Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 14 March 2019 [1]

Case C-226/18

Krohn & Schröder GmbH
v
Hauptzollamt Hamburg-Hafen

(Request for a preliminary ruling from the Finanzgericht Hamburg (Finance Court, Hamburg, Germany))

(Request for a preliminary ruling — Customs Union — Import and export procedures — Custom debt — Council Regulation (EEC) No 2913/92 — Article 212a — Council Implementing Regulation (EU) No 1238/2013 imposing a definitive anti-dumping duty — Council Implementing Regulation (EU) No 1239/2013 imposing a definitive countervailing duty — Exemptions)

I. Introduction

1. The present request for a preliminary ruling concerns the interpretation of Article 212a of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, [2] in the version applicable at the time of the facts in the main proceedings ('the Customs Code'), of Article 3(1)(a) to (c) of Council Implementing Regulation (EU) No 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China [3] and of Article 2(1)(a) to (c) of Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China. [4]

2. The request was made in proceedings between Krohn & Schröder GmbH and the Hauptzollamt Hamburg-Hafen (Principal Customs Office of the Port of Hamburg) ('the Principal Customs Office') concerning the imposition of anti-dumping and countervailing duties because the goods did not receive a new customs-approved treatment upon the expiry of the storage time limit.

3. This case gives the Court an opportunity to clarify the relationship between the Customs Code and an implementing regulation which imposes a definitive anti-dumping duty and a definitive countervailing duty, in particular as regards the conditions for exemption.

1 Original language: English.
2 OJ 1992 L 302, p. 1.
3 OJ 2013 L 325, p. 1.
4 OJ 2013 L 325, p. 66.

II. Legal context

A. The Customs Code

4. Article 4(7) of the Customs Code defines the 'Community goods' as goods 'imported from countries or territories not forming part of the customs territory of the [Union] which have been released for free circulation'.

5. Article 4(20) of the Customs Code defines the 'Release of goods' as 'the act whereby the customs authorities make goods available for the purposes stipulated by the customs procedure under which they are placed'.

6. Article 49(1) of the Customs Code provides:

'Where goods are covered by a summary declaration, the formalities necessary for them to be assigned a customs-approved treatment or use must be carried out within:

(a) 45 days from the date on which the summary declaration is lodged in the case of goods carried by sea;

(b) 20 days from the date on which the summary declaration is lodged in the case of goods carried otherwise than by sea.'

7. Article 53(1) of the Customs Code provides:

'The customs authorities shall without delay take all measures necessary, including the sale of the goods, to regularise the situation of goods in respect of which the formalities necessary for them to be assigned a customs-approved treatment or use are not initiated within the periods determined in accordance with Article 49.'

8. Article 74(2) of the Customs Code provides:

'Where, pursuant to the provisions governing the customs procedure for which the goods are declared, the customs authorities require the provision of a security, the said goods shall not be released for the customs procedure in question until such security is provided.'

9. Article 204(1)(a) of the Customs Code provides:

'A customs debt on importation shall be incurred through:

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed'.

10. Article 212a of the Customs Code provides:

'Where customs legislation provides for favourable tariff treatment of goods by reason of their nature or end-use or for relief or total or partial exemption from import or export duties pursuant to Articles 21, 82, 145 or 184 to 187, such favourable tariff treatment, relief or exemption shall also apply in cases where a customs debt is incurred pursuant to Articles 202 to 205, 210 or 211, on condition that the behaviour of the person concerned involves neither fraudulent dealing nor obvious negligence and he produces evidence that the other conditions for the application of favourable treatment, relief or exemption have been satisfied.'

B. Commission Regulation (EEC) No 2454/93

11. Article 866 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92[5] provides:

'Without prejudice to the provisions laid down concerning prohibitions or restrictions which may be applicable to the goods in question, where a customs debt on importation is incurred pursuant to Articles 202, 203, 204 or 205 of the Code and the import duties have been paid, those goods shall be deemed to be Community goods without the need for a declaration for entry into free circulation.'

C. Implementing Regulation No 1238/2013

12. Article 1(3) of Implementing Regulation No 1238/2013 provides:

'Unless otherwise specified, the provisions in force concerning customs duties shall apply.'

