Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

24 October 2013 *

(Customs union and Common Customs Tariff — Preferential arrangement for the import of products originating in the African, Caribbean and Pacific (ACP) States — Articles 16 and 32 of Protocol 1 to Annex V of the Cotonou Agreement — Import of synthetic fibres from Nigeria into the European Union — Irregularities in the movement certificate EUR.1 established by the competent authorities of the State of export — Stamp not matching the specimen notified to the Commission — Post-clearance and replacement certificates — Community Customs Code — Articles 220 and 236 — Possibility of retrospective application of a preferential customs duty no longer in effect on the date when the request for repayment is made — Conditions)

In Case C-175/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht München (Germany), made by decision of 16 February 2012, received at the Court on 13 April 2012, in the proceedings

Sandler AG

v

Hauptzollamt Regensburg,

THE COURT (Tenth Chamber),

composed of E. Juhász, President of the Tenth Chamber, acting for the President of the Chamber, A. Rosas and C. Vajda (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 July 2013,

after considering the observations submitted on behalf of:

— Sandler AG, by H.-M. Wolffgang, Steuerberater and by N. Harksen and R. Hannemann-Kacik, Rechtsanwältinnen,

— the Hauptzollamt Regensburg, by M. Brandl and C. Stephan, acting as Agents,

— the Hellenic Republic, by F. Dedousi, acting as Agent,

* Language of the case: German.

— the European Commission, by L. Keppenne and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 16 and 32 of Protocol No 1 of Annex V to the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ 2000 L 317, p. 3), and approved in behalf of the Community by Council Decision 2003/159/EC of 19 December 2002 (OJ 2003 L 65, p. 27) ('the Cotonou Agreement'), Articles 220 and 236 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1) ('the Customs Code'), and Article 889(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended most recently by Commission Regulation (EC) No 214/2007 (OJ 2007 L 62, p. 6) ('Regulation No 2454/93').

2 The request has been made in proceedings between Sandler AG ('Sandler') and the Hauptzollamt Regensburg Principal Customs Office, Regensburg (Germany) ('the HZA') concerning two notices of assessment of import duties issued by the HZA following a post-clearance examination due to the stamps on EUR.1 movement certificates ('EUR.1 certificates') not matching those established by the competent Nigerian authorities which were notified to the Commission.

Legal context

The Cotonou Agreement

3 By the Cotonou Agreement, the European Union had granted unilateral preferential tariff treatment to products originating from the African, Caribbean and Pacific Group of States (ACP) ('the ACP States'). For that purpose it had obtained a derogation until 31 December 2007 from the most-favoured-nation (MFN) clause provided for in Article 1(1) of the General Agreement on Tariffs and Trade (GATT) contained in Annex 1A to the Agreement establishing the World Trade Organization (WTO), signed in Marrakech on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). That arrangement ceased to be applicable as from 1 January 2008.

4 Article 36(3) of the Cotonou Agreement provided that the non-reciprocal trade preferences applied under the Fourth ACP-EC Convention would be maintained during the preparatory period for all ACP countries, under the conditions defined in Annex V to that agreement. Certain products, including textiles originating from the ACP States, could accordingly be imported into the European Union free of customs duties or taxes having equivalent effect. Article 37(1) of that agreement provided that the preparatory period was to end by 31 December 2007 at the latest.

5 Annex V to that same agreement set the conditions of application of the commercial arrangement during the preparatory period. Under the provisions of Protocol No 1 of that annex, relating to the definition of the concept of 'originating products' and methods for administrative cooperation ('Protocol No 1'), pursuant to Article 14(1)(a) of Protocol No 1 products originating from the ACP

States could benefit from the provisions of Annex V to the Cotonou Agreement when being imported into the European Union, upon presentation of a EUR.1 certificate issued by the customs authorities of the State of export pursuant to Article 15(1) of Protocol No 1.

6 The EUR.1 certificates bore a stamp from the customs authorities of the State of export, a specimen of which, under Article 31(1) of Protocol No 1, had to be notified to the Commission, which would send them on to the Member States. That same provision provided that the EUR.1 certificates were to be accepted for the purpose of applying preferential treatment as from the date the information was received by the Commission. Article 31(2) of Protocol No 1 provided that the European Union and the ACP States were to assist each other, through the competent customs administrations, in checking the authenticity of EUR.1 certificates.

7 Article 23 of Protocol No 1 provided that proof of origin was to be submitted to the customs authorities of the importing country in accordance with the procedures applicable in that country.

