12/00](#).

- the fact that some language versions of a Community law were not published, in particular on the accession of new Member States (76) or the occurrence of errors in one or more language versions of a published legislative text (77),

(76) Judgment of 15.5.1986 in [Case 160/84](#), Oryzomyli Kavallas OEE, [REM 1/97](#).  
(77) [REM 37/99](#).

- situations, examined on a case-by-case basis, in which the trader is able to prove that the customs operations could have been carried out without incurring a customs debt and it was as a result of an error that they were carried out in such a way as to incur the debt. The party concerned must prove that all steps were taken to identify the goods and that all supporting documents were provided (78),

(78) The most common instances are decisions on situations in which traders carried out inward processing operations ([REM 17/00](#), [REM 26/00](#), [REM 2/01](#), [REM 13/01](#), [REM 24/01](#)), outward processing operations ([REM 13/98](#), [REM 20/98](#), [REM 5/99](#), [REM 1/00](#), [REM 29/00](#)) or imports under the end-use procedure ([REM 4/00](#)) without prior authorisation. Following reform of the customs procedures with economic impact and the end-use procedure in 2001 and with the new possibility of obtaining retroactive authorisations, cases like these should no longer occur. For examples in other areas, see [REM 52/99](#), [REM 11/00](#), [REM 4/01](#), [REM 7/01](#). Note that, in certain circumstances, Article 859 IP applies to these cases.

- the denunciation of a preferential agreement by the Community where, for example, a company is exporting goods to the beneficiary country concerned (prior to repeal of the agreement) for processing and re-import under the preferential arrangements and, owing to the denunciation, the goods could not be re-imported under those arrangements. The special situation here arises because the trader could have exported under the outward processing procedure if he had known when exporting the goods that the agreement was about to be denounced (79).

(79) [REM 17/92](#).

(B) The following, however, are part of the trader's normal professional and commercial risk and are not therefore considered special situations:

- the situations referred to in Article 904 IP,
- objective situations applicable to an indefinite number of traders (e.g. the special geographical and economic situation of a part of the Community customs territory (80), the time limit starting from the moment that the person liable for payment is notified of the customs debt which differs according to whether the original failure to enter the duties in the accounts was the result of an act that could, at the time it was committed, lead to criminal court proceedings (81), the obligation to come into line with the Community Customs Code from 1 January



1994 (time limits beyond which goods in temporary storage must be assigned a customs-approved treatment or use) (82), etc.),

(80) [Coopérative agricole d'approvisionnement des Avirons op. cit., para. 22](#) (relating to the geographical and economic situation of Reunion).  
(81) Judgment of 18.1.2000 in Case [T-290/97](#), [Mehibas Dordtselaan BV](#), para. 80.  
(82) [REM 9/01](#).

- the possible invalidity of a Community regulation since Article 239 of the Community Customs Code is not to be used as a means of circumventing the rules applicable to contesting the validity of Community legal acts (83),

(83) [REM 16/01](#).

- the possible non-existence of the customs debt since a trader contesting a customs debt must challenge the decision in the national courts pursuant to Article 243 of the Code (84),

(84) Judgment of 11.7.2002 in Case [T-205/99](#), [Hyper Srl](#), para. 98.

- the inability of a customs clearance professional to recover the amount of duties from its client because the latter is insolvent or bankrupt (85),

(85) Judgment of 13.11.1984 in [CasKes 98/83 and 230/83](#), [Van Gend & Loos NV](#), para. 16, and [Mehibas Dordtselaan BV op. cit., para. 81](#); [REM 34/99](#).

- the interested party's economic difficulties (risk of bankruptcy or liquidation if the duties are not repaid or remitted) (86),

(86) [REM 4/91](#), [REM 34/99](#).

- the declarant's failure to comply with the instructions of the person he is representing (87),

(87) [REM 4/93](#), [REM 13/95](#).

- errors committed by an employee of the declarant (88), even if the employee is new or inexperienced (89),

(88) [REM 4/93](#), [REM 8/93](#).

(89) [REM 12/93](#).

- the declarant's personal problems (illness, leave, etc.) (90),

(90) [REM 9/01](#).

- difficulties connected with the introduction of a new computer system at the company (91),

(91) [REM 9/01](#).

- the failure of the trader to submit an application for repayment or remission of the duties under Article 236 of the Community Customs Code within the prescribed time limit (92),

(92) [REM 3/90](#), [REM 9/92](#).

- the failure of the competent customs authorities to advise a trader to use a customs procedure with economic impact or simplified clearance procedures (93),

(93) [REM 9/01](#).

- the theft of goods under customs supervision, which are presumed to have been placed on the Community market if they are not recovered (94),

(94) Judgment of 5.10.1983 in Cases [C-186 and 187/82](#), *Esercizio magazzini generali Spa e Mellina Agosta Srl*, paras 14 and 15, [REM 13/93](#), [REM 19/00](#).