13. Article 3 of Implementing Regulation No 1238/2013 provides:

'1. Imports declared for release into free circulation for products currently falling within CN code ex 8541 40 90 (TARIC codes 8541409021, 8541409029, 8541409031 and 8541409039) which are invoiced by companies from which undertakings are accepted by the Commission and whose names are listed in the Annex to [Commission Implementing Decision 2013/707/EU of 4 December 2013 confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures (OJ 2013 L 325, p. 214)], shall be exempt from the anti-dumping duty imposed by Article 1, on condition that:

(a) a company listed in the Annex to Implementing Decision 2013/707/EU manufactured, shipped and invoiced directly the products referred to above or via its related company also listed in the Annex to Implementing Decision 2013/707/EU either to their related companies in the Union acting as an importer and clearing the goods for free circulation in the Union or to the first independent customer acting as an importer and clearing the goods for free circulation in the Union;

(b) such imports are accompanied by an undertaking invoice which is a commercial invoice containing at least the elements and the declaration stipulated in Annex III of this Regulation;

(c) such imports are accompanied by an Export Undertaking Certificate according to Annex IV of this Regulation; and

(d) the goods declared and presented to customs correspond precisely to the description on the undertaking invoice.

2. A customs debt shall be incurred at the time of acceptance of the declaration for release into free circulation:

(a) whenever it is established, in respect of imports described in paragraph 1, that one or more of the conditions listed in that paragraph are not fulfilled;

…'

5 OJ 1993 L 253, p. 1.

D. Implementing Regulation No 1239/2013

14. Article 1(3) of Implementing Regulation No 1239/2013 provides:

'Unless otherwise specified, the provisions in force concerning customs duties shall apply.'

15. Article 2 of Implementing Regulation No 1239/2013 provides:

'1. Imports declared for release into free circulation for products currently falling within CN code ex 8541 40 90 (TARIC codes 8541409021, 8541409029, 8541409031 and 8541409039) which are invoiced by companies from which undertakings are accepted by the Commission and whose names are listed in the Annex to Implementing Decision 2013/707/EU, shall be exempt from the anti-subsidy duty imposed by Article 1, on condition that:

(a) a company listed in the Annex to Implementing Decision 2013/707/EU manufactured, shipped and invoiced directly the products referred to above or via its related company also listed in the Annex to Implementing Decision 2013/707/EU either to their related companies in the Union acting as an importer and clearing the goods for free circulation in the Union or to the first independent customer acting as an importer and clearing the goods for free circulation in the Union;

(b) such imports are accompanied by an undertaking invoice which is a commercial invoice containing at least the elements and the declaration stipulated in Annex 2 of this Regulation;

(c) such imports are accompanied by an Export Undertaking Certificate according to Annex 3 of this Regulation; and

(d) the goods declared and presented to customs correspond precisely to the description on the undertaking invoice.

2. A customs debt shall be incurred at the time of acceptance of the declaration for release into free circulation:

(a) whenever it is established, in respect of imports described in paragraph 1, that one or more of the conditions listed in that paragraph are not fulfilled;

…'

III. Facts of the main proceedings

16. The applicant has a warehouse and cargo handling company at Hamburg harbour. On 21 August 2014, it accepted two deliveries of photovoltaic modules ('the goods') to its warehouse and reported them for temporary storage.

17. The goods were manufactured and consigned by Wuxi Suntech Power Co. Ltd. ('Wuxi') — a company which is listed in the Annex to Implementing Decision 2013/707. It was intended for SF Suntech Deutschland GmbH, a company which is affiliated with Wuxi.

18. As the goods were carried other than by sea, the applicant should have completed the formalities required to assign a customs-approved treatment or use within 20 days from the date on which the summary declaration was lodged, namely, before 10 September 2014.

19. By letter dated 11 September 2014, the defendant informed the applicant that the goods did not receive a new customs designation until the end of the period of custody on 10 September 2014, and requested them to submit the documents required for importation. It noted that the goods may not be disposed of pending the adoption of a different decision.

20. By letter dated 26 September 2014, the applicant submitted some documents in which it was apparent that the goods were manufactured by Wuxi and shipped to SF Suntech Deutschland GmbH, one of its affiliated companies in Germany. Among those documents there was an undertaking invoice from Wuxi to SF Suntech Deutschland GmbH which contained a reference to Commission Decision 2013/423/EU of 2 August 2013 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China [6] and an Export Undertaking Certificate of the China Chamber of Commerce for Import & Export of Machinery & Electronic Products (CCCME). This Export Undertaking Certificate contained a similar statement to the undertaking invoice, but with reference to Implementing Decision 2013/707.