8 Article 16 of Protocol No 1, entitled 'Movement certificates EUR.1 issued retrospectively', was worded as follows:

'1. ... [A EUR.1 certificate] may exceptionally be issued after exportation of the products to which it relates if:

(a) it was not issued at the time of exportation because of errors or involuntary omissions or special circumstances; or

(b) it is demonstrated to the satisfaction of the customs authorities that [a EUR.1 certificate] was issued but was not accepted at importation for technical reasons.

2. For the implementation of paragraph 1, the exporter must indicate in his application the place and date of exportation of the products to which the [EUR.1 certificate] relates, and state the reasons for his request.

3. The customs authorities may issue a [EUR.1 certificate] retrospectively only after verifying that the information supplied in the exporter's application agrees with that in the corresponding file.

4. [EUR.1 certificates] issued retrospectively must be endorsed with one of the following phrases:

"NACHTRÄGLICH AUSGESTELLT", "DÉLIVRÉ A POSTERIORI", "RILASCIATO A POSTERIORI", "AFGEGEVEN A POSTERIORI", "ISSUED RETROSPECTIVELY", "UDSTEDT EFTERFØLGENDE", "ΕΚΔΟΘΕΝ ΕΚ ΤΩΝ ΥΣΤΕΡΩΝ", "EXPEDIDO A POSTERIORI", "EMITADO A POSTERIORI", "ANNETTU JÄLKIKÄTEEN", "UTFÄRDAT I EFTERHAND".

5. The endorsement referred to in paragraph 4 shall be inserted in the "Remarks" box of the [EUR.1 certificate].'

9 Article 18 of Protocol No 1, entitled 'Issue of [EUR.1 certificates] on the basis of a proof of origin issued or made out previously', provided:

'When originating products are placed under the control of a customs office in an ACP State or in the Community, it shall be possible to replace the original proof of origin by one or more [EUR.1 certificates] for the purpose of sending all or some of these products elsewhere within the ACP States or within the [European Union]. The replacement [EUR.1 certificates] shall be issued by the customs office under whose control the products are placed.'

10 Article 32 of Protocol No 1, entitled 'Verification of proofs of origin', provides:

'1. Subsequent verifications of proofs of origin shall be carried out at random or whenever the customs authorities of the importing country have reasonable doubts as to the authenticity of such documents, the originating status of the products concerned or the fulfilment of the other requirements of this Protocol.

2. For the purposes of implementing the provisions of paragraph 1, the customs authorities of the importing country shall return the [EUR.1 certificate] and the invoice, if it has been submitted, the invoice declaration, or a copy of these documents, to the customs authorities of the exporting country giving, where appropriate, the reasons for the enquiry. Any documents and information obtained suggesting that the information given on the proof of origin is incorrect shall be forwarded in support of the request for verification.

3. The verification shall be carried out by the customs authorities of the exporting country. For that purpose, they shall have the right to call for any evidence and to carry out any inspection of the exporter's accounts or any other check considered appropriate.

4. If the customs authorities of the importing country decide to suspend the granting of preferential treatment to the products concerned while awaiting the results of the verification, release of the products shall be offered to the importer subject to any precautionary measures judged necessary.

5. The customs authorities requesting the verification shall be informed of the results of this verification as soon as possible. These results must indicate clearly whether the documents are authentic and whether the products concerned can be considered as products originating in the ACP States … and fulfil the other requirements of this Protocol.

6. If in cases of reasonable doubt there is no reply within 10 months of the date of the verification request or if the reply does not contain sufficient information to determine the authenticity of the document in question or the real origin of the products, the requesting customs authorities shall, except in exceptional circumstances, refuse entitlement to the preferences.

7. Where the verification procedure or any other available information appears to indicate that the provisions of this Protocol are being contravened, the ACP State on its own initiative or at the request of the [European Union] shall carry out appropriate enquiries or arrange for such enquiries to be carried out with due urgency to identify and prevent such contraventions and for this purpose the ACP State concerned may invite the participation of the [European Union] in these enquiries.'

11 In order to help the Member States of import to apply the provisions relating to the preferential trade arrangements provided for by the Cotonou Agreement, the Commission published a document entitled 'Notes concerning Protocol 1 to Annex V of the ACP-EC Partnership Agreement, concerning the definition of the concept of originating products and methods of administrative cooperation' (OJ 2002, C 228, p. 20 ('the Notes').

12 Points 10, 15 and 17 of the Notes contain additional explanations about Articles 16 and 32 of Protocol No 1, as well as examples of scenarios with an indication of the action to be taken.

13 Point 10 of the Notes, entitled 'Article 16 — Technical reasons', provides:

'A [EUR.1 certificate] may be rejected for "technical reasons" because it was not made out in the prescribed manner. These are the cases which may give rise to subsequent presentation of a certificate issued retrospectively and they include, by way of example, the following:

...

