Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

11 December 2017*

(Customs union — Imports of bananas from Equador — Post-clearance recovery of import duties — Application for the remission of import duties — Decision adopted following the annulment by the General Court of an earlier decision — Reasonable time)

In Case T-125/16,

Firma Léon Van Parys NV, established in Anvers (Belgium), represented by P. Vlaemminck, B. Van Vooren, R. Verbeke and J. Auwerx, lawyers,

applicant,

v

European Commission, represented by A. Caeiros, B.-R. Killmann and E. Manhaeve, acting as Agents,

defendant,

APPLICATION, first, pursuant to Article 263 TFEU, for annulment of Commission Decision C(2016) 95 final of 20 January 2016 finding that post-clearance entry in the accounts of import duties is justified and that remission of those duties is justified with regard to a debtor and is in part justified in the particular case of another debtor but in another part not justified with regard to that particular debtor, and modifying Commission Decision C(2010) 2858 of 6 May 2010, and, second, for a declaration that Article 909 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1) had effect with regard to the applicant following the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136),

THE GENERAL COURT (Fourth Chamber),

composed of H. Kanninen, President, J. Schwarcz (Rapporteur) and C. Iliopoulos, Judges,

Registrar: G. Predonzani, Administrator,

having regard to the written part of the procedure and further to the hearing on 4 July 2017,

gives the following

* Language of the case: Dutch.

Judgment

Background to the dispute

1 Between 22 June 1998 and 8 November 1999, the applicant, Firma Léon Van Parys NV, through its customs agent, lodged with the Antwerp Customs Office (Belgium) 116 import declarations for bananas from Ecuador.

2 The import declarations were supported by 221 import licences, apparently issued by the Kingdom of Spain, which allowed bananas to be imported into the European Community as part of a tariff quota with payment of a reduced customs duty of EUR 75 per tonne, under Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1), as amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105), for the period ending on 31 December 1998, and under Regulation No 404/93 and Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Regulation No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32), for the period beginning 1 January 1999.

3 By letter dated 1 February 2000, the European Anti-Fraud Office (OLAF) informed the Belgian customs authorities that forged Spanish import licences, bearing forged stamps from the Spanish authority responsible for the issue of those documents, had been used to import bananas into the Community. In the course of an investigation the customs authorities discovered that the 221 import licences presented by the applicant to the Antwerp Customs Office, during the period from 22 June 1998 to 8 November 1999, were forged Spanish licences.

4 On 5 July 2002, the Belgian customs and excise authorities drew up a report which they sent to the applicant and the customs agent, among others, listing the findings made. According to the Report of 5 July 2002, 233 import licences used by the applicant represented forged Spanish licences, 221 of those licences having been presented in Antwerp and 12 in Hamburg (Germany). As regards the period from 1 January to 8 November 1999, 107 licences were involved, all presented by the applicant to the Antwerp Customs Office.

5 By letter of 26 July 2002 the Belgian customs and excise authorities required the applicant and the customs agent to pay the amount of EUR 7 084 967.71 for the banana imports dating from 1 January 1998 to 8 November 1999, corresponding to the application of a customs duty of EUR 850 per tonne imported, under Article 18(2) of Regulation No 404/93.

6 On 28 November 2003 a supplementary report was drawn up by the Belgian customs and excise authorities, which stated, inter alia, that requests for the taking of evidence on commission had been sent to Portugal, Spain and Italy as part of the investigation into the forged Spanish import licences.

7 After the applicant and the customs agent had challenged the recovery of post-clearance customs duties imposed on them, the Belgian customs and excise authorities were of the opinion that the request for waiver of post-clearance recovery and for remission of duties should be granted, and by letter dated 14 December 2007 transferred the file to the Commission of the European Communities so that it might take a decision, in accordance with Articles 871 and 905 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1), as amended.

8 In its letter of 14 December 2007 the Belgian customs and excise authorities were of the opinion that it was not possible in the present case to apply Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, 'the CCC') as there was insufficient evidence to justify a finding that an error had been committed by either the authorities of the Member States or by the Commission. On the other hand it found that remission of duties was required, under Article 239 of the CCC, as there was a special situation for the purposes of that article, and the applicant and the customs agent had not acted with obvious negligence.

9 On 5 May 2008, 18 and 26 November 2008, 15 January 2009 and 4 March 2010 the Commission issued requests for additional information from the Belgian customs and excise authorities, which answered each of those requests.

10 By a letter dated 8 January 2010 the Commission, on the basis of Article 906a of Regulation No 2454/93, informed the Belgian customs and excise authorities and the applicant that it intended to take a decision unfavourable to the request for remission and repayment of duties. By a letter dated 8 February 2010 the applicant submitted its observations.

11 The applicant's case was examined, in accordance with Articles 873 and 907 of Regulation No 2454/93, by a group of experts composed of representatives of all Member States, at a meeting on 12 April 2010.