21. In its decision of 24 November 2014, having concluded that a customs debt on importation under Article 204(1)(a) of the Customs Code was incurred because the goods did not receive new customs-approved treatment upon the expiry of the storage time limit set by Article 49 of the Customs Code, the defendant determined anti-dumping and countervailing duties, amongst others.

22. On 28 November 2014, the applicant appealed that decision. It claimed, inter alia, that even if a customs debt on importation was incurred as a result of a breach of a temporary storage obligation, the exemption from the anti-dumping and countervailing duties provided for, respectively, in Article 3(1) of Implementing Regulation No 1238/2013 and Article 2(1) of Implementing Regulation No 1239/2013 were to be applied pursuant to Article 212a of the Customs Code.

23. On 4 May 2015, the Principal Customs Office reduced the rate of anti-dumping and countervailing duties on the rates applicable to photovoltaic modules manufactured by Wuxi as provided for by Implementing Regulation No 1238/2013 and Implementing Regulation No 1239/2013. By contrast, it refused the exemption of those rights on the ground that the conditions for benefiting from them were not fulfilled, since the undertaking invoice produced by the applicant contained a reference to Decision 2013/423 and not to Implementing Decision 2013/707 mentioned in the Export Undertaking Certificate.

24. On 19 May 2015, the applicant submitted a corrected undertaking invoice with a reference to Implementing Decision 2013/707. When the applicant provided the requested security, the Principal Customs Office granted release of the goods and the goods were delivered to SF Suntech Deutschland GmbH.

25. On 7 July 2015, the Principal Customs Office rejected the appeal. It stated that the exemptions provided by Implementing Regulation No 1238/2013 and Implementing Regulation No 1239/2013 could not be granted if there had been no release for free circulation of the goods. Furthermore, the invoice produced did not fulfil the formal requirements laid down by these regulations.

26. The applicant then brought an action before the referring court. It argues that the exemption from anti-dumping and countervailing duties are favourable tariff treatment or, at least, exemption from import or export duties under Article 212a of the Customs Code. It also pleads that the first invoice produced fulfilled the conditions required by the Implementing Regulations. Furthermore, the

6 OJ 2013 L 209, p. 26.

corrected undertaking invoice delivered on 19 May 2015 fulfilled the formal requirements. It points out that, within the scope of Article 212a of the Customs Code, there is no release for free circulation and, therefore, it cannot be required to produce an undertaking invoice at that moment. The Principal Customs Office rejects that interpretation of the applicable legislation.

IV. The request for a preliminary ruling and the procedure before the court

27. In that context, the Finanzgericht Hamburg (Finance Court, Hamburg, Germany) had doubts about the relationship between the Customs Code and Implementing Regulation No 1238/2013 and Implementing Regulation No 1239/2013. It decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 212a of the Customs Code encompass the exemption from an anti-dumping and countervailing duty pursuant to Article 3(1) of Implementing Regulation No 1238/2013 or Article 2(1) of Implementing Regulation No 1239/2013?

(2) If the answer to the first question is in the affirmative: In the application of Article 212a of the Customs Code to the case of the incurrence of a customs debt pursuant to Article 204(1) of the Customs Code for exceeding the time limit under Article 49(1) of the Customs Code, are the conditions laid down in Article 3(1)(a) of Implementing Regulation No 1238/2013 and Article 2(1)(a) of Implementing Regulation No 1239/2013 fulfilled when the company, which is affiliated with the company listed in the Annex to Implementing Decision 2013/707, which manufactured, consigned and invoiced the goods concerned, but did not act as the importer of the goods concerned and also did not ensure the release of the goods into free circulation, but had the intention to do so and was the company to which the goods were actually delivered?

(3) If the answer to the second question is in the affirmative: When Article 212a of the Customs Code is applied to a case where a customs debt arises under Article 204(1) of the Customs Code, by failure to comply with the time limit pursuant to Article 49(1) of the Customs Code, may an undertaking invoice and an export undertaking certificate within the meaning of Article 3(1)(b) and (c) of Implementing Regulation No 1238/2013 and Article 2(1)(b) and (c) of Implementing Regulation No 1239/2013 also be submitted within a time limit set by the customs authorities pursuant to Article 53(1) of the Customs Code?