— the [EUR.1 certificate] has not been stamped and signed (i.e. in Box 11),

...

— the stamp used is a new one which has not yet been notified,

...

Action to be taken

The document should be marked "DOCUMENT NOT ACCEPTED", stating the reason(s), and then returned to the importer in order to enable him to get a new document issued retrospectively. The customs authorities, however, may keep a photocopy of the rejected document for the purposes of post-clearance verification or if they have grounds for suspecting fraud.'

14 Point 15 of the Notes, entitled 'Article 32 — Refusal of preferential treatment without verification', provides:

'This covers cases in which the proof of origin is considered inapplicable, inter alia for the following reasons:

— the goods to which the [EUR.1 certificate] refers are not eligible for preferential treatment,

— the goods description box (box 8 on EUR.1) is not filled in or refers to goods other than those presented,

...

Action to be taken

The proof of origin should be marked "INAPPLICABLE" and retained by the customs authorities to which it was presented in order to prevent any further attempt to use it.

Where it is appropriate to do so, the customs authorities of the importing country shall inform the customs authorities of the country of exportation about the refusal without delay.'

15 Point 17 of the Notes, entitled 'Article 32 — Reasonable doubt', is worded as follows:

'The following cases, by way of example, come into this category:

...

— the [EUR.1 certificate] has not been signed or dated by the issuing authority,

— the markings on the goods or packaging or the other accompanying documents refer to an origin other than that given on the [EUR.1 certificate],

...

— the stamp used to endorse the document does not match that which has been notified.

Action to be taken

The document is sent to the issuing authorities for post-clearance verification, with a statement of the reasons for the request for verification. Pending the results of this verification, all appropriate steps judged necessary by the customs authorities shall be taken to secure payment of any applicable duties.'

The Customs Code

16 The Customs Code was repealed by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1), certain provisions of which became applicable as from 24 June 2008, and other provisions of which became applicable as from 24 June 2013. However, given the material time in relation to the facts of the case before the referring court, the present dispute remains governed by the rules set out in the Customs Code.

17 Article 77 of the Customs Code covered cases where the customs declaration was made by means of a data-processing technique and provided that in such situations the customs authorities could waive the requirement that the declarant present the accompanying documents with the declaration. In such cases, however, those documents had to be kept available for customs authorities.

18 Article 78 of the Customs Code allowed the customs authorities to revise the customs declaration and conduct a post-clearance examination of the documents and commercial data relating to the import or export operations after release of the goods. Where the revision or post-clearance examination indicated that the provisions governing the customs procedure concerned had been applied on the basis of incorrect or incomplete information, the customs authorities were to take the measures necessary to regularise the situation, taking account of the new information available to them.

19 Article 236(1) of the Customs Code provided, inter alia, as follows with respect to repayment and remission of customs duties incurred in relation to a customs debt held not to exist:

'Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

...

No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.'

20 Under Article 247 of the Customs Code, the measures necessary for the implementation of that code were to be adopted by the Commission.

21 Article 889(1) of Regulation No 2454/93 contained a certain number of rules for the grant of post-clearance preferential customs treatment for the repayment or remission of duties:

'Where the request for repayment or remission is based on the existence, at the time when the declaration of release for free circulation was accepted, of a reduced or zero rate of import duty on the goods under a tariff quota, a tariff ceiling or other preferential tariff arrangements, repayment or remission shall be granted only on condition that, at the time of lodging the application for repayment or remission accompanied by the necessary documents:

— in the case of a tariff quota, its volume has not been exhausted,

— in other cases, the rate of duty normally due has not been re-established.

If the conditions laid down in the preceding paragraph are not fulfilled, repayment or remission shall nevertheless be granted where the failure to apply the reduced or zero rate of duty to the goods was the result of an error on the part of the customs authorities themselves and the declaration for free circulation contained all the particulars and was accompanied by all the documents necessary for application of the reduced or zero rate.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

22 In the period from 19 May 2005 to 11 July 2007, Sandler released for free circulation in the European Union, by electronic means using the ATLAS system, several consignments of synthetic fibres. The Hauptzollamt Hamburg-Hafen – Zollamt Waltershof (Principal Customs Office of the Port of Hamburg-Waltershof (Germany) – Waltershof Customs Office) released the goods for free circulation on the basis of the declared origin of Nigeria, applying the preferential customs duty rate of zero. The customs authorities dispensed with the presentation and examination of the EUR.1 certificates referred to in the customs declarations.

