**COMMISSION DECISION**

**C(2014)4908**

**of 16.7.2014**

**on finding that the remission of import duties is not justified in a particular case (REM 05/2013)**

(only the German text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code,

Having regard to 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,

Whereas:

(1) By letter of 3 September 2013, received by the Commission on 18 September 2013, the Federal Republic of Germany asked the Commission to decide whether, under Article 239 of Regulation (EEC) No 2913/92, the remission of import duties was justified in the following circumstances:

(2) Between 10 December 1999 and 10 June 2002, a German firm (hereafter, the applicant) submitted to the German customs authorities, through its legal representative, fifty one import declarations for release for free circulation concerning woven fabrics of flax imported from Latvia into the EU. The applicant asked the competent customs office for the release for free circulation without levying turnover import tax pending re-dispatching to other Member States.

(3) At the time of the operations, imports from Latvia into the EU were granted a preferential duty or a duty-free regime based on the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part (hereafter, the Association Agreement)[1]. EUR.1 certificates were presented to get a release for free circulation of goods. The German customs office accepted the declarations and applied the preferential tariff treatment (0%).

(4) In June 2002, after conducting a mission to verify the EUR.1 movement certificates used for the imports of woven fabrics of flax from Latvia to Denmark, the European Anti-Fraud Office (OLAF) concluded that the certificates in question were not registered in the Customs register and they were not issued by the Latvian customs, therefore they should be deemed as not valid. This fact was officially confirmed by the

[1] OJ L 26, 02.02.1998, p. 1.

Latvian Customs Administration through its letters dated 7 April 2003 and 7 May 2003.

(5) By letter of 11 September 2002, OLAF asked Member States to identify all imports of woven fabrics of flax from Latvia from 1 January 2000 onwards that were eligible for preferential treatment and to send the EUR.1 certificates not included in the list of correctly issued EUR.1 movement certificates for verification to the Latvian customs authorities.

(6) Since the EUR.1 movement certificates used by the applicant were not included in that list, two requests for post-clearance verification on the applicant's certificates were sent to the Latvian customs authorities. The Latvian customs authority reported, in its letters dated 7 April and 7 May 2013, sent to the German authorities that the certificates were not issued by them since they have not been registered in the Customs Certificate Register and should therefore be deemed invalid. On the back of the copies of the movement certificates, the Latvian customs administration in each case confirmed that the certificates did not meet the authenticity requirements.

(7) Consequently, on 3 July 2003 the German customs authorities issued a recovery notice for import duties of EUR XXXXX for imports of woven fabrics of flax carried out from 10 December 1999 to 10 June 2002.

(8) On 30 September 2003, the applicant submitted to the German customs authorities an appeal to this notice under Article 243 of the Customs Code and, at the same time, lodged a request for remission under Article 239 of the Community Customs Code.

(9) In response to the objection, the German customs authority issued subsequent amending notices reducing the amount owed down to EUR XXXXX, given the customs values attributed to the goods on importation were too high and, respectively, because the three year period for communicating the debt had elapsed for part of the operations.

(10) The public prosecutor’s office in Munich launched an investigation concerning the two managing directors of the applicant’s firm for tax evasion. The proceedings against one managing director were dropped. Later, in 2009, the Regional Court declined to initiate main proceedings against the second managing director because it could not be established beyond doubt whether the EUR.1 preference certificates presented for the deliveries at issue in the years 1999 to 2002 were in fact forged and because there might have been irregularities in the Latvian customs administration.

(11) By decision of 28 November 2012, the Finance Court of Munich held that the remission of the import duties charged to the claimant in connection with imports of woven fabrics of flax from Latvia, amounting to EUR XXXXX was a matter for consideration by the Commission under Article 239 of the Community Customs Code.

(12) In the court’s view, there were indications that the EUR.1 movement certificates presented by the claimant were knowingly issued irregularly by Latvian customs officials and that the Commission failed to supervise properly Latvia’s compliance with the Association Agreement. The Finance Court had doubts on the reliability of the checks carried out by the Latvian Customs Administration during the period when the imports took place and questioned the recording of preference certificates in registers as suitable basis for establishing if the documents were genuine.