(4) If the answer to the third question is in the affirmative: Does an undertaking invoice pursuant to Article 3(1)(b) of Implementing Regulation No 1238/2013 and Article 2(1)(b) of Implementing Regulation No 1239/2013, which refers to Decision 2013/423 instead of to Implementing Decision 2013/707, under the conditions of the case in the main proceedings and in consideration of general legal principles, satisfy the conditions in paragraph 9 of Annex III to Implementing Regulation No 1238/2013 and paragraph 9 of Annex 2 to Implementing Regulation No 1239/2013?

(5) If the answer to the fourth question is in the negative: In the application of Article 212a of the Customs Code to the case when a customs debt arises under Article 204(1) of the Customs Code due to the failure to comply with the time limit pursuant to Article 49(1) of the Customs Code, may an undertaking invoice within the meaning of Article 3(1)(b) of Implementing Regulation No 1238/2013 and Article 2(1)(b) of Implementing Regulation No 1239/2013 also still be submitted in the appeal proceedings brought against the determination of customs debt?'

28. Written observations were submitted by the applicant in the main proceedings and by the European Commission. In addition, both presented oral arguments at the hearing on 31 January 2019.

V. Analysis

29. As requested by the Court, I will confine my observations in this Opinion to the first three questions which are the subject of the reference made by Finanzgericht Hamburg (Finance Court, Hamburg).

A. The first question

30. By its first question, the referring court asks the Court if Article 212a of the Customs Code encompasses the exemption from anti-dumping and countervailing duties pursuant to Article 3(1) of Implementing Regulation No 1238/2013 or Article 2(1) of Implementing Regulation No 1239/2013.

31. The first element to answer is enshrined in both Implementing Regulation No 1238/2013 and Implementing Regulation No 1239/2013. Indeed, according to Article 1(3) of those regulations, 'unless otherwise specified, the provisions in force concerning customs duties shall apply'. Since Implementing Regulation No 1238/2013 and Implementing Regulation No 1239/2013 do not exclude Article 212a from their scope, it *may* therefore be applied.

32. However, to be applied, the exemptions from anti-dumping and countervailing duties allowed by the Implementing Regulations have to be considered as a 'favourable tariff treatment of goods by reason of their nature or end-use or for relief or total or partial exemption from import or export duties pursuant to Articles 21, 82, 145 or 184 to 187'[7] of the Customs Code.

33. In that regard, I believe that exemptions from anti-dumping and countervailing duties are in principle covered by the concept of 'favourable tariff treatment', even if they are not justified by their nature or end-use. Such an interpretation is consistent with the objective of Article 212a of the Customs Code and the objective of the anti-dumping and countervailing duties. I reach this conclusion for the following reasons.

34. First, as underlined by recital 12 of Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 amending Regulation No 2913/92,[8] which inserted the initial version of Article 212a of the Customs Code, the circumstances in which the debt is incurred is irrelevant when EU law provides for partial or total exemption from import or export duties. Indeed, 'where Community legislation provides for partial or total exemption from import or export duties, such partial or total exemption must be applicable in all cases, regardless of the circumstances in which the debt is incurred; … in these circumstances, the application of the normal rate of duty does not seem to be an appropriate sanction in the event of a failure to comply with the customs procedure rules'.[9] Second, as recalled by the Commission, the objective of the anti-dumping and countervailing duties is to avoid injury to an EU industry and not to punish the infringement of the customs rules.

35. On the other hand, it is also consistent with the wording of Article 3(1) of Implementing Regulation No 1238/2013 or Article 2(1) of Implementing Regulation No 1239/2013, which use the expression 'shall be *exempt*', where Article 212a of the Customs Code concerns 'total or partial *exemption*'.

7 Article 212a of the Customs Code.

8 OJ 1997 L 17, p. 1.

9 Recital 12 of Regulation No 82/97.

36. Finally, it might also be observed that in *Isaac International*,[10] as recalled by the Court in its judgment in that case, the national court started from the premiss that exemption from an anti-dumping duty was to be regarded as 'favourable tariff treatment' within the meaning of Article 212a of that code.[11] The Court did not call this into question. On the contrary, it answered the question asked which concerned the fulfilment of 'the other conditions for the application' within the meaning of Article 212a of the Customs Code.

