



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

19 March 2013*

(Customs union — Imports of bananas from Ecuador — Post-clearance recovery of import duties — Request for remission of import duties — Article 220(2)(b) and Article 239 of Regulation (EEC) No 2913/92 — Error by the customs authorities — Obvious negligence on the part of the interested party)

In Case T-324/10,

Firma Léon Van Parys NV, established in Antwerp (Belgium), initially represented by P. Vlaemminck and A. Hubert and subsequently by Vlaemminck, R. Verbeke and J. Auwerx, lawyers,

applicant,

supported by

Kingdom of Belgium, represented by J.-C. Halleux and M. Jacobs, acting as Agents, and by P. Vander Schueren, lawyer,

intervener,

v

European Commission, represented by L. Keppenne and F. Wilman, acting as Agents,

defendant,

APPLICATION for annulment, in part, of Commission decision C(2010) 2858 final of 6 May 2010 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 but is not justified in the particular case of another debtor,

THE GENERAL COURT (Second Chamber),

composed of N.J. Forwood, President, F. Dehousse and J. Schwarcz (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 7 November 2012,

gives the following

* Language of the case: Dutch.

Judgment

The facts

- 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 organization 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 ('the Report of 5 July 2002'), which it 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 ('the Supplementary Report'), 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).

- 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 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 contested decision'), 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)).
- 13 Recitals 4 and 5 in the preamble to the contested decision state that, for the banana imports made in 1998, the Commission authorised the Belgian authorities to decide themselves whether to proceed with the remission of the duties or not, since it took the view, in a file part of which involved a case comparable in fact and law, that post-clearance entry in the accounts of import duties and remission of those duties were justified. It is stated in recital 6 thereof that the contested decision therefore concerns only the imports made between 1 January and 8 November 1999 and the import duties relating to them, amounting to EUR 3 628 248.48.
- 14 As regards the imports made in 1999, the Commission pointed out, in recital 11 of the contested decision, that, when the imported goods were released for free circulation, the customs agent had presented import licences, apparently issued by the Spanish authorities, which the applicant had obtained from two Spanish companies through a Portuguese trader ('M'). The Commission stated that the applicant did not appear on the licences since it had simply purchased the use thereof and since it was not a transferee. Again, according to recital 11 in the preamble to the contested decision, the majority of the licences in question were supposed to belong to 'newcomers', within the meaning of Article 7 of Regulation No 2362/98, a minority of those licences belonging to 'traditional' operators, within the meaning of Article 3 of that regulation.
- 15 In recital 32 of the preamble to the contested decision, the Commission expressed its opinion that post-clearance entry in the accounts of the duties legally owed should be carried out, on the ground that no error on the part of the customs authorities could be found in this case. To reach that conclusion, the Commission observed, in recital 26, that granting favourable tariff treatment, provided for under Article 18(1) of Regulation No 404/93, as amended by Regulation No 3290/94, was subject to the presentation of import licences, but the Spanish authorities had stated that they had not issued the licences used by the applicant. According to the Commission, the licences were therefore forged. In those circumstances, the Commission found, in recital 27, 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. In recital 28, the Commission referred to the suspected involvement of a Spanish official in the fraud, suspicion which was subsequently dismissed following correspondence between OLAF and the

Spanish judicial authorities. Finally, in recitals 29 to 31, the Commission dismissed the applicant's arguments: that it was impossible for economic operators to check whether the undertakings to which the licences had been issued were actually registered and whether the licences and the stamps they bore were authentic; that it would have been impossible for the national authorities to verify the facts, and that the Community authorities had failed to perform checks, since none of these circumstances constituted an error on the part of the customs authorities.