(13) The German Finance Court considered that the Commission failed to inform the importers about the problems in the Latvian Customs Administration, including by not publishing a warning. The Commission was also considered responsible for looking

into the way in which the post-clearance checks were carried out in Latvia and how the register was kept. The court considered that it would have been appropriate for OLAF to conduct another mission or take other measures to arrive at a full understanding of the reasons for the improper issue in Latvia of preference certificates for woven fabrics of flax, as OLAF's 2002 mission did not relate directly to the claimant's imports.

(14) The Finance Court acknowledged that it was possible that the woven fabrics of flax imported by the claimant were not manufactured in Latvia and so were not eligible for preferential treatment. In its view, the claimant has not acted with intent to deceive or obvious negligence, since the cases brought against the first and second managing directors of the company were either shelved or dropped.

(15) After receiving the decision of the Finance Court, the German Federal Ministry of Finance gave the applicant the opportunity, in a letter dated 27 May 2013, to submit a statement of agreement with the draft report to the Commission pursuant to Article 905(3), first sentence, of Commission Regulation (EEC) No 2454/93 of 2 July 1993 or to submit comments. By letter dated 28 August 2013, the applicant submitted its comments to the Federal Ministry of Finance pursuant to Article 905(3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993. In this, it once again set out its belief in the existence of a "special situation", arising from the gross misconduct of the Latvian customs authorities, the serious misconduct of the European Commission and of the German customs authorities.

(16) The German Customs Administration rejected the applicant's request for remission under Article 239 of the Community Customs Code.

(17) The case before the Finance Court of Munich has been suspended, pending the decision by the European Commission on the claimant's application for remission of import duties.

(18) Before adopting its final decision, in the interest of guaranteeing applicants a fair hearing, and in accordance with Article 906a of Commission Regulation (EEC) No 2454/93, the Commission asked the applicant by letter of 14 March 2014 to comment on any issues of fact or law which might lead to the application being refused.

(19) By letter of 31 March 2014, received by the Commission on 11 April 2014, the applicant commented on the Commission's objections.

(20) The applicant claimed that it concluded its contracts of sale in line with normal commercial practice, the goods were supplied with all the usual documents (invoice, bill of lading), including stamped and signed EUR.1 certificates and the need for delivery with an EUR.1 was covered by the contracts. The applicant also argued that it had no reason to believe that the purchased woven fabrics of flax were not manufactured in Latvia and did not satisfy the origin criteria in the Association Agreement, as Latvia was one of the traditional countries in which large quantities of woven fabrics of flax were produced in the period in question. The applicant affirmed that it could not detect anything wrong in the issuing of the EUR.1 certificates by applying normal commercial diligence.

(21) The applicant's claim that a national court's conclusions are binding for the Commission cannot be retained, as they are contradictory to the European Union Court of Justice (EUCJ)'s opinion. On the contrary, the EUCJ stated that national court is bound by Commission decisions addressed to the Member States and must avoid

giving decisions which would conflict with a decision contemplated by the Commission[2].

(22) Under Article 907 of Commission Regulation (EEC) No 2454/93, where the Commission notifies the person applying for remission of its reasons for intending to refuse the applicant's request, the period of nine months within which the Commission must take a decision is extended by one month.

(23) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 8 May 2014 within the framework of the Customs Code Committee (Debts and Guarantee section) to consider the case.

(24) In order to determine whether the facts in question constitute a special situation within the meaning of that provision, the Commission must balance, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other hand, the interest of the economic operator acting in good faith not to suffer harm beyond normal commercial risk[3].

(25) Article 239 of Regulation (EC) No 2913/92 allows import duties to be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 of that regulation when two conditions are met: a) a special situation exists; and b) the situation arises from circumstances in which no deception or obvious negligence may be attributed to the person concerned. These conditions are cumulative[4].