23 In a post-clearance examination of the EUR.1 certificates in 2008 pursuant to Article 78 of the Customs Code, the HZA found that on 34 of the EUR.1 certificates there was a round stamp with the text 'NIGERIA CUSTOMS SERVICE' and 'TIN CAN ISLAND PORT LAGOS' in the border area and with the text 'ASST.COMPTROLLER o/c Export Seat Releasing Officer' in the inner area. In the HZA's view, that stamp did not match the stamp specimen which the Nigerian authorities had notified to the Commission pursuant to Article 31(1) of Protocol No 1, which consisted in a curved stamp with the text 'NIGERIA CUSTOMS SERVICE' and 'EXPORT SEAT' around the edge and the text 'TINCAN PORT' in the inner area of the stamp under the date:

Stamp affixed to the EUR.1 certificates	Stamp specimen notified by the Nigerian authorities
	

24 According to the information provided by the HZA to the referring court, the stamp specimens notified by the Nigerian authorities had been in effect since 1 July 2003 until expiry of the preferential arrangement provided for in Annex V to the Cotonou Agreement, that is, 31 December 2007, and no changes to those specimens had been notified by the Nigerian authorities in the meantime.

25 The HZA therefore informed Sandler, by letter of 30 April 2008, that the EUR.1 certificates could not be accepted and that 'Document not accepted' had to be stamped on them. The HZA further stated that customs import duties would have to be charged but that if a new EUR.1 certificate were presented it would be possible to repay the duties charged. By two notices of assessment of import duties dated 14 May 2008 and 3 June 2008, the HZA ordered the charging of customs duties totalling EUR 65 612.71, applying the duty rate of 4% applied to non-member countries.

26 On 10 September 2008 Sandler presented EUR.1 certificates bearing stamps matching the specimen notified to the Commission and requested repayment of the customs duties paid following the two notices of assessment. Those EUR.1 certificates contained, in box 7, entitled 'Remarks', the words 'being issued in replacement of EUR.1 …', together with the date and number of the EUR.1 certificates refused by the HZA.

27 By decision of 22 September 2008, the HZA refused repayment on the ground that, under Article 889(1) of Regulation No 2454/93, preferential treatment could be granted post-clearance only if the preferential customs duty requested was still in effect at the time the request for repayment was made. As the preferential arrangement provided for under the Cotonou Agreement had expired on 31 December 2007, no preferential customs duties were provided for any longer with respect to goods imported from Nigeria as from 1 January 2008.

28 Sandler also requested the repayment of the customs duties on equitable grounds under Article 239 of the Customs Code. That request was also refused by the HZA by decision of 23 February 2009.

29 Sandler lodged objections to those two decisions of the HZA, both of which were dismissed. Sandler subsequently brought actions against each of those dismissal decisions before the referring court, which joined the two actions.

30 Sandler argues before the referring court that an inaccuracy in a EUR.1 certificate drawn up by the customs authorities of a non-member country in the context of the system of administrative cooperation is an error which the economic operator cannot detect. The economic operator is not responsible for any examination functions, and nor is it possible for the required stamp specimen to be inspected with the customs authorities of the State of import. Sandler adds that the initial EUR.1 certificates had been drawn up correctly from a substantive viewpoint and that only the stamp used was incorrect. Thus nor was it a case of invalid EUR.1 certificates. In affixing an incorrect stamp, the Nigerian authorities merely made an administrative error, which they rectified by issuing subsequent, revised EUR.1 certificates.

31 In support of its argument, Sandler states that, in the present case, instead of relying on the procedure provided for in Article 16 of Protocol No 1, a post-clearance examination of the EUR.1 certificates under Article 32 of that protocol ought to have been undertaken, since the original EUR.1 certificates drawn up by the competent authorities of a State party to the Cotonou Agreement should not have been declared invalid unilaterally, without the involvement of the authorities of that State. In the event of a refusal of a EUR.1 certificate on the basis of Article 16 of Protocol No 1, the preferential origin of the goods would be incontestable and only a due issuance of the EUR.1 certificates would, for internal administrative reasons, be problematic. Since the HZA did not request a post-clearance examination under Article 32 of Protocol No 1, it is reasonable to consider that there was no doubt as to the authenticity of the document used to claim the preferential rate.

32 The HZA states, in essence, that Article 16 of Protocol No 1 was applicable to the present case because the original EUR.1 certificates bore a stamp which was clearly different from the specimens notified by the Nigerian authorities. The technical errors referred to in Article 16 of Protocol No 1 concern more serious deficiencies than those referred to in Article 32 of that protocol. The HZA adds that, in the present case, the stamp used was completely different from the specimens notified and bore no similarity to them, so that it was not a case of 'not matching' a notified specimen, as referred to in

point 17 of the Notes, which might reasonably give rise to doubt as to the authenticity of the EUR.1 certificate. The difference between the stamps at issue in the main proceedings and the specimens notified by the Nigerian authorities is so considerable that the application of the preferential customs duty is unthinkable.