- 16 As the three conditions set by Article 220(2)(b) of the CCC are cumulative, the Commission was of the view, in recital 33 of the contested decision, that there was no need to check the conditions other than that concerning whether there was an error on the part of the competent authorities.
- 17 Thereafter in the contested decision the Commission considered whether the conditions set by Article 239 of the CCC for proceeding with a remission of import duties were satisfied.
- 18 In recitals 37 to 51 of the contested decision, the Commission determined whether there was a special situation, the first condition for the remission of import duties. It noted, first of all, in recital 38, the rule according to which the presentation, even in good faith, of forged documents could not in itself be considered a special situation justifying remission of duties. The Commission pointed out, in recital 39, that the applicant and the customs agent based their application for remission not only on the existence of forged import licences but also mainly on the failings in monitoring the tariff quota for banana imports, which they attributed to the Commission. In recitals 40 to 44 the Commission recalled the legal framework establishing the various obligations placed on it and on the Member States in administering the tariff quota. In recitals 45 to 49, the Commission presented the irregularities found in the administration of the tariff quota: *inter alia*, (i) the failure to detect the fact that the banana imports covered by the import licences exceeded that quota, and (ii) the inadequacy of the Spanish authorities' precautions regarding the issue of import licences, more specifically in notifying information regarding the model of the stamp used for the issue of those licences. Accordingly, the Commission considered that such circumstances exceeded the normal commercial risk which an operator had to bear and that they constituted a special situation covered by Article 239 of the CCC.
- 19 As regards the second condition for the remission of import duties, the Commission examined the three conditions governing whether it could be found that there was no deception or obvious negligence. The Commission was of the opinion, in recital 53, that the first condition, relating to the complexity of the legislation, did not need not be examined since the customs debt was incurred because of the forgery of import licences and not an incorrect application of the legislation. As regards the condition relating to the professional experience of the persons concerned, the Commission was of the opinion, in recitals 54 to 56, that it was satisfied.
- 20 On the other hand, the Commission considered that the applicant had not shown sufficient diligence. The Commission described the factual background to the use of the forged import licences. In recital 58, it drew attention to the operational arrangements which were, in general, implemented in order that 'traditional' operators could import a larger quantity of bananas than that covered by the import licences which they possessed, and which consisted of such an operator selling bananas, before their import, to an operator holding an import licence, who sold them back to him following import and their release for free circulation. In recital 59, the Commission stated that in 1999 the bananas imported by the applicant were released for free circulation by the customs agent on the basis of its instructions and, further, the bananas were not sold to the holder of the import licence who was indicated as consignee of the goods on the declaration of release for free circulation. Moreover, the customs agent always charged the customs duty to the applicant.
- 21 Next, the Commission presented the various factors on the basis of which it considered that the applicant had not been diligent. First, it observed, in recital 60, that there was no trace of contacts between the applicant and the companies that were presented as the holders of the import licences,

whereas, in its view, such contacts appeared indispensable so that the goods could be released for free circulation, as the names of those companies appeared on the declarations of release for free circulation, for which those companies might have been held liable. In recitals 60 to 61 the Commission concluded that if the applicant had contacted those firms, it would have been apparent that they were not aware of the sale of the use of the licences issued in their name, and that the arrangements made and the lack of contacts showed that the applicant was ready to take risks to import bananas benefitting from the tariff quota. Secondly, the Commission highlighted the commercial relations between the applicant and M, namely the fact that the negotiations for the sale of the import licences were conducted directly between them (recital 62), that the payments were made into a personal account of M and not into an account of M's employer (recital 63), and that the applicant had not adduced evidence that the import licences, which it returned to M, were in fact received by him, whereas the holders of those licences had to recover them in order to secure the release of the guarantee that they had provided (recital 64). Thirdly, the Commission noted that the purchase of the use of the licences was charged using pro forma invoices sent by two Spanish companies, and that the invoices were sent by fax from unknown addresses or by unknown persons, and that all of the operational arrangements, over which the applicant seemed to have no concerns, did not fall within standard trading practice.

- 22 The Commission concluded, in recital 67 of the contested decision, that the applicant had not shown the diligence to be expected of an experienced operator and that, accordingly, the applicant could not have the benefit of a finding that there was no obvious negligence. On the other hand, the Commission was of the view that the applicant's customs agent had not engaged in any deception or obvious negligence and that he could, therefore, benefit from remission of import duties.

Procedure and forms of order sought by the parties

- 23 By application lodged at the Registry of the General Court on 11 August 2010, the applicant brought the present action.
- 24 The composition of the chambers of the General Court having been altered, the case, initially assigned to the Seventh Chamber, was assigned to the Second Chamber on 23 September 2010.
- 25 The applicant claims that the General Court should:
- annul Article 1(1) and (3) of the contested decision;
 - order the Commission to pay the costs.
- 26 The Commission contends that the General Court should:
- dismiss the application as unfounded;
 - order the applicant to pay the costs.
- 27 By letter lodged at the Registry of the General Court on 19 November 2010, the Kingdom of Belgium, pursuant to Article 115 of the Rules of Procedure of the General Court, applied for leave to intervene in support of the applicant in the present case.
- 28 By order of 18 January 2011, the President of the Second Chamber granted the Kingdom of Belgium leave to intervene in support of the form of order sought by the applicant.

- 29 In support of the form of order sought by the applicant, the Kingdom of Belgium, claimed, in essence, that the General Court should:
- annul Article 1(1) and (3) of the contested decision;
 - order the Commission to pay the costs.
- 30 By document registered at the Registry of the General Court on 15 April 2011, the Commission submitted its observations on the Kingdom of Belgium's statement in intervention; the applicant, for its part, did not submit observations.
- 31 By way of a measure of organisation of procedure, the General Court put several questions to the parties and asked them to produce documents. The parties replied by letters lodged on 18 October 2012, in respect of the applicant, and on 19 October 2012, in respect of the Commission.