(26) The EUCJ has ruled that the provisions of Article 239 represent a general principle of equity and that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable 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 the disadvantage caused by the post-clearance entry in the accounts of customs duties[5].

(27) In order for an error to give rise to a special situation, it must represent an act of the customs authorities themselves.

(28) OLAF discovered during its mission in June 2002, that the EUR.1 certificates were not recorded in the official registers of the Latvian customs authorities and the signatures on the movement certificates were not those of the officials who were supposed to sign them. OLAF’s assessment was that the documents were obviously false or forged. In what concerns the stamp imprints, although the analysis of expert of the German Customs Criminal Investigation Office indicated that from the total of twelve EUR.1 movement certificates forwarded nine held Latvian customs stamp images, the forensic examinations by the German Customs Criminal Investigation Office did not come to a definite conclusion.

(29) In the opinion of the German Customs Administration, in the correspondence between the OLAF and the forensic expert, the prevalent opinion supported by the expert was that the documents represented elaborated forgeries. Moreover, the Latvian authorities clearly stated that the signature was falsified, the customs officer concerned still

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2 Case C-375/07 Heuschen & Schrouff, paragraphs 64-66 and 70.

3 Case T-330/99, Rotermund.

4 Case C-86/97, Trans-Ex-Import vs. Hauptzollamt Potsdam , 25.02.1999, paragraph 22.

5 See cases C-204/07, C.A.S. v Commission, paragraph 82; C-230/06, Militzer & Münch, paragraph 50 (see also, to that effect, cases C-86/97, Trans-Ex-Import, paragraph 21 and 22, and C-61/98*,* De Haan, paragraphs 52 and 53.

working in the Latvian customs as no charges have been brought against his professional conduct.

(30) The letters sent by the Latvian customs authorities to the German Centre for Verification of Origin concluded that the EUR.1 should be deemed invalid were signed by the then Deputy Director, later found guilty of various breaches of administrative duty, but without direct connection with the case at hand. On the other hand, the backs of the copies of the EUR.1 movement certificates sent to Latvia for subsequent verification bore the signature of a different official.

(31) Moreover, according to Protocol 1A, Article 20(5) of the Association Agreement with Latvia, for the purpose of subsequent verification of certificates of origin, copies of the certificates as well as any export documents referring to them shall be kept for at least two years by the competent Latvian authorities. The absence of such documents further supports the opinion that the Latvian customs authorities did not issue the EUR.1 certificates.

(32) In the jurisprudence of the EUCJ it is accepted that the deliberate and active involvement of customs officials in fraud would constitute a special situation within the meaning of Article 239 of Council Regulation (EEC) No 2913/92. As the EUCJ has recalled[6], only errors attributable to acts of the customs authorities confer entitlement to the waiver of post-clearance recovery of customs duties. The failure to prove such an involvement from the Latvian customs authorities prevents the Commission from coming to the conclusion that there is a special situation created through the conduct of the Latvian authorities.

(33) In the alternative that the EUR.1 certificates were not issued by the Latvian authorities, the possibility of documents being subsequently found to be falsified or inaccurate is part of the professional and commercial risk of the operator and does not amount to a special situation [7]. It is settled case-law that submitting documents subsequently found to be falsified or inaccurate does not in itself constitute a special situation justifying the remission or repayment of import duties, even where such documents were presented in good faith[8].

(34) While the proof is, in principle, provided by the EUR.1 certificate, the person liable cannot entertain a legitimate expectation with regard to the validity of such a certificate by virtue of the fact that it was initially accepted by the customs authorities of a Member State, since such initial acceptance does not prevent subsequent checks from being carried out[9].

(35) The declarant is responsible for the content of the documents presented to the customs authorities[10]. This also includes supporting the negative consequences of its contractual partners' incorrect behaviour, which cannot be borne by the EU[11].

