ARTICLE

The Concept of 'Good Faith' in the Particular Case of Preferential Arrangements*

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Under EU preferential trade arrangements reduced or zero rates of customs duties apply to goods originating in certain countries. However, a customs debt may be incurred when the certificate of origin of the goods is deemed to be incorrect. In such cases, import duties are collected by way of post-clearance recovery since imports should not have benefited initially from preferential treatment, whereas importers may plead good faith to claim the repayment or remission of customs duties. The plea of good faith is based on the grounds of an error made by the competent authorities themselves and on the fact that the debtor was not aware nor should be aware of the irregularities committed in the country of origin. Two issues arise: (1) to what extent are EU importers required to be aware of the irregularities committed in the countries of origin; and (2) what is the impact that a notice to importers published by the European Commission may have on the good faith of importers. The first issue depends basically on the scope of the principle of good faith, so it is necessary to take into account the degree of diligence (duty of care) that should be required to EU importers. The second issue deals with the minimum level of legal certainty that may be required by notices to importers which have a direct impact on the good faith and may therefore be decisive as to determine whether importers should have been aware of irregularities committed in the country of origin.

1 Introduction

This article deals with the concept of good faith that arises in the context of EU preferential arrangements. Under these arrangements reduced or zero rates of customs duties apply to goods originating in certain countries. However, a customs debt may be incurred when the certificate of origin of the goods is deemed to be incorrect by the customs authorities and the goods are not therefore eligible for preferential tariff treatment. In such cases, import duties are collected by way of post-clearance recovery since imports should not have benefited initially from preferential treatment, whereas importers may plead his good faith in order to claim the repayment or remission of customs duties. The plea of good faith is based on the grounds of an error made by the competent authorities themselves and on the fact that the debtor was not aware nor should be aware of the irregularities committed in the country of origin.

The Union Customs Code (UCC)[1] provides for repayment or remission (waive) of customs duties when importers have acted in good faith, i.e. importers who applied the preferential arrangement without detecting, or having been able to detect, that such an arrangement was being applied incorrectly (Articles 119 UCC).[2] Therefore, in relation to irregularities committed in the country of origin, the good faith of importers must be evaluated by the customs authorities of the EU country in order to decide on the remission or repayment of customs duties. In addition, sometimes the European Commission publishes a notice to importers in the Official Journal to inform importers on the existence of reasonable doubts regarding the proper application of the preferential treatment. A notice to importers has a direct impact on the evaluation of the good faith, since importers may not rely on a plea of good faith if the Commission has published a notice stating that there are grounds for doubt

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1 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 Oct. 2013 laying down the Union Customs Code (UCC). The UCC entered into force on 30 Oct. 2013 although most of its substantive provisions took effect from 1 May 2016. The UCC repealed the 1992 Community Customs Code (CCC). This article will mainly refer to the UCC provisions but reference to the provisions of the 1992 CCC will be made when necessary.

2 In general, legal provisions for claiming the repayment or remission of customs duties are basically contained in Arts 116–123 of the UCC (Title III, Ch. 3, s. 3). Particularly, Art. 119 UCC provides for the repayment or remission of customs duties when the debt is incurred as a result of an error by the competent authorities. This circumstance is applied in the context of preferential arrangements in respect of incorrect certificates of origin issued by the competent authorities.

concerning the proper application of the preferential arrangement by the beneficiary country (Article 119.3 *in fine* UCC).

In this context, this article analyses the application of preferential arrangements on the basis of the principle of good faith, addressing two main issues that are closely connected. Firstly, to what extent the EU importers must be required to be aware of the irregularities committed in the countries of origin. Secondly, what is the impact that a notice to importers published by the European Commission may have on the good faith of importers. The first issue depends basically on the scope of the principle of good faith, so it is necessary to take into account the degree of diligence (duty of care) that should be required of EU importers. The second issue deals with the minimum level of legal certainty that may be required on notices to importers published by the European Commission in the Official Journal, i.e. to what extent the wording of the notice must be sufficiently clear and specific to prevent importers from alleging their good faith. These notices have a direct impact on the good faith and may therefore be decisive as to determine whether importers should have been aware of irregularities committed in the country of origin.

Thus, the concept of good faith is considered in this article through the following sections. First, an overview on the application of preferential arrangements is made in order to put forward the framework where the concept of good faith is raised (section 2). Second, a general analysis of the provisions laying down the repayment and remission of customs duties is carried out, taking into account both the EU customs regulations and the most relevant EU case law (section 3). Third, the article focuses on the error by the competent authorities as one of the most frequently invoked circumstances for claiming the repayment or remission of customs duties in case of an incorrect certificate issued by the authorities of the exporting country (section 4). Fourth, the condition of the good faith is discussed in light of the fundamental judgments of the EU Courts on this issue, assessing both the general requirements on this concept and the particular importance that a notice to importers may have when pleading good faith (sections 5 and 6). Finally, some conclusions are made on the application of the good faith in case of preferential arrangements, such as the connection between this concept and the general principles of legal certainty and legitimate expectations or the impact of the new systems of administrative cooperation in evaluating the good faith (section 7).

2 General overview on the application of preferential arrangements

The purpose of this section is to introduce the main concepts that will be analysed in the next paragraphs of this contribution. It must be noted that it is not intended to make an in-depth examination of them but only to describe their main features for the purposes of this article. In this respect, some considerations on the following concepts are made preliminary: (1) preferential arrangements, (2) certificates of origin and (3) good faith of economic operators.

2.1 *Preferential Arrangements*

Imports of goods from some countries may benefit from a preferential treatment under the EU customs law. Preferential tariffs (reduced or zero rates) are granted under preferential arrangements concluded by the EU with third countries or established unilaterally by the EU. In this respect, two main types of preferential arrangements may be distinguished:

- Generalized System of Preferences (GSP). The GSP constitutes an autonomous and non-reciprocal preferential arrangement, adopted unilaterally by the EU.
- Trade agreements. The EU also concludes bilateral or multilateral agreements with third countries granting tariff benefits.

The GSP is an autonomous preferential arrangement through which the EU provides non-reciprocal preferential access to the EU market for products originating in developing countries and territories by a total or partial exemption of customs duties.[3] Since 1971, the Community has granted trade preferences to developing countries under its scheme of generalized tariff preferences. There are also other types of autonomous preferential arrangements, such as those adopted in respect of Ceuta and Melilla[4] (Spanish cities not included in the customs territory of the EU); the Overseas Association Decision, by which an association of the overseas countries and territories (OCTs) with the EU is established;[5] or the

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[3] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 Oct. 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No 732/2008.

[4] Council Regulation (EC) No 82/2001 of 5 Dec. 2000 concerning the definition of the concept of 'originating products' and methods of administrative cooperation in trade between the customs territory of the Community and Ceuta and Melilla. The preferential treatment applies under Regulation No 82/2001 in trade between the EU and Ceuta and Melilla, but under the rules of origin of the preferential arrangements established by the EU with third countries the preferential treatment also apply to trade with those third countries and Ceuta and Melilla.