- the destruction of a vehicle and its goods as a result of an attack within a few hours of the goods being released (95),

(95) [REM 10/94](#).

- the supply by the client to the customs clearance professional of documents (invoices) subsequently found to be forged, falsified or inaccurate. This situation is the kind of normal commercial risk borne by customs clearance professionals in so far as they assume liability for the payment of duties and due presentation of the proper documents to the customs authorities (96).

(96) *Van Gend & Loos NV op. cit.*, para. 16 and *Mehibas Dordtselaan BV op. cit.*, para. 83.

## 2.2. The absence of deception or obvious negligence

### 2.2.1. Principle

Generally, deception refers to the commission of an act which is liable to give rise to criminal court proceedings, or the attempt to commit such an act. Consequently, any operator who has not acted in good faith is barred from receiving repayment or remission of duties under Article 239 of the Code. If there is evidence to suspect deception, it is for the operator to demonstrate that he acted in good faith and without deception.

The criteria to be used to determine whether an operator acted with obvious negligence or not are the same as those used to determine whether an error on the part of the customs authorities within the meaning of Article 220(2)(b) of the Code could reasonably have been detected by the operator. Particular account should therefore be taken of the precise nature of the error, the trader's professional experience and the care exercised (97) (see point 1.2. above).

(97) *Kaufring AG op. cit.*, paras 278 and 279.

### 2.2.2. *Examples*

For example, the following were considered to be cases of obvious negligence:

- an operator who had difficulty obtaining the documents necessary to obtain preferential treatment from his contractual partner and yet failed to contact the partner to solve the problem, despite knowing how important the documents were (98);

(98) [REM 9/90](#).

- an operator who did not take the necessary measures to re-import goods within the time-limits provided for by law in the rules on outward processing. The operator should have taken all necessary measures to ensure that the goods were bought and transported within the legal time-limit, and it was his responsibility, when calculating the time needed, to allow for potential problems, including delays in loading the goods (99);

(99) [REM 10/91](#).

- an operator who did not check that the goods were present when he drew up the customs declaration for free circulation (100);

(100) [REM 13/93](#): the declarant did not realise when drafting the declaration for free circulation that the goods had been stolen.

- an operator who did not comply with the clear provisions of the authorisation he held for a customs procedure with economic impact (101);

(101) [REM 23/99](#), [REM 18/00](#).

- an operator who did not obey regular written warnings from the customs authorities asking him to comply with the relevant rules and the time-limits stipulated in the rules (102).

(102) [REM 9/91](#).



## 2.3. **Examples taken from sectors which have given rise to a number of decisions**

### 2.3.1. *Transit*

By virtue of his trade, the principal is normally accountable to the competent authorities for the proper conduct of Community transit operations even if he is the victim of fraudulent activities by third parties. Hence failure to present goods entered for the Community transit procedure at the customs office of destination, for whatever reason, is a commercial risk normally borne by the principal.

However, in certain exceptional cases, rulings by the Court of Justice of the European Communities and the Court of First Instance, and Commission decisions, have had recourse to Article 239 of the Community Customs Code to limit the principal's liability.

- For example, the following were considered to be special situations in which no deception or obvious negligence could be attributed to the person concerned:
  - a situation in which the national authorities deliberately allowed offences or irregularities to be committed, in order to help uncover a network, identify perpetrators of fraud and obtain or corroborate evidence, where the principal was not himself guilty of fraud (103),

(103) [De Haan Beheer BV](#) op. cit., para. 53; [REM 46/99](#). The [De Haan Beheer BV](#) judgment must however be interpreted narrowly: see [REM 8/00](#).

- a situation in which a customs official took part in the commission of fraud by falsely declaring that goods covered by a transit document had indeed been presented to the customs office of destination, and in which the principal was not himself implicated in fraud (104);

(104) Judgment of 7.6.2001 in [Case T-330/99](#), [Rotermund](#); [REM 7/97](#), [REM 14/97](#); [REM 46/99](#); [REM 12/00](#); [REM 1/01](#). For a case in which the person concerned acted in an obviously negligent manner, on the other hand, see [REM 9/00](#).

- a situation in which non-Community goods were in circulation in the Community customs territory under cover of a T2 document instead of a T1 document, when proof of release for consumption in a third country had been given. The goods should not therefore have entered the commercial channels of the Community without the duties being paid. This must be an isolated error on the principal's part (105);

(105) [REM 16/93](#).

- a situation in which non-Community goods were in circulation in the Community customs territory under cover of a T2 document instead of a T1 document, when the transit procedure had been discharged by the customs office of destination, which had treated the goods in accordance with their real status. The goods should not therefore have entered the commercial channels of the Community without the duties being paid. This must be an isolated error on the principal's part (106);

(106) [REM 11/97](#), [REM 16/97](#), [REM 9/98](#).