37. In light of the foregoing considerations, it is apparent that Article 212a of the Customs Code encompasses the exemption from anti-dumping and countervailing duties pursuant to Article 3(1) of Implementing Regulation No 1238/2013 or Article 2(1) of Implementing Regulation No 1239/2013 on condition that the conditions required by those regulations are also fulfilled.

B. The second question

38. By its second question, the referring court asks the Court, in the application of Article 212a of the Customs Code to the case of the incurrence of a customs debt pursuant to Article 204(1) of the Customs Code for exceeding the time limit under Article 49(1) of the Customs Code, if the conditions laid down in Article 3(1)(a) of Implementing Regulation No 1238/2013 and Article 2(1)(a) of Implementing Regulation No 1239/2013 are fulfilled when the company which is affiliated with the company listed in the Annex to Implementing Decision 2013/707 (which manufactured, consigned and invoiced the goods concerned) neither acted as the importer of the goods concerned nor ensured the release of the goods into free circulation, but had the intention to do so and was the company to which the goods were actually delivered.

39. As a preliminary matter, it should be recalled that the applicant is a 'person concerned', within the meaning of Article 212a of the Customs Code. Indeed, the Court ruled that this concept 'must be understood, in the light of the wording of that provision, as referring to any natural or legal person who is considered to be a customs debtor under any of Articles 202 to 205 of that code'[12] which is the case of Krohn & Schröder GmbH in the present case.

40. I do not think, however, that the Court can answer the second question in the affirmative.

41. Indeed, when previously requested to interpret a similar provision to Article 3(1) of Implementing Regulation No 1238/2013 and Article 2(1) of Implementing Regulation No 1239/2013, the Court held that 'the exemption from anti-dumping duties may be made only under certain conditions, in cases specifically provided for, and thus constitutes an exception to the normal regime for anti-dumping duties. *The provisions which provide for such an exemption are, therefore, to be interpreted strictly*'.[13]

42. According to the first sentence of Article 3(1) of Implementing Regulation No 1238/2013 and of Article 2(1) of Implementing Regulation No 1239/2013, the precondition for the application of the anti-dumping or countervailing duty exemption is that the goods in question have been declared for release for free circulation. In the present case, it is clear that this precondition has not been fulfilled since the disputed custom debt is due to the fact that the formalities necessary to attribute a customs-approved treatment or use — such as release for free circulation — were not fulfilled within the time limit provided for by Article 49(1) of the Customs Code.

10 Judgment of 29 July 2010 (C-371/09, EU:C:2010:458).

11 See, to that effect, judgment of 29 July 2010, *Isaac International* (C-371/09, EU:C:2010:458, paragraph 40).

12 Judgment of 25 January 2017, *Ultra-Brag* (C-679/15, EU:C:2017:40, paragraph 38).

13 Judgment of 17 September 2014, *Baltic Agro* (C-3/13, EU:C:2014:2227, paragraph 24, emphasis added). The same rule of interpretation applies to Article 212a of the Customs Code itself (see, to that effect, judgment of 29 July 2010, *Isaac International*, C-371/09, EU:C:2010:458, paragraph 42).

43. In those circumstances, even if it could be supposed that Article 3(1) of Implementing Regulation No 1238/2013 and Article 2(1) of Implementing Regulation No 1239/2013 might apply on the basis of Article 212a of the Customs Code without the fulfilment of the precondition merely because of the fact that the customs debt arose pursuant to Article 204 of the Customs Code, the other conditions required by Article 3(1)(a) to (d) of Implementing Regulation No 1238/2013 and Article 2(1)(a) to (d) of Implementing Regulation No 1239/2013 must also be fulfilled.

44. The first of these conditions is that a company listed in the Annex to Implementing Decision 2013/707 manufactured, shipped and invoiced directly the products referred to above either to their related companies in the Union acting as an importer and clearing the goods for free circulation in the Union or to the first independent customer acting as an importer and clearing the goods for free circulation in the Union. To put it simply, the recipient must act as an importer *and* clear the goods for free circulation.

45. In the present case, the undertaking which accepted the goods is not the importer and it did not clear them for free circulation. Even if it may be supposed that the applicant accepted the goods on behalf of the importer — as stated by the applicant at the hearing on 31 January 2019 —, we are still confronted with the obligation to clear the goods for free circulation.