[5] Council Decision No 2013/755/EU of 25 Nov. 2013 on the association of the overseas countries and territories with the European Union. The aim of this Decision is to constitute a partnership based on Art. 198 TFEU to support the OCTs' sustainable development as well as to promote the values and standards of the Union in the wider world. The partners to the association are the Union, the OCTs and the Member States to which they are linked (*see* Art. 1).

application of certain preferential arrangements (ACP Group of States) to economic partnerships agreements.[6]

On the other hand, trade agreements are concluded between the UE and certain non-EU countries. They operate on a reciprocal basis (bilateral or multilateral), fixing rights and obligation for all contracting parties. Unlike unilateral preferential measures, trade agreements allow export from the EU to enter the markets of the non-EU countries at a reduced or zero rate of duties and, likewise, imports from these countries may enter the EU at same conditions.[7] Both unilateral and reciprocal arrangements only apply when the goods are originating from the beneficiary countries and the rules of origin are satisfied.[8] If, after corresponding investigations, it is found that imports initially benefited from a preferential treatment should not have had access to it, a customs debt will be incurred and a post-clearance recovery of customs duties will be carried out. Despite the proliferation of trade agreements, it must be noted that the regulatory burdens imposed by the rules of origin may constitute an important obstacle for companies using these agreements to the extent that many companies elect not to utilize them.[9]

2.2 *Certificates of Origin*

A government certification system on the origin of products is based on certificates of origin issued by the customs authorities of the exporting country. Government certificates must also comply with specific technical requirements established in each arrangement. These certificates of origin may adopt different forms depending on the preferential arrangement, for instance (unless a self-certification system is applied):

- In the framework of GSP preferences, a 'FORM A' certificate is required.
- In the bilateral preferential arrangements of the EU a certificate of movement is generally required ('EUR.1') or in certain cases a certificate within the pan-EuroMediterranean area ('EUR-MED').

Certificates of origin may sometimes be falsified or obtained by means of deception. In order to avoid this type of fraud, customs authorities of each Member State may carry out post-clearance verifications within the three-year limitation period (Article 103 UCC). Many of these verifications have their origin in requirements made to the authorities of the exporting country or in investigations carried out by the European Anti-Fraud Office (OLAF, from *Office Européen de Lutte Antifraude*).[10] If, as a result of these controls, it is found that goods do not meet the necessary requirements to benefit from the preferential treatment, the certificate would then be invalidated and a customs debt would be incurred. Customs authorities would then initiate the procedure for the post-clearance recovery of the customs duties.

It is also worth noting that the distinction between unilateral agreements and trade agreements may be relevant as to determine the binding character of the verifications carried out in the exporting country, i.e. whether or not these verifications may be binding for the authorities of the EU importing countries. In the *Lagura Vermögensverwaltung* case,[11] the European Court of Justice (ECJ) has pointed out that in case of bilateral preferential arrangements the importing State is bound to accept the results of the verifications carried out by the exporting State in cases where the importing State has serious doubts on the validity of the origin of the goods. However, the same consideration does not apply to unilateral agreements (v. gr. GSP) where the EU reserves the right to accept or reject documentary evidence of claimed origin.[12]

Finally, it must be stressed that the current system of origin certification, based on certificates of origin issued by governmental authorities and on invoice declarations made out under certain conditions by economic operators, will be progressively and completely replaced by the new *Registered Exporter system* (the REX system).[13] This system is based on a principle of self-certification by economic operators, who will have to be registered in a database by his competent authorities to become a 'register exporter' and so be entitled to make out themselves a statement on origin. The REX system applies in respect of the GSP beneficiary countries since 1

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[6] Regulation (EU) 2016/1076 of the European Parliament and of the Council of 8 June 2016 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, economic partnership agreements.

[7] *See* T. Walsh, *European Union Customs Code* 341–342 (The Netherlands: Wolters Kluwer Law & Business 2015). This author points out that trade agreements are like contracts (bilateral or multilateral), whereas tariff preferences adopted unilaterally are a form of development aid and flow only in one direction, i.e. the tariff preferences are granted only to the beneficiary countries' goods on importation into the EU but not on EU exports to the beneficiary countries (at 341).

[8] A list of preferential arrangements, both autonomous and trade agreements, including their relevant origin provisions, can be found at: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list_en.

[9] *See* J. Yi, *Rules of Origin and the Use of Free Trade Agreements: A Literature Review*, 9(1) World Cust. J. 43 (Mar./Apr. 2015).

[10] On the legal significance of investigations by European authorities in third countries concerning the preferential origin of goods, *see* U. Schrömbges & O. Wenzlaff, *Doubts Regarding the Origin of Goods Based on OLAF Mission Reports vs Protection of Confidence*, 5(1) World Cust. J. 89–94 (Mar. 2011). In the Spanish literature, *see* F. Casana Merino, *Los informes de la OLAF en relación con los regímenes arancelarios preferenciales su eficacia interna al liquidar los impuestos aduaneros*, (12) Quincena Fiscal 23–46 (2015).

[11] ECJ 8 Nov. 2012, *Lagura Vermögensverwaltung*, C-438/11, EU:C:2012:703, paras 33–36.

[12] *See* Walsh, *supra* n. 7, at 331–332.

[13] The rules of the REX system are laid down in the Commission Implementing Regulation (EU) No 2015/2447.

January 2017 (there is also a transition period until 30 June 2020 at the latest). Likewise, it is intended the REX system to be applied progressively to bilateral trade agreements between the EU and the partner countries. It must be borne in mind that the REX system is only one of the many electronic systems on exchange of information that are being developed in the framework of the UCC Work Programme.[14] Thus, the cooperation and the exchange of information with non-EU countries is improving considerably, although there are still administrative cooperation problems with some beneficiary countries in respect to the application of the preferential agreements, either due to delays in the responses or due to insufficient quality of the responses.[15]

2.3 *Good Faith of Economic Operators*

If, as a result of customs verifications, it is found that the preferential treatment should not have been applied, a post-clearance recovery of import duties will be initiated by the customs authorities of the importing country (EU country). The UCC provides for legal instruments in order to claim the repayment or remission of customs duties by those economic operators that acted in good faith and were therefore unaware that certificates of origin were invalid or were falsified. A customs debt may only be repaid or remitted under certain circumstances listed in Article 116 UCC, which will be considered bellow (section 3.2). In the context of preferential arrangements, the most frequently invoked circumstances for claiming repayment or remission of customs duties are the error by the competent authorities (Article 119 UCC) and the equity clause (Article 120 UCC).

These circumstances are particularly based on the good faith of importers, so it is necessary to analyse to what extent importers were aware or should have been aware of the fact that the certificates of origin were incorrect. Furthermore, the circumstance of the customs error also refers to the impact that may have on the good faith of importers the publication of a notice by the European Commission stating there are reasonable doubts on the proper application of the preferential treatment (Article 119.3 *in fine* UCC). In this context, the problem arises as to the difficult balance between the good faith of economic operators and the clarity of customs rules.[16] Thus, connections between the principles of good faith and legitimate expectations will also be discussed in the next sections.