12 By Decision C(2010) 2858 final of 6 May 2010, the Commission allowed post-clearance entry in the accounts of import duties (Article 1(1)) and remission of duties in the case of one person liable, the customs agent (Article 1(2)), but not in the particular case of another person liable, namely the applicant (Article 1(3)) ('the first decision').

13 By application lodged at the Registry of the General Court on 11 August 2010, the applicant brought an action for the annulment of the first decision.

14 By judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), the General Court annulled Article 1(3) of the first decision by which the Commission took the view that the remission of duties, pursuant to Article 239 of the CCC was not justified with regard to the applicant.

15 By a first letter of 16 September 2013, the Commission informed the Belgian customs and excise authorities that, following the partial annulment of the first decision, it was necessary to obtain additional information in order to adopt a new decision, and asked those authorities for certain information concerning the imports by the applicant which gave rise to the request for the remission of duties. The Commission also asked the Belgian customs and excise authorities to send the response to the request for information to the applicant and to request a written declaration from the applicant that it had been informed of that response, that it signalled its agreement and had nothing to add, or that it had observations and additional information to submit. Finally, the Commission indicated that the time limit of nine months within which to process the application for the remission of duties laid down in Article 907 of Regulation No 2454/93 was to be extended by the period between 22 August 2013 and the date on which the additional information was received.

16 By a second letter of 16 September 2013, the Commission informed the applicant that, following the partial annulment of the first decision, it had concluded that there was a need for additional information in order to adopt a new decision, and that the time limit of nine months within which to process the application for remission of duties was to be extended by the period between 22 August 2013 and the date on which the additional information was received.

17 The action for annulment lodged by the applicant against the two letters of 16 September 2013 was rejected as manifestly inadmissible by order of 24 June 2014, *Léon Van Parys* v *Commission* (T-603/13, not published, EU:T:2015:610).

18 By a letter of 14 January 2014, the Belgian customs and excise authorities informed the Commission that it found the request for additional information strange, as it had been established that all the import certificates at issue were forged and, therefore, it was impossible to accede to that request.

19 By letter of 24 January 2014, the Commission confirmed to the applicant that it had received the letter from the Belgian customs and excise authorities of 14 January 2014 and informed the applicant that given the lack of response by those authorities to its request for additional information the time limit within which to process the request was still suspended in accordance with Article 907 of Regulation No 2454/93.

20 The action for annulment presented by the applicant against the letter of 24 January 2014 was rejected by order of 26 November, *Léon Van Parys* v *Commission* (T-171/14, not published, EU:T:2014:1025).

21 By letter of 17 June 2014, the Commission again asked the Belgian customs and excise authorities to provide it with the information that it had requested by letter of 16 September 2013. In its letter of 17 June 2014, the Commission included its own calculations in the form of a table.

22 On 10 December 2014, the Belgian customs and excise authorities prepared a draft response to the Commission's letter of 16 September 2013, containing a calculation that that administration planned to send to the Commission and inviting the applicant to submit its observations.

23 By letter to the Commission of 16 February 2015, the Belgian customs and excise authorities submitted their observations on the table sent to it by the Commission and, in particular, they corrected the amounts in rows 18, 60, 67 and 99 of that table.

24 By letter of 16 February 2015, the Commission informed the applicant that it intended to adopt a negative decision concerning its request for the remission of duties.

25 On 10 August 2015, the applicant submitted its observations on the Commission's letter of 16 July 2015.

26 By Decision C(2016) 95 final of 20 January 2016, the Commission granted the post-clearance entry in the accounts of import duties (Article 1(1), to the remission of duties with regard to the customs agent (Article 1(2)), the remission of customs duties with regard to the applicant in the amount of EUR 632 241.28 corresponding to traditional licences (Article 1(3)), but refused the remission of customs duties with regard to the applicant in the amount of EUR 2 996 007.20, corresponding to newcomers' licences (Article 1(4)) ('the contested decision').

27 In recitals 18 to 23 of the contested decision, the Commission stated, in particular, that by the first decision it authorised post-clearance entry in the accounts of import duties (Article 1(1) of the first decision) and remission of duties in the case of one person liable, the customs agent (Article 1(2) of the first decision), but not in the particular case of another person liable, namely the applicant (Article 1(3) of the first decision).

28 In recital 20 of the contested decision it stated that it had made its assessment on the basis of Article 220(2)(b) of the CCC and found that it could not be said that the Spanish authorities had committed an error since they had had no part in drawing up those licences. Furthermore, in recital 23 of the contested decision, the Commission stated that, in the first decision, the Commission examined whether the conditions of Article 239 of the CCC were fulfilled and concluded that the customs agent had not engaged in any deception or negligence and could on that basis benefit from the waiver of entry in the accounts or remission of import duties. In the first decision, the Commission held also that the applicant had not acted diligently and concluded that in consequence it could not benefit from the waiver of recovery and also that it could not be granted the remission of import duties.