- a situation in which non-Community goods were in circulation in the Community customs territory without being covered by the Community transit procedure owing to an error by the principal, where the goods travelled on the same lorry as other goods covered by a transit procedure and where they were treated at the customs office of destination in accordance with their real status. The goods should not therefore have entered the commercial channels of the Community without the duties being paid. This must be an isolated error on the principal's part (107);

(107) [REM 17/97](#).

- The following, however, were not considered to be special situations in which no deception or obvious negligence could be attributed to the person concerned:
  - a situation in which goods entered for the transit procedure fraudulently went missing during the transit operation, even though the principal acted in good faith and the perpetrators were insolvent (108), and even though the interested party was a victim of the said criminal acts (109).

(108) [REM 11/90](#), [REM 9/93](#).

(109) [REM 19/00](#).

- a situation in which a transit operation was not discharged and the goods were not recovered, even though the consignee in the third country testified to having received them but was unable to prove it because his company premises had been destroyed by an act of war (110).

(110) [REM 7/94](#).

### 2.3.2. *Failure by the competent authorities to fulfil their obligations*

Serious failings on the part of the relevant customs authorities and serious failings on the part of the Commission when applying the rules in force and checking that they are applied may constitute special situations within the meaning of Article 239 of the Community Customs Code, if such failings are likely to contribute to irregularities occurring. This is particularly true in respect of preferential tariff arrangements and agreements providing for the free circulation of goods.

The concept of failing is much broader than that of an error on the part of the customs authorities. For example, even if the competent authorities have committed no error within the meaning of Article 220(2)(b) of the Community Customs Code, their behaviour may nonetheless be considered to contribute a failing.

The existence of a failing on the part of the competent authorities does not in itself confer entitlement to repayment or remission under Article 239 of the Community Customs Code. The traders concerned must also be guilty of neither deception nor obvious negligence. The criteria set out in point 2.2. above apply to the evaluation of this condition.

However, as regards the issue of invalid certificates by the competent authorities of a third country (111), a number of peculiarities arising in particular from the Community case-law should be noted (112). Firstly, the negligence of operators has to be set against the period of time during which the competent authorities persisted in their behaviour. Secondly, unless it can show that the interested party deviated from normal business practice when concluding its purchase contract and carrying out the imports concerned, it is for the authority responsible for repayment or remission to prove deception or obvious negligence on the part of the operators.

(111) Which excludes forged or falsified certificates and cases in which the exporter certifies himself that the goods meet all the conditions required to be eligible for the preferential treatment (approved exporters).

(112) *Eyckeler & Malt v. Commission* op. cit. and *Kaufring AG* op. cit.

Otherwise, it is the operators who must demonstrate that they have taken due care to ensure that all the conditions for the preferential treatment have been fulfilled. If a notice stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country is published in the Official Journal of the European Union, operators cannot plead good faith for the operations carried out after this publication.



#### 2.3.2.1. Examples of failings

The existence of serious failings constituting a special situation within the meaning of Article 239 of the Community Customs Code has been accepted in the following cases:

- imports of high-quality beef, known as “Hilton beef” in 1991 and 1992. The meat qualified for exemption from the agricultural levy subject to a quota and presentation of a certificate of authenticity issued by the competent Argentine authorities. The Court of First Instance of the European Communities found that the very high number of false or falsified certificates only led to the quota being substantially exceeded because the Commission had failed in its duty to monitor and enforce the application of the quota over the two years 1991 and 1992. The forgeries, carried out in a very professional way, therefore exceeded the normal commercial risk which must be borne by the importers (113);

(113) Eyckeler & Malt op. cit., para. 189.

- imports of “Turkish colour televisions” between 1991 and 15 January 1994 (114) under cover of ATR movement certificates, in the light of failings on the part of the competent Turkish authorities, the Commission and the EEC-Turkey Association Council which contributed to irregularities occurring in the export of televisions from Turkey to the Community. It was found that the Turkish authorities had known, or at least should have known, that the goods for which they issued ATR movement certificates did not qualify for free circulation. For more than 20 years, the Turkish authorities had failed to transpose the regulations governing the countervailing levy. Moreover, during the material time, they had introduced measures which either did not comply with the provisions of the Association Agreement and the Additional Protocol, or did not provide for correct implementation of the Agreement and the Protocol. The Commission was also in default in that it had not ensured proper surveillance of the application of the Association Agreement and the Additional Protocol and it had not warned Community importers promptly of the potential risks they ran in importing colour televisions from Turkey. The EEC-Turkey Association Council was also found to be in default in that, for more than 20 years, it had not taken any steps to ensure that Turkey complied with the Association Agreement and the Additional Protocol;

(114) Kaufring AG op. cit.; [REM 21/01](#). However, for the antidumping duties, see [REM 23/01](#).