Law

- 32 In support of its action, the applicant relies on six pleas in law: infringement of the Treaty and of the rules relating to its application, in particular of Article 239 of the CCC, of the provisions of Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6) and of Regulation No 2362/98, of the trading practices recognised by the World Trade Organisation (WTO), of an error in the classification of the facts and infringement of the probative value of the documents; infringement of the Treaty and of the rules relating to its application, in particular of Article 239 of the CCC and of the principle of proportionality; infringement of the Treaty and of the rules relating to its application, in particular of Article 239 of the CCC, of the former Article 211 EC, of the principle of legitimate expectations and of the general legal principle of *patere legem quam ipse fecisti*; infringement of the Treaty and of the rules relating to its application, in particular of Article 239 of the CCC and the principle of equal treatment; infringement of the Treaty and of the rules relating to its application, in particular of Article 220(2)(b) of the CCC; infringement of essential procedural requirements and in particular of the rights of the defence.
- 33 It is necessary to examine, first of all, the fifth and sixth pleas in law of the action, directed against the post-clearance recovery of duties under Article 220(2)(b) of the CCC.

The implementation of Article 220(2)(b) of the CCC

- 34 At the outset, it should be pointed out that under Article 220(2)(b) of the CCC the waiver of post-clearance recovery by the national authorities is subject to three cumulative conditions. Provided that those three conditions are fulfilled, the person liable is entitled to a waiver of post-clearance recovery (see, by analogy, Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraph 37 and case-law cited).
- 35 First, non-collection of the duties must have been due to an error made by the competent authorities themselves. Secondly, the error they made must be such that the person liable, acting in good faith, could not reasonably have been able to detect it in spite of the professional experience and exercise of due care required of him. Finally, the person liable must have complied with all the provisions laid down by the legislation in force so far as his customs declaration is concerned (see, by analogy, *Ilumitrónica*, paragraph 38 and case-law cited).

36 Whether those conditions are satisfied must be assessed in the light of the purpose of Article 220(2)(b) of the CCC, which is to protect the legitimate expectation of the person liable that all the information and criteria on which the decision whether or not to proceed with recovery of customs duties is based are correct (see, by analogy, *Ilumitrónica*, paragraph 39 and case-law cited).

37 It is in the light of those considerations that the fifth and sixth pleas in law in this action must be considered.

The fifth plea in law: infringement of the Treaty and of the rules relating to its application, in particular of Article 220(2)(b) of the CCC

38 The fifth plea in law in this action is divided into three parts. First, the applicant claims that the lack of involvement of the Spanish authorities in producing the forged import licences cannot be established with certainty. Secondly, it is of the view that there is a link between the level of the duties sought and the errors made by the Commission in the administration of the tariff quota. Thirdly, it is claimed that the Commission did not examine the other conditions for the application of Article 220(2)(b) of the CCC, which are, in the present case, satisfied.

39 The Commission disputes the applicant's arguments, while the Kingdom of Belgium did not intervene in support of this plea in law.

– Commission's findings

40 In the contested decision, the Commission examined whether it was possible to waive post-clearance recovery of import duties, restricting itself to determining whether one of the conditions for the application of that measure was satisfied, namely the existence of an error on the part of the Spanish authorities.

41 In recitals 26 and 27 of the contested decision, the Commission noted that, first, the grant of favourable tariff treatment was subject to the presentation of import licences, secondly, the Spanish authorities had stated that the licences in dispute, namely the forged licences, had not been issued by them, and, thirdly, it therefore could not be said that those authorities, which had no part in producing those licences, had committed an error.

42 The Commission indicated, in recital 28 of the contested decision, that the hypothesis that a Spanish official had been involved in the fraud, raised at the beginning of the investigation, had been dropped, following correspondence between OLAF and the Spanish judicial authorities.

43 In recitals 29 to 31 of the contested decision, the Commission answered the applicant's arguments. According to the Commission, the following were not capable of constituting an error on the part of the customs authorities: the circumstances that, first, it was not possible for economic operators to check whether the holders of import licences were in fact registered operators and whether the licences and the stamps they bore were authentic, secondly, it was impossible for the national authorities to perform checks and, thirdly, the European Union authorities failed to perform checks.

– The first part of the fifth plea in law

44 The applicant claims that it is not established with certainty that there were no errors on the part of the Spanish authorities. It relies principally on the report from the Belgian customs and excise authorities, an OLAF working document and evidence from criminal proceedings in a judgment of the Tribunale civile e penale di Ravenna (Civil and Criminal Court, Ravenna, Italy) of 6 October 2004, according to which there was complicity by Spanish officials in the production of the forged licences.