On the other hand, it must be pointed out that the replacement of certificates of origin by systems of self-certification will probably have an important impact when assessing the good faith of importers. However, as it has been correctly pointed out by other authors,[17] the good faith cannot be automatically disregarded in the context of a self-certification system, since such a system also implies several obligations of supervision and control by the customs authorities in order to ensure its proper functioning. Therefore, the error of the competent authorities and the good faith of importers (Article 119 UCC) should also be evaluated in the context of such systems. The same can be said in respect of the general equity clause, since it does not refer to any type of error by the authorities, but rather to a special situation (Article 120 UCC). This author is of the opinion that even though the plea of good faith cannot be automatically rejected within the framework of such systems, the defence of good faith will probably be more complicated, and therefore, cases in which repayment or remission is estimated will decrease, increasing the commercial risk of importers.

3 The repayment or remission of customs duties in the context of preferential arrangements

3.1 *The Action for Post-Clearance Recovery*

Customs controls are frequently carried out in post-clearance verifications (after the release of goods) and the existence of a customs debt is usually confirmed as result of such verifications. This is the case when economic operators import goods under a preferential arrangement (applying zero o reduced tariffs) and a customs debt arises in the context of a post-clearance verification because the certificate of origin is considered to be invalid by the customs authorities of the importing country (EU Member State).

A customs debt is thereby incurred as imports with an invalid certificate are not entitled for the application of a preferential treatment. The UCC expressly establishes the obligation of the customs authorities to enter in their accounts, in accordance with the national legislation, the amount of customs duties payable (Article 104 UCC). The UCC also establishes the obligation for the post-clearance recovery of a customs debt, i.e. the obligation to enter into accounts where the amount of customs duties payable has not been entered in the accounts or has been determined and entered in the accounts at a level lower than the amount payable (Article 105.4 UCC).

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[14] For an overview of the seventeen electronic systems that are being upgraded or developed under the UCC *see* Report form the Commission to the European Parliament and the Council *on the Implementation of the Union Customs Code and on the Exercise of the Power to Adopt Delegated Acts Pursuant to Article 284 Thereunder*, Brussels, 22 Jan. 2018, COM (2018) 39 final, at 5–6.

[15] *See* European Court of Auditors, *Import Procedures: Shortcomings in the Legal Framework and an Ineffective Implementation Impact the Financial Interests of the EU*, Luxembourg, Special Report No. 19/2017, at 27–29.

[16] *See* A. Rigaux, *Thriller douanier: délicat équilibre entre la bonne foi des opérateurs et la clarté des règles douanières*, (2) Eur. Feb. 2017 26.

[17] *See* P. Muñiz, Preferential Origin Disputes: Is the Good Faith Defence under EU Law Being Eroded?, *Global Trade and Customs Journal*, Vol. 10, Issue 11-12, pp. 368–379.

In other words, it may be said that the customs authorities are obliged to carry out a post-clearance recovery of customs duties when the recovery had not been carried out at the time of the customs clearance or it had been carried out for an amount lower than the one that corresponds.[18] Therefore, the post-clearance recovery may be seen as a regularization of the customs situation of importers and as the result of the obligation of recovery that corresponds to the customs authorities.

In such cases, importers usually invoke an error by the competent authorities of the exporting country (third country) in order to claim in the importing country (EU country) the repayment or remission of the customs duties incurred. The error by the competent authorities refers to an error made by the competent authorities when issuing the certificate of origin that entitles for the application of preferential treatment. As considered bellow, the error by the competent authorities is one of the circumstances for repayment or remission of customs duties (Article 119 UCC).

3.2 *Circumstances for Repayment or Remission of Customs Duties*

The customs debt is defined as 'the obligation on a person to pay the amount of import or export duty which applies to specific goods under the customs legislation in force' (Article 5.18 UCC). Repayment[19] or remission[20] may only be granted under certain conditions and in cases specifically provided for in the UCC. Circumstances for claiming repayment or remission of customs duties have been consolidated in the UCC and have been delimited and structured more clearly than they were in the CCC (Articles 116–123 UCC and 235–242 CCC).

Customs duties may be repaid o remitted under the following circumstances (Article 116 UCC):

- Overcharged amounts of import or export duty
- Defective goods or goods not complying with the terms of the contract
- Error by the competent authorities
- Equity

No repayment or remission shall be granted when the situation which led to the notification of the customs debt results from deception by the debtor (Article 116.5 UCC). Therefore, a lack of obvious negligence is an essential condition of being able to claim for repayment or remission of customs duties.

This article refers particularly to the error by the competent authorities as this circumstance is usually claim by the importers in respect of incorrect certificates of origin. However, there are other circumstances that may also be relevant in the context of a preferential arrangement. This is specially the case of the equity clause, which applies when the debt results from circumstances that put the declarant in an exceptional situation compared to other operators in the same business (Article 120 UCC and former Article 239 CCC). Three main conditions must be met in order to claim a special situation: (1) be considered exceptional when compared to operators of similar businesses, (2) be outside of normal commercial risk for your business and (3) not be the result of any negligence or deception on your part.

The equity clause may be considered as a safeguard clause for claiming repayment or remission, as it has broader scope of application than the customs error analysed in this article. However, the customs error and the equity clause may also be explained in equitable terms, since the former is based on legitimate expectations, whereas the latter encompasses all other equitable considerations, so in both cases the applicant has to have acted in a bona fide and reasonably informed manner ('with clean hands').[21] Consequently, many of the considerations drawn in this article with respect to the concept of good faith may also apply to the general equity clause.

3.3 *General Interpretation Criteria of the EU Courts*

The interpretation of the circumstances for claiming the repayment or remission of customs duties has given rise to an important case law of the EU Courts (both the EGC and the ECJ). For the purpose of this article, three fundamental criteria may be drawn from this doctrine:

- Restricted interpretation.
- Aim of the repayment or remission procedures.
- The duty to balance of the European Commission.

3.3.1 *Restricted Interpretation*

The repayment or remission of import and export duties may be made only under certain conditions and in cases specifically provided for. For this reason, according to settled case law, the repayment or remission provisions must be interpreted strictly since they are considered to be an exception to the normal import and export procedures.

This also implies a restricted interpretation of the concept of good faith since the good faith is a fundamental condition of being able to claim repayment or remission of customs

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[18] *See* S. Ibáñez Marsilla, *Las liquidaciones aduaneras posteriores al levante de las mercancías*, (129) Revista Española de Derecho Financiero 71 (2006).

[19] The repayment means the refunding of an amount of import or export duty that has been paid (Art. 5.29 UCC).

[20] The remission means the waiving of the obligation to pay an amount of import or export duty which has not been paid (Art. 5.30 UCC).