29 In recitals 25 to 32 of the contested decision, the Commission recalled that since the General Court had annulled Article 1(3) of the first decision, it should, in accordance with Article 266 TFEU, adopt a new decision within a reasonable period, the only time limit applicable in the present case.

30 As far as concerns the adoption of that new decision, the Commission stated, first, in recital 33 of the contested decision, that a group of experts composed of representatives of all the Member States met to examine the case on 21 September 2015 within the framework of the CCC Committee. Second, it stated, in recital 37 of the contested decision, that it had only focused on whether the second condition laid down in Article 239 of the CCC with regard to the absence of deception or negligence was satisfied.

31 In recital 39 of the contested decision, the Commission also stated that it must be noted that, in its judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), the General Court held that, in its defence, the Commission took the view that the arrangements used by the applicant to obtain use of the import licences were 'unlawful', as they were contrary to the second subparagraph of Article 21(2) of Regulation No 2362/98, which did not allow any transfers of rights arising from an import licence from a newcomer operator to a traditional operator. The General Court added that, on that point, it was clear that the first decision, in so far as it refused the remission of import duties, was not based on the unlawfulness of the arrangements for the purchase of the import licences, but on the obvious negligence on the part of the applicant. The General Court concluded that, therefore, the Commission's argument could not, in the present case, have any bearing on the proper foundation for the refusal to remit the import duties. In the same recital of the contested decision, the Commission concluded that it had also to examine in the new decision whether the arrangements used by the applicant to obtain use of the import licences were lawful, taking into account that the second subparagraph of Article 21(2) of Regulation No 2362/98 did not allow any transfers of rights arising from an import licence from a newcomer operator to a traditional operator. It added that it had also to reassess in the new decision the grounds for establishing whether there was absence of deception or negligence.

32 The Commission held, in recitals 49 and 50 of the contested decision, that, if nothing in the file sufficiently proved a lack of diligence with regard to the traditional operator licences acquired by the applicant regarding the newcomers' licences, a simple examination of the licences should have allowed the applicant to conclude that it could not use the rights based on those licences because that use would be contrary to Article 21(2), second subparagraph, of Regulation No 2362/98.

33 In recital 60 of the contested decision, the Commission therefore decided, first, that by using 'newcomers' licenses, the applicant, which is a traditional operator, had failed to comply with the prohibition laid down in Article 21(2), second subparagraph, of Regulation No 2362/98 and, second, on the basis of Article 239 of the CCC, there was no justification for the remission of the duties in the sum of EUR 2 996 007.20 related to newcomers' licences used by the applicant and covering the period between 1 January and 8 November 1999.

34 Finally, in recital 62 of the contested decision, the Commission stated that the provisions of Article 1(1) and (2) of the first decision had to remain unaltered as they were neither challenged nor annulled by the judgment of 19 November 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136).

Procedure and forms of order sought

35 By application lodged at the Registry of the General Court on 23 March 2016 the applicant brought the present action.

36 The applicant claims that the Court should:

– annul the contested decision;

– declare that Article 909 of Regulation No 2454/93 has produced its full effects with regard to it following the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), so that it benefits from the full remission of the customs debt and interest or costs which are directly or indirectly related to it;

– order the Commission to pay the costs.

37 The Commission contends that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

Law

38 The applicant puts forward five pleas in law in support of its action. The first and second pleas are based on the infringement of Articles 907 and 909 of Regulation No 2454/93 and Article 41 of the Charter of Fundamental Rights of the European Union. The third, relied on in the alternative, is based on the breach of the principle of good administration. The fourth, relied on in the further alternative, alleges a misuse of powers and, the fifth, also in the further alternative is based on an incorrect interpretation of the regulatory framework governing the organisation of the banana market and a breach of the principle of equal treatment.

Admissibility

First head of claim seeking annulment of the contested decision

39 The Commission, without raising a plea of inadmissibility, argues that the action is only admissible as regards Article 1(4) of the contested decision. It submits, first, that the action is inadmissible with respect to Article 1(1) and (2) of the contested decision, since those two provisions are purely confirmatory of Article 1(1) and (2) of the first decision. In that connection, it observes that those two provisions are identical, that they do not contain any new elements and that they were not preceded by a fresh examination of the applicant's situation. Second, it states that since Article 1(3) of the contested decision amended Article 1(3) of the first decision in favour of the applicant, that provision does not adversely affect it and is not challengeable.

40 The applicant replies that the action is rightly brought against the contested decision in its entirety, as the latter is vitiated by illegality on the ground that it is a decision adopted under the combined provisions of Articles 907 and 909 of Regulation No 2454/93 and that the time limit within which to adopt such decision had already expired when it was adopted.