- 45 By that line of argument, the applicant complains that the Commission did not show that there was no error on the part of the customs authorities, within the meaning of Article 220(2)(b) of the CCC. However, as the Commission pointed out, the process for waiving post-clearance recovery of duties presupposes proof of the existence of an error. The first part of the fifth plea in law is therefore based on a premiss which is contrary to Article 220(2)(b) of the CCC and which in any event is insufficient to prove the existence of an error.
- 46 Moreover, analysis of the applicant's arguments and the documents on which it relies provides no basis for reviewing that conclusion.
- 47 In the first place, the applicant relies on the Supplementary Report, which refers to OLAF's investigation, during which reference was made to a theft of import licences within the Spanish Secretariat General for Foreign Trade. However, it is apparent from OLAF's working document of 22 September 2000 that that event occurred in late 1999 and that the stolen licences were used during the first two quarters of 2000. Therefore it cannot concern the licences in dispute presented for imports, the last of which occurred on 8 November 1999, as the last licences used on that occasion showed 23 September 1999 as the alleged issue date.
- 48 In the second place, the applicant refers to the judgment of the Tribunale civile e penale. However, that court merely recorded the hypothesis, contemplated by OLAF, of possible bribery of an official at the Spanish Ministry of Foreign Trade and the fact that OLAF had brought the matter before the Spanish judicial authorities. It did not itself find evidence of bribery of a Spanish official, since it stated that, on the date of the judgment, the criminal investigation was still on going in Spain.
- 49 In the third place, the applicant claims that the lack of an error on the part of the Spanish authorities has not been shown, as the existence of correspondence between OLAF and the Spanish judicial authorities relating to the lack of involvement of a Spanish official is not, in its view, established. However, a letter of 20 October 2005, sent by the Spanish judicial authorities to OLAF, states that Spanish officials were not involved in the case of the forged import licences. Moreover, the Commission sent a copy of that letter to the applicant, on 28 January 2010, within the administrative procedure.
- 50 Although the applicant refers to there being abundant evidence of the involvement of Spanish officials in the production of the forged licences, it is not apparent from the file that such evidence exists, since both OLAF's working document of 22 September 2000 and the Supplementary Report, and the judgment of the Tribunale civile e penale of 6 October 2004, at most set out only the supposition to that effect.
- 51 In the fourth place, the applicant observes, in its reply, the existence of various types of conduct, which it categorises as errors which are attributable to the Spanish authorities: blank import licences were issued; some information, such as the theft of the import licence forms or the stamp used by the authorities, was not provided to the Commission; the absence of information on the change of the stamp used by those authorities.
- 52 First, it must be borne in mind that the theft of the import licences has no bearing on the present dispute (see paragraph 47 above) and that the alleged theft of the stamp within the Spanish authorities is not established, as there is nothing in the file which corroborates such an event and the applicant does not refer to any document to that effect.
- 53 Secondly, the lack of information to the Commission as to the change of the stamp used constitutes a failure on the part of the Spanish authorities which cannot, however, be categorised as an error giving rise to the failure to enter in the accounts the duties legally due, since only active conduct by the authorities confers entitlement to the waiver of post-clearance recovery (see *Ilumitrónica*, paragraph 34 above, paragraphs 38 and 42, and case-law cited).

- 54 Thirdly, the applicant makes no reference to any statement or document as to the Spanish authorities making blank import licences available, and does no more than state that such a situation is apparent from OLAF's working document of 22 September 2000. It must be pointed out that OLAF stated that the Spanish authorities offered blank import licence forms for sale and that that scheme ended in 1999, having regard to the risk of abuse which it presented. Although the Spanish authorities considered that such a circumstance presented a risk of abuse, it could not, in itself, constitute an error on the part of the customs authorities.
- 55 Accordingly, the first part of the fifth plea in law must be rejected.
- The second part of the fifth plea in law
- 56 The applicant complains that the Commission made errors, in the administration of the tariff quota, which should have been taken into account in implementing Article 220(2)(b) of the CCC.
- 57 The Commission contends that it is not part of the customs authorities, whose errors are taken into account in the application of Article 220(2)(b) of the CCC.
- 58 Article 220(2)(b) of the CCC provides that the waiver of post-clearance recovery of import duties is not possible where the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities.
- 59 In the context of the rules in force before the CCC, the Court of Justice has held that, since no precise and exhaustive definition of 'competent authorities' is provided, not only the authorities competent for taking action for recovery but any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and which may thus cause the person liable to entertain legitimate expectations must be regarded as a 'competent authority' (*Ilumitrónica*, paragraph 34 above, paragraph 40).
- 60 Moreover, it is apparent from Article 4(3) of the CCC, that 'customs authorities' means the authorities responsible inter alia for applying customs rules. Accordingly, it follows that this includes the administrative authorities of the Member States and non-Member States which are responsible for ensuring the supervision and control of the customs rules, in accordance with the definition of those tasks provided by Article 4(13) and (14) of the CCC. Although the Commission plays a role in the administration of the customs tariff enabling the import of bananas with a reduced customs duty, it cannot on that basis be considered to be a customs authority for the purposes of the CCC. Accordingly, any errors made by it, in that context, are not capable of conferring entitlement to the waiver of post-clearance recovery under Article 220(2)(b) of the CCC.
- 61 Finally, it is necessary to reject the applicant's argument that the fact that the Commission is not a customs authority cannot suffice to free it of liability for its errors, since Article 220(2)(b) of the CCC constitutes a fairness clause which precludes operators being penalised for the faults of the authorities. Were it accepted, that argument would lead the General Court to disregard Article 220(2)(b) of the CCC in order to apply a fairness clause, the customs rules for which provide that it does not enter into consideration at the stage of post-clearance recovery, but subsequently, in the implementation of Article 239 of the CCC.
- 62 Accordingly, the second part of the fifth plea in law must be rejected.