[21] *See* Walsh, *supra* n. 7, at 951.

duties. Accordingly, the ECJ has stated that the term good faith must be interpreted in such a way that the number of cases of repayment or remission remains limited.[22]

3.3.2 *Aim of the Repayment or Remission Procedures*

The repayment or remission of customs duties may be regarded either as an exception to the power of the customs authorities to proceed with the post-clearance recovery or as a form of extinction of the customs debt.[23] Both approaches are not necessary incompatible, but quite the contrary, they are closely connected. The latter seems to be the option contemplated by the EU customs codes (Articles 233 b CCC and 124.1 c UCC), whereas the former is stressed in the ECJ case law.

The ECJ has stated in a large number of cases that the procedures set out in the customs regulations for the repayment or remission of customs duties pursue the same aim: to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations.[24] In this respect, the principle of legitimate expectations may be considered as an important limitation for the post-clearance recovery of customs duties.

3.3.3 *The Duty to Balance of the European Commission*

In order to assess whether requirements necessary to repaid or remit a customs debt are met, the European Commission is called upon to intervene in certain cases. This happens, for instance, when there is an error by the authorities (Articles 119 UCC) or a special situation (Article 120 UCC), and either the debt exceeds 500.000 euros in value or it results from an EU investigation (Article 116.3 UCC).

Thus, there are cases where the customs authorities may not themselves decide not to collect duties by taking the view that the conditions for pleading a legitimate expectation are satisfied.[25] When the customs authorities must refer the issue to the Commission for consideration, the Commission has some discretion on the decision, but the duty to balance the different interests involved cannot be disregarded: on the one hand, the European Union interest, in full compliance with the provisions of customs legislation, 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.[26]

4 THE ERROR BY THE COMPETENT AUTHORITIES IN RESPECT OF THE CERTIFICATES OF ORIGIN

Articles 119 UCC provides for the repayment or remission of customs duties on the ground of an error by the competent authorities (former Article 220.2 b) CCC). Under this provision, an import or export duty shall be repaid or remitted where, as a result of an error on the part of the competent authorities, the amount corresponding to the customs debt initially notified was lower than the amount payable, provided the following conditions are met:

(1) the debtor could not reasonably have detected that error; and

(2) the debtor was acting in good faith.

Article 119 UCC also contains a specific disposition in respect of the repayment or remission of customs duties when the debt is incurred as a result of the non-application of the preferential treatment of the goods, particularly due to an incorrect certificate of origin. This issue is expressly envisaged in paragraph 3 of the Article 119 UCC where several indications regarding the concepts of (un)detected error and good faith are made.

4.1 *An Error Which Cannot Reasonably Be Detected*

With regard to the concept of '*an error which cannot reasonably be detected*' the following considerations must be made:

– Preferential treatment of the goods granted on the basis of a system of administrative cooperation involving the authorities of a third country (outside the customs territory of the Union): a certificate issued by those authorities, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected.

– However, an incorrect certificate shall not constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where it is evident that the issuing authorities were

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[22] ECJ 1 Oct. 2009, *Agrar-Invest-Tatschl v. Commission*, C-552/08 P, EU:C:2009:605, para. 53; ECJ 20 Nov. 2008, *Heuschen & Schrouff Oriëntal Foods Trading v. Commission*, C-38/07 P, EU:C:2008:641, para. 60; ECJ 11 Nov. 1999, *Söhl & Söhlke*, C-48/98, EU:C:1999:548, para. 52.

[23] *See* A. García Heredia, *La liquidación de los impuestos aduaneros y la protección de la confianza legítima de los importadores*, (17) Quincena Fiscal 15 (2014) (electronic version).

[24] ECJ 1 Oct. 2009, *Agrar-Invest-Tatschl v. Commission*, C-552/08 P, EU:C:2009:605, para. 52; ECJ 20 Nov. 2008, *Heuschen & Schrouff Oriëntal Foods Trading*, C-375/07, EU:C:2008:645, para. 57; ECJ 1 Apr. 1993, *Hewlett Packard v. Directeur général des douanes*, C-250/91, EU:C:1993:134, para. 46.

[25] ECJ 26 Oct. 2017, *Aqua Pro*, C-407/16, EU:C:2017:817, para. 53.

[26] EGC 19 Mar. 2013, *Firma Van Parys v. Commission*, T-324/10, EU:T:2013:136, para. 81; EGC 30 Nov. 2006, *Heuschen & Schrouff Oriëntal Foods v. Commission*, T-382/04, EU:T:2006:369, para. 46.

aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

Therefore, as a general rule an incorrect certificate issued by the authorities of a third country may constitute an error not reasonably detected by the importer, unless the certificate is based on an incorrect account of the facts provided by the exporter. And, even in this case, the incorrect certificate may be deemed to remain an error if the issuing authorities were aware or should have been aware that the goods did not meet the conditions for entitlement to the preferential treatment.

The burden of proof in relation to incorrect certificate of origin was addressed by the ECJ in the *Beemsterboer* case,[27] which had a direct impact on the application of the former Article 220.2 b) CCC[28] and continues to apply. The ECJ concluded that in principle the burden of proof lies in the customs authorities, which have to adduce evidence that the incorrect certificate was issued because of the inaccurate account of the facts provided by the exporter. However, if as a result of negligence wholly attributable to the exporter, it is impossible for the customs authorities to adduce the necessary evidence, the burden of proving that the certificate was based on an accurate account of the facts lies with the person liable for the duty.

It must also be pointed out that this burden of proof may be higher for importers in case of unilateral agreements (GSP). The ECJ in the *Lagura Vermögensverwaltung* case concluded that the burden of proof resets with the importer when the authorities of the GSP country are unable, thorough a subsequent verification, to determine whether the certificate of origin is based on a correct account of the facts (due to the fact that exporter has ceased production).[29] In this respect a difference between trade agreements and unilateral agreements may be appreciated. The ECJ stated that in the latter case is not possible for the EU unilaterally to impose obligation to economic operator in the exporting country, so the importer must exercise all due diligence or freed from risk as regards the verification of the origin of the goods (*Lagura Vermögensverwaltung*, paragraph 29). The ECJ has repeatedly held that it is the responsibility of trader to make the necessary arrangements in their contractual relations in order to guard against the risk of an action for post-clearance recovery.[30]

4.2 *Acting in Good Faith*

On the other hand, in order to determine the concept of good faith two considerations must be pointed out:

- Duty of care: The debtor is considered to be in good faith if he can demonstrate that, during the period of the trading operations concerned, he has taken due care to ensure that all the conditions for the preferential treatment have been fulfilled.
- Notice to importers issued by the Commission: The debtor may not rely on a plea of good faith if the Commission has published a notice in the Official Journal of the European Union (OJEU) stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country.

In this context, a duty of care is required to the importer during the period of the trading operations. This means that the importer must ensure that all conditions for the application of the preferential treatment have been fulfilled. However, good faith does not entitle for the remission of the customs debt when the Commission has published a notice to the importers in the OJEU stating that there are doubts on the proper application of the preferential arrangement.