41 It must be recalled that, for an action for annulment brought by a natural or legal person to be admissible, that person must have a vested and present interest in the annulment of the contested act. According to settled case-law, only the acts or decisions in respect of which an action for annulment may be brought are those measures which produce binding legal effects such as to affect the interests of the applicant by bringing about a distinct change in its legal position. In order to ascertain whether

or not a measure which has been challenged produces such effects it is necessary to look to its substance (see, to that effect, judgment of 22 March 2000, *Coca-Cola* v *Commission*, T-125/97 and T-127/97, EU:T:2000:84, paragraph 77 and the case-law cited).

42 In the present case, the applicant does not show how Article 1(1) to (3) of the contested decision changes its situation unfavourably. Paragraphs 1 and 2 which, as regards the duties at issue, repeat the operative part of Article 1(1) and (2) of the first decision, without a fresh examination having been carried out in that regard, does not change its previous situation in that it grants the applicant the remission of import duties of EUR 632 241.28, corresponding to traditional licences. Therefore, it does not appear that the applicant has standing to challenge those provisions, so that the action against them is inadmissible.

43 However, as regards Article 1(4) of the contested decision, which by refusing the remission of duties with regard to the applicant following a fresh examination thus adversely affects its situation, the action is admissible in so far as it is directed against that provision.

The second head of claim, seeking a declaration that Article 909 of Regulation No 2454/93 has produced its full effects with regard to the applicant following the judgment of 19 March 2013, Firma Van Parys v Commission (T-324/10, EU:T:2013:136)

44 It must be held that in proceedings before the European Union judicature there is no remedy whereby the Court can adopt a position by means of a general declaration or statement of principle (judgment of 15 December 2005, *Infront WM* v *Commission*, T-33/01, EU:T:2005:461, paragraph 171; orders of 3 September 2008, *Cofra* v *Commission*, T-477/07, not published, EU:T:2008:307, paragraph 21, and of 24 May 2011, *Nuova Agricast* v *Commission*, T-373/08, not published, EU:T:2011:237, paragraph 46).

45 Therefore, this head of claim must be dismissed.

Substance

46 It must be held that, by the arguments advanced in support of the first four pleas in the action, the applicant essentially challenges the way in which the Commission implemented the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136). It claims, first, that no new decision was necessary. Second, even if such a decision could be adopted, the applicant considers that it should have been taken within a period no longer than the initial time limit of nine months laid down in Article 907 of Regulation No 2454/93. Third, although the Commission had had a reasonable period in which to implement the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), that period could not in any case exceed a further time limit of nine months laid down in Article 907 of Regulation No 2454/93. Finally, fourth, it claims that the partial annulment of the first decision did not confer on the Commission new and full decision-making powers in order to conduct a fresh examination and adopt a new decision based on the grounds already examined by the General Court.

47 The Commission challenges the merits of the first four pleas in the application.

48 According to settled case-law, in order to comply with a judgment annulling a measure and to implement it fully, the institution concerned is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and which constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the

annulled measure (judgments of 26 April 1988, *Asteris and Others* v *Commission*, 97/86, 99/86, 193/86 and 215/86, EU:C:1988:199, paragraph 27, and of 6 March 2003, *Interporc* v *Commission*, C-41/00 P, EU:C:2003:125, paragraph 29).

49 However, Article 266 TFEU requires the institution whose act has been declared void only to take the necessary measures to comply with the judgment annulling that act. Accordingly, that article requires the institution concerned to ensure that any act intended to replace the annulled act is not affected by the same irregularities as those identified in the judgment annulling the original act (judgment of 6 March 2003, *Interporc* v *Commission*, C-41/00 P, EU:C:2003:125, paragraph 30). However, the institutions have broad discretion to decide the measures to put into effect in order to give due effect to an annulling judgment or declaration of invalidity, it being understood that the measures must be compatible with the operative part of the judgment in question and the grounds constituting its essential basis (judgment of 28 January 2016, *CM Eurologistik and GLS*, C-283/14 and C-284/14, EU:C:2016:57, paragraph 76).

50 Furthermore it should be recalled that annulment of a Union measure does not necessarily affect the preparatory acts (judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 73).

51 In that connection, it must be recalled that the obligation of an EU institution to give effect to a judgment of annulment delivered by the European Union judicature derives from Article 266 TFEU. It has been recognised by the Court of Justice that compliance calls for the adoption of a number of administrative measures and is not normally possible immediately: the institution is allowed a reasonable period within which to comply with a judgment annulling one of its decisions (judgment of 19 March 1997, *Oliveira* v *Commission*, T-73/95, EU:T:1997:39, paragraph 41; see also to that effect, judgment of 12 January 1984, *Turner* v *Commission*, 266/82, EU:C:1984:3, paragraphs 5 and 6). The reasonableness of such a period must be appraised in the light of the circumstances specific to each case and, in particular, its context, the various procedural stages followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved (judgment of 15 July 2004, *Spain* v *Commission*, C-501/00, EU:C:2004:438, paragraph 53). Furthermore, whether the period within which an annulling judgment has been complied with is reasonable is a matter to be considered case by case. The reasonableness of the time depends on the nature of the measures to be adopted and the circumstances surrounding each case. Therefore, in this case regard must be had to the various stages involved in the procedure for adoption of the decision (judgment of 19 March 1997, *Oliveira* v *Commission*, T-73/95, EU:T;1997:39, paragraph 45).