– The third part of the fifth plea in law

- 63 Admittedly, as the applicant maintains, the Commission, after examining whether it could be claimed that the Spanish authorities had made an error, expressly claimed, in recital 33 of the contested decision, that there was no need to check whether the two other conditions for the application of Article 220(2)(b) of the CCC were fulfilled. However, since the conditions laid down by that article are cumulative, the Commission was not obliged to consider the other conditions governing its application, since the first of those conditions was not fulfilled in any event (see, by analogy, Joined Cases T-10/97 and T-11/97 *Unifrigo and CPL Imperial 2 v Commission* [1998] ECR II-2231, paragraph 65).
- 64 Consequently, it is necessary to reject the third part of the fifth plea in law and, with it, that plea in law in its entirety.

The sixth plea in law: infringement of essential procedural requirements and in particular the rights of the defence

- 65 The applicant claims that it requested OLAF to provide access to any documents or information on any possible complicity when the forged licences were issued. However, the majority of the documents requested were never made available to it, even after the intervention of the European Ombudsman, who proposed an amicable settlement which OLAF has not yet implemented. All attempts by the applicant to obtain more information and to defend itself against post-clearance recovery were rejected as regards essential documents relating to alleged forgeries and the complicity of the Spanish authorities. To that extent, the applicant claims that there was a material infringement of its rights of defence.
- 66 The Commission disputes the applicant's arguments, while the Kingdom of Belgium did not intervene in support of this plea in law.
- 67 In the first place, the applicant complains that OLAF did not grant it complete access to the documents requested. It considers that the information which was refused to it was essential to determine whether there was error on the part of the Spanish authorities, within the meaning of Article 220(2)(b) of the CCC.
- 68 In so far as the applicant's arguments appear to be directed against the decisions by which OLAF refused full access to the documents requested, taken on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), it must be stated that it is apparent from the file that, by the decisions of 26 October and 3 December 2004, OLAF replied to the two requests made by the applicant confirming access to the documents. Moreover, the applicant does not dispute that it did not bring court proceedings against those decisions, as the Commission pointed out. Accordingly, the fact that OLAF refused full access to the documents requested has no bearing on the present dispute.
- 69 In the second place, the applicant claims that its rights of defence were the subject of material infringement, since it was unable to obtain the information which it sought on the alleged falsification of the import licences in dispute and on the possible complicity within the Spanish authorities.
- 70 It must be borne in mind that, under the principle of observance of the rights of the defence, it cannot be for the Commission alone to decide which documents are useful to the person concerned for the purposes of the waiver of post-clearance recovery. The administrative file may include documents favourable to the waiver of recovery which the person concerned could use in support of his request

even if the Commission has not used them. The applicant must therefore be able to have access to all the non-confidential documents on file including those which have not been used as the basis for the Commission's objections (Case T-53/02 *Ricosmos v Commission* [2005] ECR II-3173, paragraph 72).

- 71 By its arguments, the applicant does no more than maintain that it did not have access to documents relating to the falsification of the import licences in dispute and to the possible complicity within the Spanish authorities. On that point, as the Commission points out, two observations may be made.
- 72 First, before taking the contested decision, the Commission provided the applicant with a copy of the letter from the Spanish judicial authorities of 20 October 2005 stating that Spanish officials were not involved in the case of the forged import licences. Moreover, the Commission contends that it is perhaps impossible to obtain information relating to the alleged complicity within the Spanish authorities simply because such facts have not been established. The Commission must accordingly be regarded as claiming that it is not aware of the existence of such information and does not have any document which makes reference thereto. It is clear from the case-law that, where the institution concerned asserts that a particular document to which access has been sought does not exist, there is a presumption that it does not exist. That, none the less, is a simple presumption, which the applicant may rebut in any way by relevant and consistent evidence (see Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, paragraph 95, and Case T-146/04 *Gorostiaga Atxalandabaso v Parliament* [2005] ECR II-5989, paragraph 121). In the present case, the applicant has not adduced such evidence as to the existence of documents which would establish the alleged forging of the import licences in dispute and possible complicity within the Spanish authorities.
- 73 Secondly, it must be noted that the applicant submitted several documents before the General Court in order to substantiate the existence of the alleged complicity and of the method(s) of forging the import licences in dispute. These are, in particular, OLAF's working document of 22 September 2000, the judgment of the Tribunale civile e penale, referred to during the examination of the fifth plea in law, and the report of 23 June 2004 concerning the evidence of OLAF officials responsible for the investigation concerning the fraudulent imports taken by the investigating magistrate in Ravenna. It is also apparent from the file that the applicant already had those three documents when it submitted to the Belgian customs and excise authorities a document entitled 'Position paper' (report) dated 25 June 2007, which they were annexed to. As was stated in paragraphs 48 and 50 above, both OLAF's working document and the judgment of the Tribunale civile e penale record only the suspicions of complicity within the Spanish authorities in the production of forged import licences. The same is true of the report on the evidence from the OLAF officials.
- 74 It follows from the foregoing that, even before the procedure for waiving post-clearance recovery was referred to the Commission, the applicant was in possession of documents setting out the suspicions of complicity within the Spanish administration in the production of forged import licences and describing quite specifically the probable methods used to forge the licences, enabling it to present its defence on the question of the potential complicity of a Spanish official in drawing up the forged licences.
- 75 Accordingly, it is clear that the applicant is not justified in claiming that its rights of defence have been materially infringed because it could not obtain access to certain information or certain documents.
- 76 Since the applicant did not provide further clarification on the alleged infringement of the rights of the defence to which it claims it was subject and since it did not substantiate further the mere assertion of infringement of essential procedural requirements, the arguments raised must be rejected and, with it, the sixth plea in law of the action.