Therefore, this kind of warnings issued by the Commission present two main features: (1) are published in the OJEU and (2) inform that there are grounds for doubt on the proper application of a preferential arrangement by the beneficiary jurisdiction. As a general rule, the publication of this kind of notices prevents the debtor from claiming his good faith and therefore from obtaining the repayment or remission of customs duties. However, as considered bellow, there may be particular cases where the person liable for payment may plead his good faith even in a case of notice to importers. For instance, this may be the case when such person has adopted additional verification measures after the notice or when the wording of the notice is not clear enough and it therefore does not meet a minimum of legal certainty (see section 6 of this article).

5 The good faith of importers in respect of the irregularities committed in the country of origin

5.1 *Breaking the Concept of Good Faith*

The error by the competent authorities is a circumstance for remission or repayment of customs duties when the amount of the initially notified debt is lower than the amount

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[27] ECJ 9 Mar. 2006, *Beemsterboer*, C-293/04, EU:C:2006:162, para. 48.3.

[28] *See* European Commission (Customs Code Committee), *Guidelines on the Consequences of the Judgment of the Court of 9 March 2006 in Case C-293/04 'Beemsterboer'*, Working paper, TAXUD//2006/1222–Final, Brussels, 24 June 2008.

[29] ECJ 8 Nov. 2012, *Lagura Vermögensverwaltung*, C-438/11, EU:C:2012:703, paras 38–41.

[30] ECJ 17 July 1997, *Pascoal & Filhos v. Fazenda Pública*, C-97/95, EU:C:1997:370, para. 60; ECJ 9 Dec. 1999, *CPL Imperial 2 and Unifrigo v. Commission*, C-299/98 P, EU:C:1999:598, para. 38; ECJ 9 Mar. 2006, *Beemsterboer*, C-293/04, EU:C:2006:162, para. 41; ECJ 8 Nov. 2012, *Lagura Vermögensverwaltung*, C-438/11, EU:C:2012:703, para. 30.

actually levied, due to an error committed by the customs authorities themselves (Article 119 UCC). As stated, in accordance with this disposition, two conditions are required in the performance of the debtor: (1) the debtor has not been able to reasonably detect the error of the competent authorities and (2) the debtor must have been acted in good faith.

The ECJ has developed a consolidated line of reasoning in order to determine when customs duties may be repaid or remitted due to an error by the competent authorities. Thus, according to settled case law,[31] an operator is entitled to expect customs duties not to be recovered when three cumulative requirements are met:

- The existence of an error made by the competent authorities themselves.
- The (un)detectable nature of the error.
- The fulfilment of all the provision laid down by the legislation in force.

5.1.1 *The Existence of an Error Made by the Competent Authorities Themselves*

The legitimate expectations of the person liable attract the protection provided for in that article only if it was the competent authorities themselves which created the basis for those expectations. Thus, only errors attributable to acts of the authorities create entitlement to the waiver of post-clearance recovery of customs duties. The mere fact of an incorrect declaration by the debtor does not suffice to exclude any possibility of an error attributable to the competent authorities.

The existence of an error may be appreciated when the customs authorities have not raised any objection about the tariff classification made by the operator and the statements presented by the operator are sufficiently complete. This is what happens when all the customs declarations presented by the operator are complete and when the controversial imports are numerous and are made over a relatively long period without the tariff classification being discussed.

5.1.2 *The (Un)detectable Nature of the Error*

The error made by the competent authorities must be such that it could not reasonably be detected by the person liable, acting in good faith, notwithstanding his professional experience and the care expected of him. In order to assess whether an error made by the customs authorities could be detected by the economic operator, it is necessary to take into account the specific nature of the error, the professional experience and the diligence of the operator.

In relation to the specific nature of the error, the complexity of the rules concerned and the period of time during which the authorities persisted in their error should also be evaluated. The debtor cannot invoke good faith when the Commission has published in the EU Official Journal a notice to importers stating grounds for doubts in relation to the proper application of the preferential arrangement by the beneficiary country.

5.1.3 *The Fulfilment of All the Provision Laid Down by the Legislation in Force*

The debtor must have complied with all the provisions laid down by the legislation in force as far as his customs declaration is concerned. This requirement may be connected with the criterion of the care to be taken by a professional person. That person is obliged to supply the competent customs authorities with all the necessary information required by the rules of European Union law and any national provisions which supplement or transpose them, in relation to the customs treatment requested for the goods in question.

5.2 *The Good Faith on a Case by Case Basis*

The criteria analysed in the previous section must be applied taking into account the particularities of each specific case. It is therefore necessary to consider such criteria on a case by case basis depending on the facts concerned. There are several cases where the EU Courts have evaluated the level of diligence of economic operators when assessing whether repayment or remission must be granted. In this respect, there are two recent judgments of the European General Court (EGC) that may illustrate the reasoning of the Courts when evaluating the good faith on a case by case basis. These judgments are also particularly relevant for this purpose since they enable us to highlight the differences that may arise in apparently similar cases:

- Imports of tuna products originating in Ecuador (*ACTEMSA* case).[32]
- Imports of tuna products originating in El Salvador (*Calvo group* case).[33]

Imports of tuna from Ecuador and El Salvador carried out by two Spanish companies (ACTEMSA and Calvo) were considered in two independent cases (T-548/14 y T-466/14, not joined cases), although they have the same case name (*Spain v. Commission*) and date (16 December 2016).

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[31] *See* inter alia, ECJ 14 Nov. 2002, *Ilumitrónica*, C-251/00, EU:C:2002:655, paras 37 and 38.

[32] EGC 15 Dec. 2016, *Spain v. Commission*, T-548/14, EU:T:2016:739 (hereinafter *ACTEMSA* case).

[33] EGC 15 Dec. 2016, *Spain v. Commission*, T-466/14, EU:T:2016:742 (hereinafter *Calvo group* case).

These cases show how similar imports may give rise to different judgments as far as the condition of good faith is concerned. In both cases, imports of tuna were declared under the preferential treatment of the GSP (Ecuador and El Salvador).[34] However, after investigations in the originating countries, customs authorities concluded that imports could not benefit from a preferential treatment since goods did not satisfy the rules of origin stipulated in the GSP. Accordingly, an action for post-clearance recovery of the customs duties was initiated by the Spanish customs authorities. The Spanish companies claimed the remission of duties but it was rejected by the Commission; the companies then appealed to the General Court which issued two different judgments.

In the *Calvo group* case (T-466/14), the EGC considered that the debtor was not entitled for remission since the requirements regarding rules of origin had not been met. In this sense, the fact that the debtor was a highly experienced importer operating in different parts of the world was decisive. Consequently, the Court held that the debtor should have taken extreme precautions and have ensured compliance with all rules regarding the origin of goods. In particular, certain requirements necessary to consider tuna caught as originating in El Salvador had not been satisfied (e.g. specific requirements related to the crew of the ships and their flag).

In addition, in the *Calvo group* case, the exporting company established in the GSP country was also a company of the Calvo group and the tuna vessels also belonged to the same group. Thus, in view of the nature of the debtor's activities and of his belonging to a group operating in different continents, both the Commission and the EGC considered that the debtor's diligence had not been sufficiently proven. For these reasons, the EGC concluded that the debtor should have detected the error committed by the Salvadoran authorities.