52 Finally, it must be stated that, except where the irregularity found rendered the entire procedure null and void, those institutions may, in order to adopt an act intended to replace a preceding act annulled or declared invalid, reopen the procedure at the stage at which that irregularity was committed (see, to that effect, judgment of 29 November 2007, *Italy* v *Commission*, C-417/06 P, not published, EU:C:2007:733, paragraph 52 and the case-law cited).

53 It is in the light of those findings that the first four pleas must be examined, starting with the arguments relied on in the first, second and fourth pleas that it is appropriate to deal with together.

The first, second and fourth pleas: infringement of Articles 907 and 909 of Regulation No 2454/93, Article 41 of the Charter of Fundamental Rights and misuse of power

54 In the present case, it must be stated that by the present action, the applicant challenges a decision taken by the Commission to replace the first decision which gave a ruling on its application for import duties, which was partially annulled by judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), on the ground that the factors on which the Commission based its decision did not establish a lack of diligence on the part of the applicant.

55 Therefore, the Commission was obliged to re-examine the evidence in the file and to take a fresh decision on the application for remission of duties which was annulled in order to correct the irregularities found (see, by analogy, judgment of 19 March 1997, *Oliveira* v *Commission*, T-73/95, EU:T:1997:39, paragraph 32).

56 In so doing, it was required to take account of all factual and legal information available at that time. The Commission's obligation to apply due diligence in the decision-making process and to adopt its decision on the basis of all information which might have a bearing on the result derives in particular from the principles of sound administration and equal treatment. In those circumstances, the Commission cannot be criticised for resuming its inquiries and compiling a complete file (see, by analogy, judgment of 19 March 1997, *Oliveira* v *Commission*, T-73/95, EU:T:1997:39, paragraph 32).

57 Furthermore, the applicant's argument to the effect that even if the Commission were in a position to adopt a new decision, that decision had to be limited to the measures necessary in order to enforce the decision of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), and could not, in any event, be based on the ground of failure to comply with Article 21(2) of Regulation No 2362/98, which has already been discussed, must be rejected.

58 In that connection, it must be held that that ground did not appear in the reasoning of the first decision and, therefore, it was not subject to the review of the General Court 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136). Although the question of the failure to comply with Article 21(2) of Regulation No 2362/98 was relied on by the Commission in its defence in the case cited above, the General Court held, in paragraphs 90 and 91 of that judgment, that the first decision was not based on that issue and that, therefore, the Commission's argument cannot have any bearing on the proper foundation for the refusal to remit the import duties. Therefore, although the question of the failure to comply with Article 21(2) of Regulation No 2362/98 was mentioned by the General Court in paragraph 90 of the judgment 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), it did not make any ruling on the merits.

59 Furthermore, as regards the argument in essence that the Commission could, or in any event should, have relied on the ground relating to the non-compliance with Article 21(2) of Regulation No 2362/98, since that ground was already known when the first decision was adopted, it must be held that the ground relating to the applicant's clear negligence adopted by the Commission in the first decision was, in theory, sufficient in itself to justify the remission of import duties. The Commission is free to adopt the ground it considers most relevant to justify its decision, unless an error committed in the choice of that ground prevents it from subsequently adopting a ground that it could have relied on in the first decision (see, by analogy, judgment of 14 September 2016, *National Iranian Tanker Company* v *Council*, T-207/15, not published, under appeal, EU:T:2016:471, paragraph 54).

60 Therefore, without prejudice to the examination of the merits of the ground adopted in the contested decision, that is the failure to comply with Article 21(2) of Regulation No 2362/98, which is covered by the fifth plea, it must be held that the Commission was entitled to base its decision on the ground alleging failure to comply with that provision in order to refuse the remission of import duties in the contested decision. Moreover, it must be stated that the fact that that ground was not raised in the

first decision in no way prevented the Commission from relying on it in the contested decision, since, according to settled case-law, the author of an annulled act may rely, in its new decision, on grounds other than those on which it based its first decision (see, to that effect, judgment of 5 September 2014, *Éditions Odile Jacob* v *Commission*, T-471/11, EU:T:2014:739, paragraph 125 and the case-law cited).

61 As regards the plea by which the applicant criticises the Commission for deciding that the finding of illegality of the first decision in the grounds for the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), enabled it to remedy that illegality in the decision intended to replace it within a reasonable period must be rejected. It must be stated that such a period is fully consistent with the case-law cited in paragraph 51 above.