- imports of “Turkish tuna” between June 1993 and the date of publication of notice to importers 2000/C 366/09, since the competent Turkish authorities had known, or at least should have known, that the goods for which they issued ATR

movement certificates did not qualify for preferential treatment. It also emerged from information from Community inquiries and the Turkish authorities' failure to cooperate, that the latter had not taken all the necessary precautions to ensure that the relevant provisions were properly applied. Moreover, the authorities had not only refused to withdraw the certificates in question following the results of the inquiries but had continued to issue certificates to the exporters concerned (115);

(115) [REMs 25, 27, 33 and 35/00](#).

- imports of “textile products from Bangladesh” between 1994 and 5 April 1997, when notice to importers No 97/C 107/05 was published, under preferential arrangements applicable as part of the Generalised System of Preferences, since the competent authorities in Bangladesh which issued the form A certificates failed to fulfil their obligations. The failure by the competent authorities related to imports under cover of certificates of origin which were later withdrawn by the Bangladesh authorities following a Community inquiry conducted in 1996. It also related to imports covered by origin certificates for which the Bangladesh authorities failed to reply to requests for a post-clearance check on the grounds of exceptional circumstances. The Bangladesh authorities were considered to have failed to fulfil their obligations because they knew, or at least should have known, that the goods for which they issued form A certificates did not qualify for preferential treatment:
  - the country's exports far outstripped its yarn-production capacity;
  - exporters presented documents in support of certificate applications which would have enabled the quantity of imported raw material used in the manufacture of the finished products to be assessed;
  - the Bangladesh authorities submitted two requests for derogations from the rules of origin in 1989 and 1994 containing information from which one could infer that they knew or should have known that the bulk of ready-to-wear clothing exported under cover of form A certificates issued by the competent authorities in Bangladesh did not fulfil the origin criteria;
  - it could be deduced from Bangladesh's national policy of expanding spinning capacity, in conjunction with the various requests for derogations from the rules of origin, that the Bangladesh authorities knew or at least should have known that spinning capacity was not large enough to enable the domestic industry to produce sufficient yarn;
  - many of the form A certificates in question were withdrawn;
  - it was impossible for the Bangladesh authorities to perform a post-clearance check on a large number of the form A certificates which it had issued) (116);

(116) [REMs 21 to 24/00](#), [REM 28/01](#).

- imports of “textile products from Laos” under cover of form A certificates issued by the Laos authorities between 1 November 1992 and 28 November 1995, since the competent authorities which issued the certificates failed to fulfil their obligations. The failure by the competent authorities related to imports

under cover of origin certificates which were included on a list by a Commission inquiry carried out in Laos in 1995 and subsequently withdrawn by the Laos authorities. The latter were considered to have failed to fulfil their obligations because they knew or should have known that the goods for which they issued form A certificates did not qualify for preferential treatment, because they never inspected the export companies and because they stamped certificates after the goods had been exported (117).

(117) [REM 5/01](#).



#### 2.3.2.2. Examples of non-recognition of failure

The existence of serious failings constituting a special situation within the meaning of Article 239 of the Community Customs Code has been dismissed in the following cases:

- imports of consignments of DRAMs originating in Japan, accompanied by documents giving price undertakings drawn up by the exporter and providing exemption from anti-dumping duties on import which subsequently proved to be invalid. The EC Court of First Instance found that the Commission had not failed to fulfil its obligations as it was not required to check that each undertaking corresponded to the actual import operation and, in any case, such monitoring could be based only on post-clearance checks. Moreover, this was an isolated case and it was not shown how the Commission could have detected the fraudulent use of the price undertakings at the time of the import operation (118);

(118) Judgment of 4.7.2002 in [Case T-239/00](#), SCI UK Ltd; see also [REM 44/99](#).

- imports of colour televisions from India using Form A certificates under the GSP, certificates which were subsequently withdrawn by the Indian authorities following an investigation by the Community. The EC Court of First Instance found that neither the competent Indian authorities nor the Commission had failed to meet their obligations. In fact, the Indian authorities had actively cooperated with the Commission services and those of the Member States as regards verification of the legality of exports of colour television sets to the Community. Moreover, those authorities had not been aware of all the facts needed to apply the rules in question and had not acted in collusion with the exporters. The Commission for its part had acted promptly and diligently and was obliged, under its general duty of diligence, to issue a general warning to Community importers only when it had serious doubts as to the legality of a large number of exports effected under a system of preferential treatment (119).

(119) Judgment of 11.7.2002 in Case [T-205/99](#), Hyper Srl; see also [REM 14/98](#).