33 The referring court takes the view that in order to rule on the dispute before it, it is decisive to ascertain whether the HZA may refuse Sandler's request for repayment on the ground that, under Article 889 of Regulation No 2454/93, repayment may be granted only if the preferential rate which was in effect at the time when the goods were placed in free circulation is still applicable when the request for repayment is made. Although Article 889 of Regulation No 2454/93 does not preclude repayment in such circumstances, the question arises as to whether the authorities of a Member State may, without issuing a formal request for a post-clearance examination under Article 32 of Protocol No 1, examine and/or refuse EUR.1 certificate issued by an ACP State when the customs authorities of that State used a stamp which is different from the one notified to the Commission and, therefore, refuse to grant a preferential customs duty rate to the importer on their own initiative.

34 In those circumstances, the Finanzgericht München (Finance Court, Munich) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the second indent of the first subparagraph of Article 889(1) of [Regulation No 2454/93] to be interpreted as only regulating cases of requests for repayment where goods were first released for free circulation at the duty rate applicable to non-member countries and it subsequently transpires that at the time when the customs declaration was accepted a reduced or zero rate of import duty (in this case a preferential rate) actually existed, but had already expired when the request for repayment was made, with the result that the expiry of a temporary preferential tariff arrangement cannot be invoked against an operator in connection with the submission of a request for repayment where the preferential tariff rate is granted at the time of placing into free circulation and it is only upon post-clearance recovery by the administration that the preferential rate is refused and the customs duty rate applicable to goods originating from non-member countries is applied?

2. Are Article 16(1)(b) and/or Article 32 of Protocol No 1 … to be interpreted to the effect that the customs authorities of the State of import, when the State of export has placed on [a EUR.1 certificate] a stamp other than the specimen of the stamp notified by the authorities of the State of export, may, in case of doubt, treat such a variation as a technical deficiency covered by Article 16(1)(b) of Protocol No 1 … and accordingly refuse to accept that [certificate] without the involvement of the customs authorities of the State of export?

3. If the answer to Question 2 is in the affirmative:

   (a) Should Article 16(1)(b) of Protocol No 1 … be applied also when the technical deficiency is not detected immediately upon import, but only during a subsequent verification by the customs authorities?

   (b) Must Article 16(4) and (5) of Protocol No 1 … be interpreted to the effect that a technical deficiency is to be considered rectified where, in the case of [a EUR.1 certificate] issued retrospectively, one of the indications provided for in Article 16(4) of Protocol … has not been entered, in its precise wording, in the "Remarks" box, but only a phrase to the effect that the [EUR.1 certificate] was issued retrospectively?

4. If Question 2 is answered in the negative:

   Is Article 236(1) of the Customs Code to be interpreted to the effect that import duties were not legally owed and were therefore wrongly recovered pursuant to Article 220(1) of the Customs Code where the [EUR.1 certificates] originally used could not be declared invalid by the customs authorities of the State of import without the involvement of the customs authorities of the State of export?

5. Similarly, in the case of [a EUR.1 certificate] issued retrospectively pursuant to Article 16 of Protocol No 1 …, is the repayment of already recovered and paid import duties under Article 889 of [Regulation No 2454/93] possible only if the preferential tariff rate is still in effect at the time of the request for repayment?'

The questions referred for a preliminary ruling

Consideration of the first question

35 By its first question, the referring court asks, in essence, whether the second indent of the first subparagraph of Article 889(1) of Regulation No 2454/93 must be interpreted as precluding a request for repayment of customs duties where preferential customs treatment was requested and granted at the time the goods were placed in free circulation and it was only subsequently, in the course of a post-clearance examination after the expiry of the preferential customs arrangement and the re-establishment of the customs duties normally due, that the authorities of the State of import recovered the difference between that and the customs duty applicable to goods originating from a non-member country.

36 As observed by the referring court in its request for a preliminary ruling, the wording of the second indent of the first subparagraph of Article 889(1) of Regulation No 2454/93 makes it clear that the exception to the application of Article 236 of the Customs Code covers only those cases where goods are placed in free circulation subject to the customs duty normally owing but it transpires subsequently that a reduced rate of duty – or even a customs duty exemption – could have been requested, under, for example, a preferential arrangement.

37 Consequently, in a situation such as that of the main proceedings, where preferential customs treatment was requested and granted at the time the goods were placed in free circulation and it was only subsequently, in the course of a post-clearance examination after the expiry of the preferential customs arrangement and the re-establishment of the customs duties normally due, that the authorities of the State of import recovered the difference between that and the customs duty applicable to goods originating from a non-member country, the second indent of the first subparagraph of Article 889(1) of Regulation No 2454/93 does not preclude a request for repayment of that difference.