62 Similarly the applicant's argument that, essentially, following the partial annulment of the first decision with *ex tunc* effect, the Commission had no more than five days in which to adopt a decision regarding its request for remission, in order to comply with the time limit laid down in Article 907 of Regulation No 2454/93, must be rejected. As the Commission rightly submits, the nine-month time limit laid down by that provision cannot be applicable in a procedure re-opened pursuant to Article 266 TFEU.

63 In that connection, as set out in paragraph 52 above, where an irregularity has been committed the institutions in question must be able to reopen the procedure at the stage of the investigation at which the irregularity was committed or to commence a new procedure if the irregularity established vitiated with illegality the entire procedure. It is true, as is clear from Article 907 of Regulation No 2454/93, that the decision establishing either that the particular situation examined justifies the grant of the reimbursement or remission or that it does not, must be taken within nine months. However, it must be stated that Article 907 concerns only the initial procedure and not the procedure which has been re-opened following the annulling judgment. It follows that, since the procedure at issue in the present case have been re-opened, the nine-month time limit laid down for the initial procedure is not applicable to it (see, by analogy, judgment of 28 January 2016, *CM Eurologistik and GLS*, C-283/14 and C-284/14, EU:C:2016:57, paragraphs 57 to 61). Therefore, the applicant's argument that the Commission denied the *ex tunc* effect of the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), holding that it had a reasonable period within which to remedy the illegality found in that judgment and not a time limit of five days within which to comply with the initial time limit of nine months laid down in Article 907 of Regulation No 2454/93 should be rejected.

64 Finally, the argument that, in essence, the Commission's repeated requests to the Belgian authorities were completely superfluous and merely served to unduly suspend the time limit laid down in Article 907 of Regulation No 2454/93 must be dismissed. It cannot be validly argued that the Commission sent the requests to the Belgian authorities with the sole aim of suspending that time limit since it was not applicable in any event.

65 In the light of all the foregoing considerations, the first second and fourth pleas must be dismissed.

The third plea, alleging an infringement of the principle of proportionality

66 By that plea, the applicant essentially criticises the Commission for holding, in recital 32 of the contested decision, that the reasonable period provided for by Article 266 TFEU could, without any limitation, be longer than the nine-month time limit laid down in Article 907 of Regulation No 2454/93 and that, in addition, the benefit of the expiry of the time limit laid down in Article 909 thereof also ceased to be applicable. It argues that even if the Commission had a reasonable period within which to implement the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), that period could not in any even exceed the new time limit of nine months laid down in Article 907 of Regulation No 2454/93. Therefore, it considers that even if the

Commission had a new nine-month period within which to adopt a decision from the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), that time limit expired, taking account of the various suspensions due to requests for information by the Commission, on 11 June 2015.

67 Furthermore, the applicant criticises the Commission for having breached the principle of legal certainty because, initially and during the decision-making procedure preceding the adoption of the contested decision, it repeatedly referred to the application of the time limit laid down in Article 907 of Regulation No 2454/93, read together with Article 909 thereof, then, on the expiry of the new time limit which was alleged to be non-existent and erroneously extended, it stated that the only time limit applicable was the reasonable period deriving from Article 266 TFEU.

68 The Commission contests the merits of that plea.

69 First, it submits that it is pointless to refer to Article 907 of Regulation No 2454/93 in order to calculate the period within which to adopt a fresh decision from the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), since neither that provision nor Article 909 of Regulation No 2454/93 was applicable in a procedure under Article 266 TFEU. Second, it states that it is possible that the reasonable period is longer than the time limit laid down in Articles 907 and 909 of Regulation No 2454/93. Third, it considers that the contested decision was the appropriate measure to eliminate the illegality found by the General Court with respect to the first decision, within a reasonable time, having regard to the circumstances specific to that case. In that regard, it claims that most of the time needed to adopt the contested decision was due to the fact that the Belgian customs authorities did not respond to the Commission's request in spite of numerous reminders, and the fact that the latter had exclusive competence to give a decision on the customs debt. Furthermore, the Commission adds that, before making its decision, it had heard the applicant and a group of experts composed of representatives of all the Member States, which met on 21 September 2015 in order to examine the case.

70 Fourth, the Commission states that, in any event, even if it were established that it had failed to act within a reasonable period, that would not have resulted in the annulment of the contested decision. First, the applicant does not claim that the time limit which expired adversely affected it and undermined its rights of defence. The Commission recalls that part of the delay was due specifically to the fact that it considered it was necessary to hear the applicant before making its decision in order to fully protect the applicant's rights of defence. Second, it considers that the failure to comply with a procedural rule, such as the reasonable period, cannot constitute an infringement of an essential procedural requirement in the present case, since even if there had not been such an infringement, the content of the contested decision would not have been different.