46. Not only have the goods not been declared for release into free circulation, it seems that they also have not been cleared for free circulation.[14] If the goods involved are deemed 'Community goods' and delivered, this is only by application of Article 866 of the Regulation No 2454/93.

47. Furthermore, in principle, in order to benefit from this provision, the customs debt on importation involved has to be incurred pursuant to Article 204 of the Customs Code *and the import duties have to be paid*. In the present case, however, such import duties were not in fact paid. If the goods have been delivered to the intended recipient, it is only because the requested security was provided. When questioned on this issue by members of the Court at the hearing on 31 January 2019, the parties agreed that the provision of security cannot be considered as the equivalent of the payment of import duties.

48. To sum up, in the present case neither the precondition nor the first condition required by Article 3(1) of Implementing Regulation No 1238/2013 and Article 2(1) of Implementing Regulation No 1239/2013 are fulfilled: imports have not been declared for release into free circulation, the undertaking which accepted the goods is not the importer and the goods have not been formally released for free circulation.

49. In other words, the exemptions provided for by Article 3(1) of Implementing Regulation No 1238/2013 and Article 2(1) of Implementing Regulation No 1239/2013 would apply only if a succession of other regulations apply and by application of a number of legal fictions — such as, for example, by deeming the applicant to be the importer and treating the payment of a security as if it were the import duty payable in accordance with Article 866 of Regulation No 2454/93.

50. The application of the legislation in this manner would effectively lead to a distortion of Article 3(1) of Implementing Regulation No 1238/2013 and Article 2(1) of Implementing Regulation No 1239/2013 and fly in the face of the rule of interpretation previously recalled and according to which a provision that provides for an exemption from anti-dumping duty is to be interpreted strictly.[15]

14 According to the explanation given by the Commission at the hearing on 31 January 2019, the goods will be cleared for free circulation retroactively at the end of the litigation, once the relevant import duties have been paid.

15 See, to that effect, judgment of 17 September 2014, *Baltic Agro* (C-3/13, EU:C:2014:2227, paragraph 24).

51. Furthermore, it must be noted that the conditions such as those required by Article 3(1) of Implementing Regulation No 1238/2013 and Article 2(1) of Implementing Regulation No 1239/2013 are laid down 'in order to enable the Commission and the customs authorities to monitor effectively the compliance of the companies with the undertakings when the request for release for free circulation is presented to the relevant customs authority. Consequently, if the conditions are not met the appropriate anti-dumping duty shall be incurred at the time of acceptance of the declaration for release into free circulation'. [16]

52. As the Court has already pointed out in *Isaac International*, [17] a condition which permits the customs authorities to verify, at the material time, that all the requirements regarding an exemption from anti-dumping duty have been satisfied is of particular importance. [18] Thus, the application of Article 212a of the Customs Code cannot lead to the result that such an exemption from anti-dumping duty could be granted even where this kind of condition has not been satisfied. [19]

53. In a context like the present case, I believe that the conditions laid down by Article 3(1)(a) of Implementing Regulation No 1238/2013 and Article 2(1)(a) of Implementing Regulation No 1239/2013 are of particular importance. The failure to ensure that these conditions were satisfied also underscores the conclusion that the anti-dumping exemption simply does not apply.

54. Indeed, as suggested by the Commission in its written observations, [20] it cannot be excluded that the intervention of a third party in the procedure — such as the applicant in the present case — and the acquisition of the status of 'Community goods' after an operation other than the release of the goods 'for free circulation' — such as for example, pursuant to Article 866 of Regulation No 2454/93 — compromise the possibility of verifying compliance with the other conditions of Article 3(1) of Implementing Regulation No 1238/2013 and Article 2(1) of Implementing Regulation No 1239/2013, thus potentially jeopardising the financial interests of the Union.

55. In the light of the foregoing considerations, I find myself obliged to conclude that, in the application of Article 212a of the Customs Code to the case of the incurrence of a customs debt pursuant to Article 204(1) of the Customs Code for exceeding the time limit under Article 49(1) of the Customs Code, the conditions laid down in Article 3(1)(a) of Implementing Regulation No 1238/2013 and Article 2(1)(a) of Implementing Regulation No 1239/2013 are not fulfilled when the company which is affiliated with the company listed in the Annex to Implementing Decision 2013/707 (which manufactured, consigned and invoiced the goods concerned) neither acted as the importer of the goods concerned nor ensured the release of the goods into free circulation, even if it had the intention to do so and was the company to which the goods were actually delivered.