(36) In what regards Commission's conduct, neither the Association Agreement, nor any other applicable legislation creates a specific legal obligation for the Commission to monitor compliance with the rules on preferential arrangements and to issue specific

[6] Cases C-348/89 Mecanarte, paragraph 23, and C-204/94, Faroe Seafood*,* paragraph 91.
[7] Case T-290/97, Mehibas, paragraph. 83.
[8] CaseT-42/96, Eyckeler & Malt, paragraph 162.
[9] Case C-204/94, Faroe Seafood, paragraph. 93; T-191/09 Hit Trading, paragraph 99.
[10] CaseT-42/96, Eyckeler & Malt, paragraph 162.
[11] Case C-97/95, Pascoal e Filhos, paragraph 55.

warnings[12]. The EUCJ has confirmed that the absence of a notice to importers is not a Commission error even after an OLAF mission[13].

(37) The Commission was only called to publish a warning if, after having assessed the problem, it had serious doubts about the regularity of a large number of exports under a system of preferences. An obligation to publish a warning does not exist in the form invoked by the applicant and the existence of the case in which the applicant was involved was not reason enough for the Commission to publish such a warning. Moreover, the Commission did not need to organise a separate mission if it did not consider that it lacked information which would allow it to make an assessment of the situation.

(38) The Commission met all the general monitoring obligations under the Association Agreement by its annual checks, the results of which were published in the reports referred to also in the present document. It worked actively to reduce the problems in Latvia. However, it was not obliged to monitor all imports from Latvia for compliance with the rules on preferential arrangements. Protocol 1A, Article 20(4), second paragraph, of the Association Agreement with Latvia stated that, should such verifications reveal systematic irregularities in the use of declarations of origin, the Community may subject imports of the products in question to the provisions of Article 2(1) of this Protocol. The fact that this provision hasn't been applied indicates that the irregularities concerning the use of declarations of origin were not significant and did not justify special measures from the part of the Commission, including the issuing of a warning.

(39) Concerning the Commission's Regular Reports on Latvia's Progress towards Accession, they cannot be considered to create a general assumption of misconduct on the part of the country reviewed. Moreover, they do not specify to which extent the corruption affected the application of preferential rules.

(40) In relation to the Finance Court's contention that there were grounds for believing that the Commission did not require samples of customs stamps under Article 29 of Protocol 3 to be submitted in sufficient quantities, the court fails to recognise that the correspondence between the customs investigation office and the Commission concerns not the submission of stamp imprints under the above mentioned article, but the submission of original imprints for technical investigation of the colouring and print features for the purposes of criminal investigation of the authenticity of EUR.1 movement certificates. As there are no indications that the Latvian customs authorities did not inform regularly the Commission about stamp imprints used within the meaning of Article 29 of Protocol 3, there was no reason for the Commission to ask for additional imprints.

(41) Hence, the conduct of the Commission cannot be considered as generating a special situation.

(42) Although the conduct of the German Customs Administration has not been challenged by the decision of the Finance Court, the applicant considered that its behaviour originated a special situation. According to the information existing in the file, the German customs authorities proved to be diligent and active in the attempt to identify the breaches of current legislation.

[12] Case T-191/09,Hit Trading, paragraphs 79-80.

[13] Cases T-191/09 Hit Trading, paragraphs 80-82, and T-205/99 Hyper, paragraph 126.

(43) The Commission deems that the misconduct of the Latvian authorities has not been proven and, consequently, the claims made by the applicant based on that assumption are discharged. These include the accusations of negligent assessment of the letters from the Latvian Customs Administration and of the alleged participation of the Latvian authorities in the issuing of irregular EUR.1 certificates.

(44) To allow imports without the respect of the legislation in force, only because the authorities have accepted them even in such conditions, would mean allowing a negligence which would encourage operators to benefit from errors from their customs authorities[14].

(45) Considering all of the above, the Commission has found that the request for remission was not justified because the applicant had not demonstrated that there was a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(46) Given the cumulative nature of the conditions under Article 239, the Commission is under no duty to consider the second condition, relating to the absence of deception and obvious negligence on the part of the applicant[15]. Nevertheless, the Commission has assessed all the facts and elements of the situation presented to it.