71 As a preliminary point it must be recalled that, following the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), which partially annulled the first decision, Article 907 of Regulation No 2454/93 was no longer applicable in the procedure re-opened in order to adopt the contested decision which was intended to replace the first decision, since only the reasonable period was applicable in accordance with the case-law (see paragraph 63 above).

72 As the applicant submits, it appears that the facts of the present case indicate that the reasonable period was exceeded.

73 The relevant time limit in the present case, for the purposes of examining whether the requirement of a reasonable period was observed, is the time limit which expired between the delivery of the annulling judgment on 19 March 2013 and the date on which the contested decision was adopted, on 20 January 2016, that is a period of 34 months, over two and a half years. More specifically, five months after the delivery of the annulling judgment, on 21 August 2013, the date on which the first request for

additional information was sent by the Commission to the Belgian authorities, the Commission began to re-constitute and re-examine the file which, after the reception of the information requested from the Belgian customs authorities, led 29 months later to the contested decision.

74 In order to justify that period, the Commission claims, on one hand, that the greater part of the time required in order to adopt the contested decision is due to the fact that the Belgian customs authorities did not reply to the Commission's request, in spite of several reminders and, on the other hand, that before adopting its decision, on 21 September 2015 it heard the applicant and a group of experts composed of representatives of all the Member States, who met in order to examine the case.

75 In that connection, it suffices to recall that, even if the requests for information sent by the Commission to the Belgian customs authorities were able to suspend the nine-month time limit, which is not the case as the mechanism laid down in Article 907 of Regulation No 2454/93 could not be applied again, more than 10 months had elapsed between the response of those authorities and the adoption of the contested decision.

76 In the present case, it must be held that no decision to be taken by the Commission or which has been taken by it can justify such a period. It is true that the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), obliged the Commission to re-examine the evidence in the file (see paragraph 55 above). However, it must be held, as the applicant submits, that there is no evidence that following that judgment the Commission constituted a new file or a fortiori presented or uncovered new facts.

77 Moreover, it must be recalled that the Commission was already very familiar with the case. As is clear, in particular, from a comparison between the first decision and the contested decision, the recital of the facts being identical in both, the Commission was required, on one hand, to establish the applicant's negligence, not as to the manner in which it received the import licences, but on its use of certificates intended for newcomer operators which is clearly prohibited by Article 21(2) of Regulation No 2362/98 and, on the other hand, to calculate the breakdown between the amounts corresponding to traditional operators' licences and those corresponding to newcomers' licences. The Commission submitted at the hearing that the main reason for its re-examination of the file was to calculate that breakdown, which had not been communicated to it before the adoption of the contested decision, and that it had been unable to determine the basis of the information which had been communicated to it by the Belgian customs authorities.

78 However, it does not appear and furthermore the Commission has made no mention of the fact that it made a full re-examination of the file. In particular, it states in its pleadings, first, that following the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), 'it could limit its examination to verifying whether the operator was guilty of deception or clear negligence in accordance with Article 239 of the CCC' and, second, that 'since it was not contested [in that judgment] that it was a special situation, the only issue was whether the applicant was guilty of deception or clear negligence'.

79 In light of the foregoing, it must be held therefore that, having regard to the nature of the measures to be taken and the attendant circumstances of the case, the Commission did not comply with a reasonable period in its conduct of the procedure which led to the adoption of the contested decision.

80 However, the Commission claims, during the written and oral procedure, that that fact cannot lead to the annulment of the contested decision on the ground that the applicant had failed to establish that a shorter period would have led to a different decision to the one adopted, nor has it established that its rights of defence were adversely affected as a result of the excessive length of the administrative procedure (see paragraph 70 above).

81 In that connection, it must be observed that it is clear from settled case-law that breach of the principle of a reasonable period justifies the annulment of a decision taken following the administrative procedure only if it also involves a breach of the rights of defence of the person concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure (see judgment of 13 December 2016, *Al-Ghabra* v *Commission*, T-248/13, EU:T:2016:721, paragraph 62 and the case-law cited).

82 Similarly, it must be recalled that a breach of the 'reasonable time' principle does not, as a general rule, warrant annulment of a decision adopted following an administrative procedure. It is only where the elapsing of an excessive period is likely to affect the content itself of the decision adopted at the end of the administrative procedure that failure to observe the reasonable time principle affects the validity of that administrative procedure (see judgment of 7 June 2013, *Italy* v *Commission*, T-267/07, EU:T:2013:305, paragraph 80 and the case-law cited).

83 In the present case, in order to give a ruling on whether the non-compliance with the reasonable time may lead to the annulment of the contested decision, reference should be made to the relevant procedural rules on the remission of customs duties in the present case, namely Articles 235 to 239 of the CCC and Articles 878 to 909 of Regulation No 2454/93.