However, in the *ACTEMSA* case (T-548/14), both the Commission and the EGC concluded that the debtor, despite being an experienced operator, had acted in good faith, at least, before the publication of the notice to importers. The Commission considered that after the notice the debtor could no longer claim his good faith. However, the EGC gave the reason to the importer because the Court understood that the notice was not clear enough, since it only mentioned specifically two countries (Colombia and El Salvador) and included a generic reference to other countries with tariff preferences but without mentioning them expressly.

The EGC contended that the fact that the notice had not included an express mention to Ecuador, although this mention could implicitly be inferred from the general reference to 'other countries with tariff preferences', entailed a lack of legal certainty attributable to the Commission. Therefore, in this particular case, the good faith of the importer could not be questioned despite the publication of a notice to importers in the Official Journal.

5.3 *Different Standards of Good Faith*

The interpretation of the concept of good faith set out in the previous paragraphs has been elaborated by the EU Courts in interpreting the provisions for claiming the repayment or remission of customs duties. However, under a preferential arrangement tariff benefits may be granted by the customs authorities of the both parties of the arrangement, except in case of autonomous and non-reciprocal preferential arrangements (such as the GSP). Thus, when a reciprocal treatment is granted under a preferential arrangement (bilateral or multilateral) the issue may arise as to whether the other beneficiary jurisdiction is applying the rules of origin with similar criteria, and specifically, whether in cases of irregularities committed in the other country, the concept of good faith is also considered under similar criteria. Due to the fact that provisions on the repayment or remission of customs duties provided for in the EU regulations may vary from the provisions on this matter stipulated by the third countries legislation, the evaluation of the good faith of importers may thereby subjected to different criteria. Even though the provisions of the EU and the third country may be quite similar, the application of them by different national authorities (both administrative and judicial) may also give rise to divergent decisions.

The issue of different standards in respect of the concept of good faith may also arise in the context of the application of the customs union between the EU and non EU countries (Turkey[35]). Turkish courts have decided in some cases that the preferential treatment granted under the EU-Turkey customs union must be granted even in case of an incorrect certificate of origin (imports from Hungary and Italy).[36] In these cases, the Turkish courts held that, for the importation of goods from EU, the preferential treatment of customs duties must be applied despite of the fact that the contested certificates had some formal deficiencies, since such deficiencies did not affect their validity. This reveals how the authorities of third countries apply their own standards to decide whether or not the preferential treatment must be granted. And these standards may not necessarily be the same as those applied by the ECJ in respect of imports originating from the same beneficiary countries.

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[34] Processed tuna products (canned tuna and frozen tuna loins) were imported from countries beneficiaries of the GSP.

[35] The customs union between Turkey and the EU was established in 1995 and entered into force on 1 Jan. 1996 (Council Decision 1/95 of the EC-Turkey Association Council of 22 Dec. 1995 on implementing the final phase of the Customs Union, 96/142/EC).

[36] *See* B. Yalti, *Turkish Courts and the Application of EU Tax Law*, in *Litigating EU Tax Law in International National and Non-EU National Courts* 10 (Online Books IBDF 2014).

As far as the author of this article knows, the fact of whether divergences in the application of the good faith criteria, on behalf of different jurisdictions, may be relevant for claiming the repayment or remission of customs duties, has had no implications in the EU case law so far. The issue of to what extent the decisions of third countries may have any impact on the decisions issued by the customs authorities of the EU countries or vice versa (and even on the decisions of the Commission or the EU Courts) goes beyond the scope of this article. However, it may be noted that the provisions for repayment or remission are not included in preferential arrangements but in the EU customs regulations, so it seems more difficult to apply these provisions (bilaterally or multilaterally) to the other party (s) of the arrangement. This situation might be different in the case of the customs union with Turkey, since this country must adopt in several fields customs provisions based on the EU customs regulations, and particularly in the field of customs debt (Article 28.1 h) of the Decision 1/95). Therefore, it may arguably be considered that the ECJ decisions on these fields might also be invoked before the Turkish courts.

Finally, the application of different standards is not only an issue that may arise in respect of the repayment or remission claimed in the third country, but also in respect of the application of the UCC provisions within the EU countries themselves, as the EU customs regulations apply by different customs authorities (the national authorities of each Member State). Although the legal framework in respect of customs duties is the same in the EU, the application of the same rules by different customs authorities may also give rise to divergent interpretations. This is in fact one of the main concerns of the European Commission when addressing the new challenges of the EU customs union. While the rules are the same across the EU, customs authorities do not always apply them in a cohesive, uniform manner, so the Commission puts forward that the independent customs administrations of Member States should work towards acting as one single entity.[37]

6 Consequences of a Notice to Importers Published by the European Commission in the Official Journal: May the Debtor Plead His Good Faith?

This paragraph considers to what extent a notice to importers may prevent the debtor from pleading his good faith. Under Article 119.3 *in fine* UCC the person liable for payment may not plead his good faith if the Commission has published a notice in the Official Journal stating that there are grounds for doubt concerning the proper application of the preferential arrangement by the beneficiary non-member country.

There are several issues concerning this provision that will be analysed in the following sections. On the one hand, the impact of a notice to importers on the good faith will be considered by dealing with three particular issues (section 6.1): (1) the date for taking into account the good faith, (2) the burden of proof and (3) the relevance of supplementary verification measures carried out by the importer. On the other hand, the impact of a notice to importers must also be analysed in light of the general principles of legal certainty and legitimate expectations (section 6.2). These principles may be relevant in order to determine whether this kind of notices may or not prevent the debtor from alleging his good faith. The consequences of a notice to importers have been touched upon by the EU General Court in two important judgments: *Agrar-Invest-Tatschl v. Commission*[38] and *Spain v. Commission*[39] (ACTEMSA case). This case law is explained bellow in order to illustrate the importance that a notice to importers may have in respect of the concept of good faith.

6.1 *Impact of a Notice to Importers on the Good Faith*

Under Article 119.3 UCC it may be stated that notices to importers prevent alleging good faith. However, important clarifications must be made in light of the *Agrar-Invest-Tatschl v. Commission* case, where the EGC has clarified several issues: (1) the decisive date for taking into account the good faith, (2) the impossibility of restoring good faith after the period of the trading operations and (3) the possibility of pleading good faith after a notice to importers but before the period of the trading operations.

6.1.1 *Decisive Date for Taking into Account the Good Faith*

The decisive date for taking into account the good faith is the date of imports. The good faith of importers must be appreciated at the time when the controversial imports are made. It is therefore irrelevant that, after imports, importers have acted in good faith. As the General Court states:

> the person liable may plead his good faith only 'when he can demonstrate that, during the period of the trading operations concerned, he has taken due care to

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[37] *See* Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Developing the EU Customs Union and Its Governance*, Brussels, 21 Dec. 2016, COM (2016) 813 final, at 7 et seq. and European Commission – Press release: Commission sets out the strategic way forward for the EU's Customs Union, 21 Dec. 2016.

[38] EGC 8 Oct. 2008, *Agrar-Invest-Tatschl v. Commission*, T-51/07, EU:T:2008:420.