The implementation of the second indent of Article 239(1) of the CCC

Preliminary considerations

- 77 It should be borne in mind that Article 905 of Regulation No 2454/93, a provision which sets out and expands on the rule laid down in Article 239 of the CCC, constitutes a general fairness clause intended in particular to cover exceptional situations which, in themselves, do not fall within any of the cases provided for in Articles 900 to 904 of that regulation (Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraph 18). It is clear from Article 905 that repayment of import duties is subject to two cumulative conditions, namely, first, the existence of a special situation and, secondly, the absence of deception or obvious negligence on the part of the economic operator (Case T-282/01 *Aslantrans v Commission* [2004] ECR II-693, paragraph 53). Accordingly, repayment of duties must be refused if either of those conditions is not met (Case T-75/95 *Günzler Aluminium v Commission* [1996] ECR II-497, paragraph 54, and *Aslantrans v Commission*, paragraph 53).
- 78 It is stated in the contested decision that the condition of the existence of a special situation is satisfied in this case (see paragraph 18 above). Consequently, the General Court's examination must exclusively relate to the question of whether the Commission was right to find that there was obvious negligence.
- 79 According to the case-law, in order to assess whether there is obvious negligence within the meaning of Article 239 of the CCC, account must be taken in particular of the complexity of the provisions non-compliance with which resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader (Cases C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 56, and Case C-156/00 *Netherlands v Commission* [2003] ECR I-2527, paragraph 92).
- 80 Moreover, it must be borne in mind that the Commission enjoys a margin of discretion when adopting a decision pursuant to Article 239 of the CCC (see, by analogy, Case T-290/97 *Mehibas Dordtselaan v Commission* [2000] ECR II-15, paragraphs 46 and 78). It must also be pointed out that the repayment or remission of import duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure, and, consequently, the provisions which provide for such repayment or such remission are to be interpreted strictly. In particular, since a lack of obvious negligence is an essential condition of being able to claim repayment or remission of import duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited (*Söhl & Söhlke*, paragraph 79 above, paragraph 52).
- 81 However, although the Commission has some discretion as regards the application of Article 239 of the CCC, it cannot disregard its duty to balance, on the one hand, the European Union interest in full compliance with the provisions of customs legislation, and, on the other hand, the interest of an importer acting in good faith not to suffer harm which goes beyond the normal commercial risk (see judgment of 30 November 2006 in Case T-382/04 *Heuschen & Schrouff Oriëntal Foods v Commission*, paragraph 46 and case-law cited).
- 82 It is in the light of those considerations that the second plea in law of this action, in support of which the Kingdom of Belgium intervened, must particularly be examined.

The second plea in law: infringement of the Treaty and of the rules relating to its application, in particular of Article 239 of the CCC and of the principle of proportionality

- 83 The applicant criticises the finding of obvious negligence which the Commission attributed to it in the contested decision. Supported by the Kingdom of Belgium, the applicant sets out several arguments in support of that plea in law.