84 According to those provisions, application for remission of import duties must be made by specific request by the person concerned (Article 878(1) of Regulation No 2454/93). That application must be lodged with the competent customs authority (Article 879(1) of Regulation No 2454/93). When the appropriate customs authority has all the necessary particulars, it gives its decision in writing on the application for remission (Article 886(1) of Regulation No 2454/93).

85 However, where the customs authority is unable to make a decision on the basis of Article 899 et seq. of Regulation No 2454/93, which describes a number of situations in which remission may or may not be granted, and 'the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned', the Member State to which the authority belongs is to transmit the case to the Commission (Article 905(1) of Regulation No 2454/93). The file sent to the Commission must include all the facts necessary for a full examination of the case (Article 905(3) of Regulation No 2454/93). Within 15 days of receipt of the file, the Commission is to forward a copy thereof to the Member States (first paragraph of Article 906 of Regulation No 2454/93). Article 906a of Regulation No 2454/93 states that where, at any time in the procedure provided for in Articles 906 and 907, the Commission intends to take a decision unfavourable towards the applicant for repayment or remission, it is to communicate its objections to him/her in writing, together with all the documents on which it bases those objections, the applicant having one month in which to express his/her point of view.

86 After consulting a group of experts composed of representatives of all Member States, meeting within the framework of the Committee to consider the case in question, the Commission must decide whether or not the special situation which has been considered justifies repayment or remission (first paragraph of Article 907 of Regulation No 2454/93). That decision must be taken within nine months of the date on which the file transmitted by the Member State is received by the Commission (second paragraph of Article 907) and the Member State concerned must be notified of that decision as soon as possible (Article 908(1)). On the basis of that Commission decision, the decision-making customs authority must decide whether to grant or refuse the application for remission made to it (Article 908(2) of Regulation No 2454/93).

87 Where the Commission has found it necessary to ask for additional information from the Member State in order to reach its decision, the nine months are to be extended by a period equivalent to that between the date the Commission sent the request for additional information and the date it received that information. The person applying for repayment or remission must be notified of the extension (third paragraph of Article 907 of Regulation No 2454/93). Where the Commission has notified the person applying for repayment or remission of its objections in accordance with Article 906a, the time limit of nine months must be extended by one month.

88 Finally, under Article 909, if the Commission fails to take a decision within the time limit set in Article 907, the national customs authority is to grant the application.

89 It follows from the provisions cited above that Regulation No 2454/93 is intended to lay down certain rules the application of which aims to lead to greater legal certainty as is clear from its recitals, and that it laid down strict time limits to be complied with both by the applicant and the Commission in order to deal with a request for remission of import duties.

90 It is clear from Article 907 of Regulation No 2454/93 that, although the nine-month time limit the Commission has in which to adopt its decision may be suspended in certain circumstances, the decision on the request for remission of duties must be given within the time limit laid down by Article 907, second paragraph, of Regulation No 2454/93, it being stated that the decision-making customs authority is to grant the application pursuant to Article 909 thereof.

91 In the present case, if the Commission acted within the framework of Regulation No 2454/93, it must be observed that its decision given after the nine-month time limit, including suspensions, laid down by Article 907 of that regulation, would have the result that the decision-making customs authority would grant the applicant's request.

92 In the circumstances of the present case, it is true that the system put in place, and in particular the nine-month time limit laid down by Article 907 of Regulation No 2454/93, were no longer binding on the Commission in procedures opened under Article 266 TFEU (see paragraphs 63 and 71 above). However, the fact remains that, by adopting the contested decision without observing a reasonable period, the Commission disregarded the guarantees laid down by Regulation No 2454/93 and deprived the applicant of the effectiveness of that regulation, of the possibility to obtain a decision within the time limits laid down, and the guarantee that it would benefit from a favourable decision in the absence of a response within those time limits.

93 Therefore, it must be held that by adopting the contested decision 34 months after the delivery of the judgment of 19 March 2013, *Firma Van Parys* v *Commission* (T-324/10, EU:T:2013:136), the Commission breached the reasonable time principle which, in the particular circumstances of the case, constitutes a ground for annulment of the contested decision.

94 Having regard to the foregoing considerations, the third plea must be upheld and the contested decision annulled, without there being any need to examine the fifth plea.

Costs

95 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

96 In the present case, since the Commission has been largely unsuccessful, it must be ordered to bear its own costs and to pay those of the applicant.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls Article 1(4) of Commission Decision C(2016) 95 final of 20 January 2016 finding that post-clearance entry in the accounts of import duties is justified and that remission of those duties is justified with regard to a debtor and is in part justified in the particular case of another debtor but in another part not justified with regard to that particular debtor, and modifying Commission Decision C(2010) 2858 of 6 May 2010;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission to bear its own costs and to pay those incurred by Firma Léon Van Parys NV.**

Kanninen Schwarcz Iliopoulos

Delivered in open court in Luxembourg on 11 December 2017.

[Signatures]