C. The third question

56. The third question submitted by the referring court is asked only if the answer to the second question is in the affirmative. As this is not the case, in my view, it should not be necessary to answer that question. In the interest of completeness, I propose nonetheless to examine it.

16 Judgment of 17 September 2014, *Baltic Agro* (C-3/13, EU:C:2014:2227, paragraph 29). Although Regulation No 1238/2013 and Regulation No 1239/2013 do not contain the same recital as that on which the Court bases its interpretation in *Baltic Agro*, the conditions required to obtain the exemption are similar.

17 Judgment of 29 July 2010 (C-371/09, EU:C:2010:458).

18 See, to that effect, judgment of 29 July 2010, *Isaac International* (C-371/09, EU:C:2010:458, paragraph 43).

19 See, to that effect, judgment of 29 July 2010, *Isaac International* (C-371/09, EU:C:2010:458, paragraph 44).

20 See, to that effect, paragraphs 45 and 49 of the Commission's written observations.

57. By its third question, the referring court asks the Court if, when Article 212a of the Customs Code is applied to a case where a customs debt arises under Article 204(1) of the Customs Code, by failure to comply with the time limit pursuant to Article 49(1) of the Customs Code, an undertaking invoice and an Export Undertaking Certificate within the meaning of Article 3(1)(b) and (c) of Implementing Regulation No 1238/2013 and Article 2(1)(b) and (c) of Implementing Regulation No 1239/2013 may also be submitted within a time limit set by the customs authorities pursuant to Article 53(1) of the Customs Code.

58. As already recalled in point 41 of the present Opinion, the provisions providing for an exemption from anti-dumping duties must be interpreted strictly.

59. However, as mentioned by the referring court, the Court ruled in *Tigers* that, under Article 78 of the Customs Code, it is permissible to present new material which may be taken into consideration by the customs authorities after the customs declaration has been made. [21]

60. I consider that this solution is also applicable by analogy in cases arising under Article 53 of the Customs Code. I take this view for the following reasons.

61. First, it follows from the wording of Article 3(1) of Implementing Regulation No 1238/2013 and of Article 2(1) of Implementing Regulation No 1239/2013 that to be exempted from anti-dumping and countervailing duties provided for by those regulations, the imports declared for release into free circulation *must be accompanied* by an undertaking invoice and by an Export Undertaking Certificate. However, that wording provides no indication whatsoever as to when that invoice must be presented.

62. Indeed, if that wording suggests that the 'right' moment is when the customs declaration is made, it must be noted that, in the same way that the Court and the Advocate General underlined in *Tigers* [22] regarding Council Implementing Regulation (EU) No 412/2013 of 13 May 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tableware and kitchenware originating in the People's Republic of China, [23] no other provision of Implementing Regulation No 1238/2013 or of Implementing Regulation No 1239/2013, unlike other anti-dumping regulations, specifies the point in time at which the undertaking invoice and the Export Undertaking Certificate must be presented to the customs authorities. [24]

63. Furthermore, although Article 62 of the Customs Code provides a similar rule according to which 'the customs declaration *shall be accompanied* by all the documents required for implementation of the provisions governing the customs procedure for which the goods are declared', the Court stated that 'that provision does not specify the consequences linked to a lack of conformity of the documents accompanying that declaration'. [25]

64. Second, the time of the customs declaration is only relevant for the hypothesis referred to in Article 3(1) of Implementing Regulation No 1238/2013 and in Article 2(1) of Implementing Regulation No 1239/2013, that is to say when the custom debt occurs following the declaration for release into free circulation.

21 Judgment of 12 October 2017, *Tigers* (C-156/16, EU:C:2017:754, paragraph 31).

22 See, to that effect, judgment of 12 October 2017, *Tigers* (C-156/16, EU:C:2017:754, paragraph 25), and opinion of Advocate General Mengozzi in *Tigers* (C-156/16, EU:C:2017:474, point 60).