38 Consequently, the answer to the first question referred is that the second indent of the first subparagraph of Article 889(1) of Regulation No 2454/93 must be interpreted as not precluding a request for repayment of customs duties where preferential customs treatment was requested and granted at the time the goods were placed in free circulation and it was only subsequently, in the course of a post-clearance examination after the expiry of the preferential customs arrangement and the re-establishment of the customs duties normally due, that the authorities of the State of import recovered the difference between that and the customs duty applicable to goods originating from a non-member country.

Consideration of the second question and the first part of the third question

39 By its second question and the first part of its third question, which it is appropriate to consider together, the referring court asks, in essence, whether Articles 16(1)(b) and 32 of Protocol No 1 must be interpreted as meaning that, when it transpires, in the course of a post-clearance examination, that a stamp not matching the specimen notified by the authorities of the State of export was affixed to the EUR.1 certificate, the customs authorities of the State of import may refuse that certificate and return it to the importer in order to allow him to obtain a certificate issued retrospectively pursuant to Article 16(1)(b) of Protocol No 1 rather than triggering the procedure provided for in Article 32 of that protocol.

40 It should be remembered that, under Article 14(1)(a) of Protocol No 1, the presentation of a EUR.1 certificate issued by the customs authorities of the State of export was a procedural condition for allowing products originating from the ACP States to enjoy the advantages of the arrangement introduced by Annex V to the Cotonou Agreement.

41 Article 31(1) of Protocol No 1 provided, moreover, that EUR.1 certificates had to bear a stamp from the customs authorities of the State of export, the specimens of which were notified to the Commission, who notified them to the Member States. Under the second subparagraph thereof, EUR.1 certificates were to be accepted for the application of preferential treatment as from the date on which the necessary information was received by the Commission.

42 It is common ground that the stamps affixed to the EUR.1 certificates at issue in the main proceedings clearly did not match the specimen notified to the Commission by the Nigerian authorities, as those stamp specimens had been in effect since 1 July 2003 until the expiry of the preferential arrangement provided for in Annex V to the Cotonou Agreement, that is, 31 December 2007, without any amendment whatsoever having been notified in the meantime by the Nigerian authorities.

43 It follows that, under the second subparagraph of Article 31(1) of Protocol No 1, the authorities of the Member State of import could not in any event have accepted EUR.1 certificates such as those at issue in the main proceedings.

44 As regards the action to be taken in such a situation by the authorities of the Member State of import, Protocol No 1 does not contain any provision setting out specifically the respective scopes of the procedure referred to in Article 16 of that protocol and that provided for in Article 32 thereof. That protocol thus leaves a certain margin of discretion to the authorities of the Member State of import.

45 The choice between those two procedures must be made taking into account not only the legal rules laid down in Protocol No 1 and the Notes but also all the aspects of the case, including the facts.

46 The Notes, which are not binding on the authorities of the Member States but nevertheless are a useful tool for ensuring uniform application of the provisions of the Protocol No 1, do not provide any guidance in this area.

47 Points 10 and 17 of the Notes are liable to guide the conduct of an authority faced with a dissimilarity between the stamps used and the notified specimen. Point 10 of those notes recommends, in the case of use of ‘a new one which has not yet been notified’, returning the certificate to the importer in order to allow him to obtain a certificate issued retrospectively pursuant to Article 16(1)(b) of Protocol No 1. By contrast, point 17 of those same notes advises, in the event that the stamp used ‘does not match that which has been notified’, sending the certificate for post-clearance examination to the authorities of the State of export pursuant to Article 32 of Protocol No 1.

48 It should be borne in mind, however, that point 10 of the Notes refers to the possibility of parallel application of Articles 16(1) and 32 of Protocol No 1 and, consequently, confirms that, contrary to the Commission's position expressed in its written observations, the respective scopes of those provisions are not mutually exclusive. Point 10 provides that the authority of the State of import who returns a refused certificate to the importer in order to allow him to request a new certificate issued retrospectively pursuant to Article 16(1) of Protocol No 1 must keep a photocopy of the refused certificate inter alia 'for the purposes of post-clearance verification' pursuant to Article 32 of Protocol No 1.

49 It is settled case-law that the system of administrative cooperation established by a protocol stating, in an annex to an agreement between the European Union and a non-member State, the rules concerning the origin of goods is based on mutual trust between the authorities of the importing Member States and those of the exporting State and that the cooperation established by a protocol with regard to the origin of goods can function only if the importing State accepts the determinations legally made in that regard by the exporting State (see Case C-409/10 *Afasia Knits Deutschland* [2011] ECR I-13331, paragraphs 28 and 29 and the case-law cited).