[39] EGC 15 Dec. 2016, *Spain v. Commission*, T-548/14, EU:T:2016:739.

ensure that all the conditions for the preferential treatment have been fulfilled'. It follows from that provision that the person liable must imperatively have been of good faith during the period of the trading operations concerned. Therefore, the decisive date for taking into account the good faith of the person liable is the date of importation (*Agrar-Invest-Tatschl v. Commission,* paragraph 47).

6.1.2 *No Restoration of Good Faith*

The good faith cannot be 'restored' with retroactive measures after the period of the trading operations concerned. This means that the good faith cannot be re-established by the subsequent confirmation of the authenticity and accuracy of the certificates of origin. On this point, the General Court confirms that:

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

6.1.3 *Pleading Good Faith After a Notice to Importers*

Exceptional circumstances may allow importers to plead good faith even after the publication of a notice to importers. This is the case of supplementary verification measures adopted after a notice to importers but before imports. The adoption by importers of supplementary measures, after the publication of a notice but before or at the time of the contested imports, may lead, in exceptional circumstances, to recognize the operator's good faith.

However, under what conditions such an exception would be applied has not yet been examined by the EU Courts. In cases where this exception might have been relevant the applicant had not acted in good faith, so the court did not go on to analyse the conditions for its application. Despite the uncertainty on what those conditions would be, it must be stressed that the Commission has admitted that in certain cases this exception would be possible. The General Court seems to agree with the Commission although this exception has not yet been explored in a particular case:

> At the hearing, the Commission admitted that it cannot be excluded that, in exceptional circumstances, it could be prompted to adjust its position regarding the absolute effect of a notice to importers where an economic operator claims that, following publication of such a notice, but before importation, it carried out supplementary verification measures which confirmed the origin of the goods. However, it is not necessary to examine whether, and under what conditions, such an exception would be possible, because, in any case, the applicant has not acted in good faith in the present case (*Agrar-Invest-Tatschl v. Commission*, paragraphs 45 and 46).

This case law has probably led the Commission to state that the question on whether the publication of a notice to importers establishes an irrebuttable presumption of the absence of good faith has not yet been addressed.[40] The Commission assumes that, in some exceptional circumstances, an operator may plead good faith after demonstrating that additional checks were carried out following the publication of a notice to importers. In such cases, where a notice to importers is published, the burden of proving good faith and due care must lie with the importer, who must prove that he has taken additional measures to verify the origin of the goods after publication of the notice.

This case law also makes it possible to clarify the effects that notices to importers may have on the good faith of importers. Both the Commission and the EU Courts seem to leave the door open to exceptional cases where the good faith might even be plead after the publication of a notice. To this aim, two conditions would be necessary: (1) the importer should demonstrate he has taken additional verification measures after the notices and (2) such measures should have necessarily taken place before the contested imports. This approach introduces a very interesting nuance to Article 119.3 *in fine* UCC that may be upheld by importers to demonstrate their good faith and claim for the remission or repayment of customs duties.

6.2 *Application of the General Principles of Legal Certainty and Legitimate Expectations*

The ECG has stated that the absolute exclusion of good faith where a notice to importers has been published ensures a very high level of legal certainty.[41] Therefore, it may be concluded that when a notice to importers does

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[40] EGC 15 Dec. 2016, *Spain v. Commission*, T-548/14, EU:T:2016:739, paras 36 and 37.

[41] EGC 8 Oct. 2008, *Agrar-Invest-Tatschl v. Commission*, T-51/07, EU:T:2008:420, para. 43.

not comply with a legal certainty standard such a notice should not prevent importers from pleading their good faith. This important issue has been addressed by the General Court in the aforementioned *Spain v. Commission* case (ACTEMSA case). The General Court considered that a notice to importers published by the European Commission was not sufficiently clear and precise, since countries with respect to which importers should take extreme precautions were not sharply defined.

This case may also be seen as the result, in the particular case of preferential arrangements, of a consolidated case law on the legal certainty principle, under which the requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them.[42] And, as it is discussed in this article, the publication of a notice to importers obviously entails financial consequences for economic operators.

Therefore, the Court concluded that despite the publication of a notice to importers, the debtor could invoke good faith and claim the remission or repayment of import duties. The General Court ruled that the Commission's notice did not meet the requirements of clarity and precision demanded by the general principles of legal certainty and legitimate expectations. The following considerations may be drawn from the judgment of the ECG in the above mentioned *Spain v. Commission* case.

6.2.1 *General Reference to Other Countries Benefitting from the GSP*

The notice of the Commission, on the one hand, referred expressly to imports from Colombia or El Salvador, and on the other hand it also included a general mention to other countries of the GSP, that read as follows:

> Moreover, it cannot be excluded that consignments are imported from other countries benefitting from the generalized system of preferences (GSP) without fulfilling requirements of GSP rules of origin concerning cumulation of origin.

The EGC considered that this general reference did not make clear whether the notice was referring to all the GSP beneficiary countries or only to those that were part of the same regional group as Colombia and El Salvador (group II). This broad and inaccurate wording led the Court to conclude that its reading was not even clear to an experienced operator acting in various areas of the world. The EGC held that it could not fall on the economic operators the responsibility for an opaque wording of a notice of the Commission, which should have served precisely as a guide for their activities (paragraph 73).

6.2.2 *Different Linguistic Versions*

The EGC even compared the different language versions in which the notice to importers was published. This comparison was made only to see whether some of the versions showed clearer information to importers. But this clarity was not seen in any of the versions in which the notice had been published. Furthermore, the fact of having to compare different language versions (meticulous examination) was seen by the Court as additional evidence that the wording of the notice cannot be considered to be sufficiently clear in order to ensure legal certainty and the protection of operators' legitimate expectations (paragraph 69).

6.2.3 *The Purpose of the Notices*

The purpose of the notices is to enable Member States to protect the Union's financial interests and operators to protect their own economic interests. The EGC considered that the vagueness of the notice in question does not facilitate the achievement of those aims. Therefore, it was pointed out that the Commission should have drafted the notice in clearer terms as regards the countries covered, in order to preclude the possibility of fraudulent movements in trade flows related to the fishing of the products concerned (paragraph 72).

6.2.4 *The Commission's Alleged Previous Practice*

The EGC put forward that it is irrelevant that in other cases the Commission had published notices to importers that did not expressly mention all the countries affected. The question of whether a notice complies with the requirement of being sufficiently clear and precise depends on an ad hoc assessment and not on an analysis in the light of an alleged practice of the Commission (paragraph 71). This author is also of the opinion that the argument of the Commission is untenable. Notices cannot be drafted inaccurately simply because the Commission had previously done so.

6.2.5 *Implications of the Decision*

After the judgment in the *Spain v. Commission* case, the Commission should take special care to ensure that notices to importers are sufficiently clear and precise. This means that countries that may be considered to be 'suspect

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[42] ECJ 9 July 2015, *Salomie and Oltean*, C-183/14, EU:C:2015:454, paras 30 and 31 and the case law cited therein.

countries' (i.e. countries on which the Commission considers there are serious doubts in relation to the application of the preferential treatment) must be included very clearly and very specifically in the wording of the notice.