23 OJ 2013 L 131, p. 1.

24 In the Regulation cited by Advocate General Mengozzi in his Opinion in *Tigers* (C-156/16, EU:C:2017:474), the relevant provision provides that '*When the declaration for release for free circulation is presented*, exemption from the duty shall be conditional upon presentation to the competent Member States' customs services of a valid, original production certificate issued by one of the companies listed in paragraph 4' (emphasis added) (Article 2(2) of the Council Regulation (EC) No 2320/97 of 17 November 1997 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, Russia, the Czech Republic, Romania and the Slovak Republic, repealing Regulation (EEC) No 1189/93 and terminating the proceeding in respect of such imports originating in the Republic of Croatia, OJ 1997 L 322, p. 1).

25 Judgment of 12 October 2017, *Tigers* (C-156/16, EU:C:2017:754, paragraph 28).

65. Here this is not the case. If the Court accepts that Article 212a of the Customs Code is applicable in the event of the incurrence of a customs debt pursuant to Article 204(1) of the Customs Code for exceeding the time limit laid down in Article 49(1) of the Customs Code, it should be recognised that the time at which the undertaking invoice and the Export Undertaking Certificate must be given cannot be at the moment of the declaration. As I have already noted, in the present case this did not happen.

66. Therefore, since Article 53(1) of the Customs Code allows — and even obliges — the customs authorities to take '*all measures* necessary to regularise the situation of goods in respect of which the formalities necessary for them to be assigned a customs-approved treatment or use are not initiated within the periods determined in accordance with Article 49',[26] it should be permissible to present the undertaking invoice and the Export Undertaking Certificate in the context of that procedure, within the time limit set by the customs authorities or at the latest before the release of goods to avoid any risk of circumvention.

67. That logic is consistent with the objective of the anti-dumping and countervailing duties which, as already pointed out in point 34 of the present Opinion, is to avoid injury to an EU industry and not to punish the infringement of the customs rules. More broadly, that logic is also in line with the objective of the Customs Code, which, according to recital 5 thereof, is, in particular, to ensure the correct application of the duties provided for therein.[27]

68. In the light of the foregoing considerations, it seems to me that, when Article 212a of the Customs Code is applied to a case where a customs debt arises under Article 204(1) of the Customs Code, by failure to comply with the time limit pursuant to Article 49(1) of the Customs Code, it is permissible to present the undertaking invoice and the Export Undertaking Certificate within the meaning of Article 3(1)(b) and (c) of Implementing Regulation No 1238/2013 and Article 2(1)(b) and (c) of Implementing Regulation No 1239/2013 within the time limit set by the customs authorities or at the latest before the release of goods.

VI. Conclusion

69. Accordingly, I propose that the Court should answer the two first questions referred by the Finanzgericht Hamburg (Finance Court, Hamburg, Germany) as follows:

(1) Article 212a of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code encompasses the exemption from an anti-dumping and a countervailing duty pursuant to Article 3(1) of Council Implementing Regulation (EU) No 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China and of Article 2(1) of Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China on condition that the conditions required by those regulations are fulfilled.

(2) In the application of Article 212a of the Customs Code to the case of the incurrence of a customs debt pursuant to Article 204(1) of the Customs Code for exceeding the time limit under Article 49(1) of the Customs Code, the conditions laid down in Article 3(1)(a) of Implementing Regulation No 1238/2013 and Article 2(1)(a) of Implementing Regulation No 1239/2013 are not fulfilled when the company which is affiliated with the company listed in the Annex to

26 Emphasis added.

27 See, to that effect, Opinion of Advocate General Mengozzi in *Tigers* (C-156/16, EU:C:2017:474, point 52 and the case-law cited).

Commission Implementing Decision 2013/707/EU of 4 December 2013 confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures (which manufactured, consigned and invoiced the goods concerned) neither acted as the importer of the goods concerned nor ensured the release of the goods into free circulation, even if it had the intention to do so and was the company to which the goods were actually delivered.

70. If the Court does not concur with my views on the second question, I propose that the Court should answer the third question referred by the Finanzgericht Hamburg (Finance Court, Hamburg) as follows:

(3) When Article 212a of the Customs Code is applied to a case where a customs debt arises under Article 204(1) of the Customs Code, by failure to comply with the time limit pursuant to Article 49(1) of the Customs Code, it is permissible to present the undertaking invoice and the Export Undertaking Certificate within the meaning of Article 3(1)(b) and (c) of Implementing Regulation No 1238/2013 and Article 2(1)(b) and (c) of Implementing Regulation No 1239/2013 within the time limit set by the customs authorities or at the latest before the release of goods.