- 84 First, the applicant claims that the Commission cannot accuse it of the slightest obvious negligence since the alleged infringements were based on the incorrect hypothesis that it had entered into an agreement to repurchase the goods. Secondly, the applicant claims that, in the light of the circumstances of the present case, it was impossible for it to know that the alleged forged import licences existed, bought at market rates through M, who for years had had a relationship of trust with its subsidiary. Thirdly, contrary to the case-law of the General Court, the Commission does not adduce evidence of obvious negligence on the part of the applicant, although it had always acted in the framework of standard trading practices and displayed professional and diligent conduct. Fourthly, the applicant claims, in essence, that the Commission's criticisms of the commercial relations with M and the holders of the import licences in dispute are unfounded, as those relations fall within standard trading practices. Fifthly, the diligence required is contrary to case-law, and is particularly severe and disproportionate, in a specific situation which is far in excess of normal commercial risk. At the material time, there was no need to question the authenticity of the import licences. Sixthly, the Commission wrongly considered that the condition as to the complexity of the legislation is irrelevant.
- 85 By the third, fourth and fifth arguments, which should be examined together and before the other matters, the applicant considers, in essence, that the Commission has not shown that it failed to act with due care.
- 86 In the first place, it must be borne in mind that, where the customs authorities have concluded that it could not be established that there was deception or obvious negligence on the economic operator's part, it is for the Commission, when it intends to depart from the position taken by the national authorities, to prove, on the basis of relevant facts, that there was in this case obvious negligence on the part of that operator (Case T-26/03 *Geologistics v Commission* [2005] ECR II-3885, paragraphs 78 and 82).
- 87 It must be noted that, in its letter of 14 December 2007, the Belgian customs and excise authorities were of the opinion that there was a special situation within the meaning of Article 239 of the CCC and that the applicant had not acted with obvious negligence.
- 88 In the second place, it must be borne in mind that, to conclude that the applicant had not acted with due care, the Commission noted, in recital 60 of the contested decision, that there was no trace of contacts with the holders of the import licences, although such contacts would have been indispensable so that the goods could be released for free circulation, as the names of those companies appeared on the declarations of release for free circulation, for which those companies could have been held liable. In recitals 60 to 61 the Commission pointed out that if the applicant had contacted those firms, it would have been apparent that they were not aware of the sale of the use of the licences issued in their name, and concluded that the arrangements made and the lack of contacts showed that the applicant was ready to take risks to import bananas benefiting from the tariff quota. The Commission indicated, in recital 62, that the negotiations for the purchase of the import licences were conducted directly between the applicant and M; in recital 63, that the applicant's payments were made into a personal account of M and not into an account of M's employer; in recital 64 that the applicant had not adduced evidence that the import licences, which it returned to M, were in fact received by him, whereas the holders of those licences had to recover them in order to secure the release of the guarantee that they had provided, under the legislation, and, in recital 65, that the purchase of the use of the licences was effected using pro forma invoices sent by fax by two Spanish companies, certain invoices being faxed from unknown addresses or by unknown persons. According to the Commission, those arrangements did not fall within standard trading practices.
- 89 To summarise, there are five factors relied on by the Commission to find the lack of due care: the lack of contact between the applicant and the entities holding the import licences; the purchase of the use of the licences by direct negotiations between the applicant and M; the payments made to the personal

account of M; the lack of evidence of receipt by M of the licences sent by the applicant; the invoicing for the purchase of the use of the licences by pro forma invoices sent by fax, certain of them from unknown addresses or persons.

- 90 In the third place, it must be noted that, in its defence, the Commission considered that the arrangements used by the applicant to obtain use of the import licences were ‘unlawful’, as they are contrary to the second indent of Article 21(2) of Regulation No 2362/98, which does not allow any transfers of rights arising from an import licence from a newcomer operator to a traditional operator. On that point, it is clear that the contested decision, in that it refuses the remission of import duties, is not based on the unlawfulness of the arrangements for the purchase of the use of the import licences, but on the obvious negligence on the part of the applicant.
- 91 Therefore, the Commission’s argument cannot, in the present case, have any bearing on the proper foundation for the refusal to remit the import duties.
- 92 In the fourth place, it must be pointed out that the applicant, supported on this point by the Kingdom of Belgium, is of the view that it is only in the event of doubt as to the authenticity of import licences that the degree of diligence entailed an active obligation on its part. The Commission contends that, having regard to the circumstances of this present case, known only by the applicant, the applicant ought to have had doubts and required further information on the holders of the import licences, and any lack of doubt by the customs authorities having no bearing on that point.
- 93 On first reading, it is not apparent from the contested decision that the Commission refused the remission of import duties on the ground that the applicant ought to have had doubts as to the authenticity of import licences in dispute. The lack of due care appears to be based on the arrangements put into place to obtain use of those licences, certain aspects of which did not fall within standard trading practices (recital 65 of the contested decision). Having regard to such content, the applicant’s argument is irrelevant to the assessment of whether the contested decision is well founded.
- 94 However, it cannot be ruled out that the Commission considered that, in the light of the arrangements used to purchase use of the import licences in dispute, the applicant ought to have had doubts as to their authenticity, as it is pointed out, in recitals 60 and 65 of the contested decision, that contacts with the holders of those licences ought to have been indispensable and that the applicant did not have concerns about the fact that large sums of money had been paid on the basis of pro forma invoices received by fax. Nevertheless, for the reasons set out in paragraphs 98 to 102 and 111 to 115 below, those factors were not capable, in the circumstances of the present case, of giving rise to doubts as to the authenticity of the import licences in dispute.
- 95 In the fifth place, it is necessary to examine the five grounds of complaint in the light of which the Commission considered that the applicant had not shown due care.
- 96 Firstly, the applicant claims that, other than by bearing a disproportionate administrative burden, having regard to the large number of licences in dispute, it could not contact each licence holder. It acted within the framework of normal commercial relations by leaving M to manage the contacts with its network. If it had acted differently, it would have jeopardised its business relations with M, which it required so that M would find newcomer operators wishing to sell the use of their import licences. The applicant is of the view that it had no reason, at the material time, to display particular vigilance with regard to the agreements concluded by M, since the method used was the same that it had used with other intermediaries.
- 97 According to the Commission, the applicant cannot take refuge behind the argument that it had a relationship of trust with M, unless it accepts all the consequences of the choice to give precedence to that relationship over acting with the due care required. Moreover, the Commission is of the view that