However, an important clarification must be made as to what extent a notice must be clear and specific. In this author's view, in order to comply with the principle of legal certainty, it is not strictly necessary that a notice to importers refers expressly to all countries concerned, but at least a precise reference to those countries should be included in the notice in order to allow importers to identify them easily. For instance, in the *Spain v. Commission* case, it would have been enough, in order to comply with the standard of legal certainty, to include in the notice an express reference to the regional group II and to regulations in which such a group is determined.

The lack of precision attributable to the Commission in this case gives rise to the following outcome: a notice to importers, not complying with the legal certainty standards, only produces effects on countries that are expressly identified in the notice, but not on countries that cannot easily be identified, even though the Commission may have the same doubts on the latter countries as to the possible irregularities in the application of the rules of origin. Consequently, in relation to imports from other beneficiary countries not expressly included in the notice, such as Ecuador, the debtor may invoke his good faith on the grounds that the notice is not clear enough and is not therefore in line with the principle of legal certainty.

7 Conclusions

In the particular case of preferential arrangements, the concept of good faith may be considered from a twofold perspective. On the one hand, the principle of good faith requires a determination as to what is the standard of due care that may be expected from an operator involved in the international trade. On the other hand, the good faith may also be connected with the fundamental principles of legal certainty and legitimate expectations, as these principles may be relevant when ascertaining the level of diligence and good faith that may be expected from an experienced operator.

With respect to the standard of due care, it must be stressed that this entails a certain subjectivity and requires an examination of the particular circumstances on a case by case basis, evaluating the degree of diligence that may be required of different operators (the two judgments of the General Court in the *Spain v. Commission* cases are a good example of this evaluation: experienced and well-versed operators). This level of diligence may therefore vary in different cases and it depends on the particular experience of importers. For instance, importers operating in different countries might be considered as highly experienced importers and, therefore, a greater level of diligence might be required of them.

On the other hand, with respect to the notices to importers issued by the Commission, it must be stressed that if they do not meet a minimum standard of precision and clarity, it may be concluded that such notices are not aligned with the principles of legal certainty and legitimate expectations. Therefore, the good faith of importers, which is a fundamental condition for claiming the remission or repayment of customs duties, may even be estimated after the publication of a notice of this kind. This approach introduces an important clarification to Article 119.3, fourth paragraph, UCC (former Article 220.2 b), fifth paragraph, CCC), since this article seems to presume that there is no good faith after the publication of a notice to importers.

Consequently, it cannot necessarily be concluded that, after the publication of a notice to importers, there is an irrefutable presumption (*iuris et de iure*) on the lack of the good faith of importers. As a result, there may be certain cases where a notice of the Commission does not necessarily prevent importers from pleading their good faith, either because they have subsequently adopted additional verification measures confirming the origin of goods (*Agrar-Invest-Tatschl v. Commission*) or simply, due to the fact that the notice is not sufficiently clear and precise in regards to the beneficiary countries (*Spain v. Commission*).

The application of the principle of legal certainty to notices to importers may therefore be seen as an example of the expansion of this principle to different areas of the EU law. It must be noted that the principle of legal certainty is not applied in these cases to a legal norm *stricto sensu*, i.e. in the form of a regulation or legislation, but to a notice issued by the European Commission. This is clear evidence of the spread of this principle to different fields of EU law and how it may be expanded to cover rules or decisions with a different legal nature but, in any case, with financial consequences to economic operators.

Another interesting issue raised by this article is the restricted interpretation by the EU Courts on the provisions concerning the repayment or remission of customs duties. It is settled case law that these provisions must be interpreted in such a way that the number of cases of repayment or remission remains limited, since they are the exception to the general regime of imports and exports. This author is of the opinion that provisions that establish an exception must not however be interpreted strictly, since the exception itself already implies a restriction on the general regime. Therefore, a restricted interpretation by the EU Courts may increase the ordinary commercial risk of importers and may give rise to cases in which the good faith is not duly recognized. The requirements provided for claiming the repayment or remission are already drafted in very strict terms, so a strict interpretation of what is already strict in itself is redundant and may lead to situations contrary to the main objective of these procedures: the protection of the interest of an importer

acting in good faith not to suffer harm which goes beyond the normal commercial risk.

Moreover, it must be noted that the application of the concept of good faith is analysed in this article from the perspective of the customs authorities of the EU country (and accordingly from the perspective of the decisions of the European authorities: Commission and EU Courts). However, the same issue may also arise as to the application of the preferential arrangement by the authorities of the third country. This may be the case of a trade agreement providing a reciprocal preferential treatment, under which the authorities of the third country must also consider the rules of origin and the good faith of importers but from the other perspective, i.e. evaluating whether the goods are originating from an EU country. Although the provisions relating the origin of goods are usually provided for in the bilateral or multilateral preferential arrangements, the provisions regarding the repayment or remission of customs duties are laid down on the customs regulations adopted unilaterally by the EU and the third countries.

This may give rise to different standards on the concept of good faith when evaluating the duty of care that may be required of economic operators involved in the international trade between the parties of the agreement (EU and third countries). Thus, a system of transparency and exchange of information on the decisions adopted by each one of the parties in respect to the repayment or remission of customs duties, might contribute to develop a new system of bilateral/multilateral cooperation and also to create a harmonized standard on the concept of the good faith in the international trade, at least in the trade between both jurisdictions. To achieve this aim, the inclusion of a good faith provision in trade agreements might be an interesting approach that would be worth exploring in a future contribution.

Finally, it must be stressed that the proper application of preferential arrangements requires an adequate system of administrative cooperation between exporting and importing countries. Administrative cooperation is necessary both in order to determine whether preferential arrangements are being correctly applied as well as to evaluate to what extent importers were aware, or should be aware, of the incorrect application of such arrangements. In this respect, the implementation of news systems of administrative cooperation may affect the application of the provisions granting the repayment or remission of customs duties, and particularly the evaluation of the good faith of importers. This may be, for instance, the case of the *Registered Exporter system* (the REX system) that applies in the GSP of the EU since 1 January 2017, and that will also be applied progressively in the context of bilateral trade agreements between the EU and the partner countries (such as the CETA Agreement: EU-Canada). As the REX system is based on a principle of self-certification by economic operators, who will make out themselves so-called statements on origin, the possibilities of invoking both the error by the competent authorities and the good faith of importers are likely to be reduced.

However, in this author`s view, claims for repayment or remission that may arise in the context of self-certification systems, should not be automatically dismissed. In fact, the EU Courts case law analysed in this paper might also be taken into account when a self-certification system applies, considering not only the duty of care of importers but also the control obligations incumbent upon the customs authorities in respect of such systems. An assessment of the particular circumstances on a case by case basis should therefore be necessary in order to evaluate the good faith of importers, both when a certificate of origin is required and, if applicable, when the origin is granted under a system of self-certification.