(47) According to established case-law, when examining whether there has been deception or obvious negligence, account must be taken, in particular, of the complexity of the legislation and of the operator's professional experience and diligence[16].

(48) However, the trader's relevant experience and the care taken by him, are merely criteria, on the basis of which the Commission must ascertain whether in a specific case there was obvious negligence on the part of the trader [17] The Commission must, as part of its assessment, identify the specific acts or omissions of the person applying for remission which, taken separately or as a whole, amount to obvious negligence, and it must do so in the light of, inter alia, the criteria mentioned.

(49) Regarding the complexity of the legislation, the rules concerned cannot be judged as complex, since they are clearly detailed in Title III (Free movement of goods) of the Association Agreement. Such provisions are easy to understand even by an inexperienced trader. Moreover, once a regulation is published in the Official Journal of the EU, it constitutes the sole relevant positive law and everyone is deemed to be aware of that law[18]. Therefore, the applicant cannot claim, in good faith, that the law was not clear or accessible. Moreover, the applicant is considered to be an experienced trader.

(50) As regards the diligence shown by the applicant, it must be noted that, even when doubts exist as to the applicable regime, non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make inquiries and seek all possible clarification to ensure that he does not infringe those provisions[19].

(51) Even though the cases against the applicant's first and second managing directors regarding the forging of certificates were either dropped of shelved, this element represents only a part of the considerations to be taken into account when assessing the

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14 Case C-38/07, Heuschen & Schrouff, paragraph 64.
15 Case T-290/97, Mehibas, paragraph 88.
16 Case C-38/07, Heuschen & Schrouff, paragraph 19.
17 Case C-48/98 Söhl & Söhlke, paragraph 59.
18 Case C-161/88, Binder, paragraph 59.
19 Case C-48/98, Söhl & Söhlke, paragraph 58 and C-38/07, Heuschen & Schrouff, paragraph 59.

applicant's good faith. Lack of penal condemnation does not automatically result in recognition of good faith or lack of deception or obvious negligence.

(52) The fact that the imported goods were not eligible for preferential treatment and the circumstance that the applicant is trying to benefit from preferential treatment for goods not fulfilling the necessary criteria and manufactured in a different country, when the trader is presumed to possess that information, represent an indication not only of the applicant's lack of diligence in ensuring that the goods qualified for the preferential treatment granted through the Association Agreement but also of its lack of good faith.

(53) During the meeting of the group of experts on 8 May 2014 within the framework of the Customs Code Committee (Debts and Guarantee section) in which the present case has been discussed, Latvia stated that, apart from the fact that the EUR.1 certificates were forged and were not issued by Latvian customs, the goods themselves did not originate in Latvia. On the contrary, there were strong indications (e.g., the journey has been broken up only to disguise the real origin of the goods and to use freight documents issued in Latvia to falsely certify that the goods were of Latvian origin) that the woven fabrics of flax were not manufactured in Latvia, but were coming from Lithuania, Russia or China.

(54) According to the EUCJ, where verification does not confirm the origin, the goods are of unknown origin and recovery of duties is a normal consequence[20]. It further restated that the burden of proof of origin is on the importer[21]. The applicant knew or could have known the real origin of the goods.

(55) The Commission therefore concludes that the condition concerning the absence of deception or obvious negligence has not been met either.

(56) On the basis of this assessment, the Commission deems that remission of duties in the amount of EUR XXXXX is not justified under Article 239 of Council Regulation (EEC) No 2913/92,

HAS ADOPTED THIS DECISION:

*Article 1*

The import duties in the sum of EUR XXXXX requested by the Federal Republic of Germany on 3 September 2013 for imports made between 10 December 1999 and 10 June 2002 shall not be remitted.

*Article 2*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 16.7.2014

*For the Commission*
*Algirdas ŠEMETA*
*Member of the Commission*

[20] Case C-409/10, Afasia Knits, paragraphs 44-45.
[21] Case C-409/10, Afasia Knits, paragraphs 54-55.