50 However, the requirement of mutual trust is not called into question by the fact that Protocol No 1, depending on the circumstances, allows the authorities of the State of import to choose between the procedures provided for in Articles 16 and 32 thereof. Contrary to the views expressed by Sandler and the Commission, both of those procedures require the involvement of the authorities of the State of export; the only difference consists in whether those authorities are contacted by the authorities of the Member State of import pursuant to Article 32 of Protocol No 1 or by the importer pursuant to Article 16(1) of Protocol No 1. In both cases, it is only after the authorities of the State of export have been involved that the products originating from the ACP State in question will be permitted to benefit from the arrangement introduced by Annex V to the Cotonou Agreement. Thus, under Article 16 of Protocol No 1, it was the authorities of the State of export who could issue a EUR.1 certificate retrospectively, following a check of the statements contained in the exporter's application. Similarly, the checks provided for by Article 32 of that protocol were carried out by the authorities of the State of export in order to confirm the authenticity of the EUR.1 certificates and the origin of the products.

51 Nor is it possible to accept the Commission's argument that it is only when the authorities of the Member State of import suspect that there are new stamps and that they will be notified by the non-member State that those authorities may refuse the EUR.1 certificate, whereas if they do not believe that new stamps will be notified to them, they have no choice but to undertake the post-clearance examination procedure provided for by Article 32 of Protocol No 1. It would be impossible in practice for the authorities of the Member State of import to distinguish between those two scenarios.

52 As regards the issue whether, in the case of non-matching stamps, such as those at issue in the main proceedings, is detected not directly at the time of import but only in the course of a post-clearance examination, the authorities of the Member State of import may still refuse a EUR.1 certificate and order the importer to comply with Article 16(1)(b) of Protocol No 1, it should be noted that the concept of 'importation' within the meaning of that provision, must, as pointed out by the Commission, be construed broadly and therefore in principle as covering the entire period up to the time all of the importer's obligations are fulfilled.

53 According to the wording of Article 23 of Protocol No 1, proof of origin had to be presented to the customs authorities in accordance with the procedural rules in force in the State of import, which means, in a case such as that in the main proceedings, inter alia in accordance with the Customs Code.

54 Article 77(2) of the Customs Code specified in that regard that where the customs declaration was made by means of a data-processing technique, as is the case in the main proceedings here, the customs authorities could accept that the EUR.1 certificates not be presented with the customs declaration, although they had to be kept available for those authorities in order to enable them to be able to conduct subsequent checks. Article 16 of the Customs Code further provided that the persons concerned had to keep all documents and information for the period laid down in the provisions in force and for at least three calendar years, irrespective of the medium used, whilst Article 221(3) of the Customs Code, read in conjunction with Article 201(2) thereof, permitted the duties to be communicated up to three years after the time of acceptance of the customs declaration.

55 Given those considerations, the wording 'was not accepted at importation for technical reasons' in Article 16(1)(b) of Protocol No 1 must be read in conjunction with Article 23 of that protocol and Article 77(2) of the Customs Code, to the effect that those words refer to the time when the country of import actually examines the EUR.1 certificates for the first time, in accordance with its procedural rules. The same wording must therefore apply as well at the time of a post-clearance examination.

56 Consequently, the answer to the second question and the first part of the third question is that Articles 16(1)(b) and 32 of Protocol No 1 must be interpreted as meaning that if it transpires in a post-clearance examination that a stamp not matching the specimen notified by the authorities of the State of export was affixed to the EUR.1 certificate, the customs authorities of the State of import may refuse that certificate and return it to the importer in order to allow him to obtain a certificate issued retrospectively pursuant to Article 16(1)(b) of Protocol No 1 rather than triggering the procedure provided for in Article 32 of that protocol.

Consideration of the second part of the third question

57 By the second part of its third question, the referring court asks, in essence, whether Article 16(4) and (5) of Protocol No 1 must be interpreted as meaning that a EUR.1 certificate bearing, in box 7 thereof, entitled 'Remarks', not the wording specified in Article 16(4), but carries an indication to the effect that the EUR.1 certificate was issued pursuant to Article 16(1) of that protocol, must, in circumstances such as those of the main proceedings, be deemed to be a EUR.1 certificate issued retrospectively by virtue of which the goods in question may receive the benefit of the arrangement introduced by Annex V to the Cotonou Agreement.

58 It should be borne in mind in that regard that, under Articles 14 and 15(7) of Protocol No 1, the EUR.1 certificate must, as a rule, have been issued at the time of actual export of the goods, in order to be able to be presented to the customs authorities of the State of import.

59 Article 16(1) of Protocol No 1 is an exception to that rule in that it allows, by way of exception and by derogating expressly from Article 15(7) of that protocol, the establishment of EUR.1 certificates after export, inter alia when it is demonstrated that a EUR.1 certificate was issued but not accepted at the time of import for technical reasons.

60 In that context Article 16(4) and (5) of Protocol No 1 requires that EUR.1 certificates issued retrospectively contain, in the box 'Remarks', one of the specific indications, the wording of which is to be found in Article 16(4): 'issued retrospectively'.

61 It is common ground, however, that in the situation which gave rise to the main proceedings, the EUR.1 certificates presented by Sandler after the HZA refused to accept the EUR.1 certificates initially presented by it, although indeed bearing the stamps which matched the specimen notified to the Commission, did not contain, in the 'Remarks' box, the wording specified by Article 16(4) of Protocol No 1, but the words 'being issued in replacement of EUR.1 …', together with the date and number of the EUR.1 certificates refused by the HZA.

62 The latter wording could give the impression that the second certificates presented by Sandler had been issued pursuant to Article 18 of Protocol No 1, concerning replacement certificates.

63 According to the referring court, however, by that wording the issuing authority essentially stated, with sufficient precision, that the EUR.1 certificates issued subsequently were by way of replacement for the preferential treatment documents initially issued. Nor is there anything in the file submitted to the Court to indicate that Sandler or the authorities of the State of export had intended to rely on Article 18 of Protocol No 1 or that the conditions for application of that provision were met.

64 In such circumstances, EUR.1 certificates such as those at issue in the main proceedings could, in principle, be equated with EUR.1 certificates issued retrospectively, and the authorities of the State of import could not refuse to accept them per se.

65 The authorities of the State of import are thus required, following an assessment of all relevant circumstances, either to accept the new EUR.1 certificates as rectifying the technical error made in the first set of certificates or, if they have well-founded doubts as to the authenticity of the documents in question or as to the originating status of the products concerned, initiate the control procedure provided for by Article 32 of Protocol No 1.

66 Therefore, the answer to the second part of the third question is that Articles 16(4) and (5) and 32 of Protocol No 1 must be interpreted as precluding the authorities of a State of import from refusing to accept, as a EUR.1 certificate issued retrospectively within the meaning of Article 16(1) of that protocol, a EUR.1 certificate which, whilst complying in all other respects with the requirements of the provisions of that protocol, does not contain, in the 'Remarks' box, the wording specified by Article 16(4) of Protocol No 1, but an indication to the effect that the EUR.1 certificate was issued pursuant to Article 16(1) of that protocol. In cases of doubt as to the authenticity of that document or the originating status of the products concerned, those authorities are required to initiate the control procedure provided for in Article 32 of that protocol.

Consideration of the fourth question

67 In view of the answer to the second question, it is unnecessary to reply to the fourth question.

Consideration of the fifth question

68 In view of the answer to the first question, it is unnecessary to reply to the fifth question.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

1. **The second indent of the first subparagraph of Article 889(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended most recently by Commission Regulation (EC) No 214/2007, must be interpreted as not precluding a request for repayment of customs duties where preferential customs treatment was requested and granted at the time the goods were placed in free circulation and it was only subsequently, in the course of a post-clearance examination after**

the expiry of the preferential customs arrangement and the re-establishment of the customs duties normally due, that the authorities of the State of import recovered the difference between that and the customs duty applicable to goods originating from a non-member country.

2. **Articles 16(1)(b) and 32 of Protocol No 1 of Annex V to the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, and approved in behalf of the Community by Council Decision 2003/159/EC of 19 December 2002, must be interpreted as meaning that if it transpires in a post-clearance examination that a stamp not matching the specimen notified by the authorities of the State of export was affixed to the EUR.1 certificate, the customs authorities of the State of import may refuse that certificate and return it to the importer in order to allow him to obtain a certificate issued retrospectively pursuant to Article 16(1)(b) of Protocol No 1 rather than triggering the procedure provided for in Article 32 of that protocol.**

3. **Articles 16(4) and (5) and 32 of Protocol No 1 must be interpreted as precluding the authorities of a State of import from refusing to accept, as a EUR.1 certificate issued retrospectively within the meaning of Article 16(1) of that protocol, a EUR.1 certificate which, whilst complying in all other respects with the requirements of the provisions of that protocol, does not contain, in the 'Remarks' box, the wording specified by Article 16(4) of Protocol No 1, but an indication to the effect that the EUR.1 certificate was issued pursuant to Article 16(1) of that protocol. In cases of doubt as to the authenticity of that document or the originating status of the products concerned, those authorities are required to initiate the control procedure provided for in Article 32 of that protocol.**

[Signatures]