the applicant could have required M to provide information on the licence holders, as their commercial relations were quite recent at the material time. Finally, the Commission considers that the measures which the applicant specifically took to manage the import licences are irrelevant since it was not shown how they contributed to checking the diligent and lawful use of the licences.

- 98 It is apparent from the file that the applicant had all the import licences in dispute through M and that those licences were made available to it, as a general rule, at the end of the three-month periods for which they were used. It must be noted that the applicant, both in its written pleadings and at the hearing, dwelled on the fact that the transactions for which the import licences in dispute were used always concerned small volumes of bananas. In its view, such a fact justified relying on an intermediary as the best way of obtaining in quite short periods the licences enabling the import of cargos within the limit of the tariff quota. Those various facts were not disputed by the Commission. Moreover, the applicant claims, without being contradicted, that it checked the formal requirements and the content of the import licences that it used, in particular as to the point whether the quantities set out on the certificates corresponded to the quantities allocated to the newcomer operator whose name appeared on the licence.
- 99 Notwithstanding such checks being carried out, the Commission's first objection implies that the applicant was obliged to contact the holders of the licences in dispute within a quite short period of time in order to avoid the criticisms set out in recitals 60 and 61 of the contested decision.
- 100 Questioned at the hearing on the nature and the scope of that obligation, which follows from recital 60 of the contested decision, the Commission was unable to identify the provisions which might be the basis of that obligation and was unable to specify its significance for the procedure for the customs clearance of imported goods, in particular their release for free circulation, doing no more than alleging that the purchase of the right to use the import licences from newcomer operators did not comply with the customs legislation. However, as has already been stated in paragraphs 90 and 91 above, the contested decision is not based on the unlawfulness of the arrangements for the purchase of the right to use the import licences.
- 101 Accordingly, the Commission has not established that the applicant was obliged to contact the holders of the import licences in dispute in order to carry out the customs clearance procedures. Specifically, the Commission does not adduce any evidence to show that such contact was mandatory if the applicant was to put the imported goods into free circulation, while it is not in dispute that the applicant could have accomplished without hindrance all of the administrative formalities linked to the import of the goods covered by the import licences in dispute.
- 102 Further, it cannot be accepted, as a general rule, that an economic operator who imports goods into the European Union and who, with that objective, resorts to the use of an intermediary to obtain use of the import licences, is regarded as lacking in prudence or diligence if he does not carry out checks of the holders of the licences. Recourse to the service of such an intermediary comes within the practical methods used to carry out the business of imports within the discretion of the importer and is aimed at facilitating that business, since the importer may consider that, in a particular economic context, the intermediary is a person who is better placed than he is to find newcomer operators who have obtained licences and who wish to transfer use thereof, in particular when, as in the present case, the importer requires a large number of licences in a quite short period (see paragraph 98 above). In the absence of any other detailed information capable of giving rise to doubts on the part of the operator as to the authenticity of the import licences used, it cannot be considered that contact with the holders of the import licences was indispensable to enable releasing the imported goods into free circulation.
- 103 Consequently, the Commission does not establish that the circumstances described in recitals 60 and 61 of the contested decision constitutes a lack of diligence on the part of the applicant.

- 104 Secondly, the applicant claims that it was normal to make payments into M's personal account, since M operated on an independent basis and it acted in this way with other intermediaries; that it could not be criticised for not having checked whether the licences which it returned to M were actually received by him, which would constitute a disproportionate burden of work and would not be consistent with standard trading practices, and that it would have been informed if M had not received the licences, in the light, in particular, of the regular nature of their business relations.
- 105 In defence, the Commission restates the criticisms set out in the contested decision, namely that, on the basis of the degree of diligence applicable in the present case, it could be expected of the applicant that it would ensure that payments were made to the appropriate accounts and that it would check that the licences which it returned were actually received. The Commission points out that the applicant, as a diligent operator, ought to have had concerns as to the fact that M wanted large amounts be paid into his own name and into private accounts, without his employer being aware of it.
- 106 The second, third and fourth objections set out in recitals 62 to 64 of the contested decision concern the purchase of the right to use the licences by direct negotiations between the applicant and M, the payments made into the personal account of M, and the lack of proof of receipt by M of the licences returned by the applicant (see paragraph 89 above).
- 107 As regards the facts, it must be noted that the applicant had maintained commercial relations with M since 1997, one of its Italian subsidiaries having previously had relations during several years with a Portuguese international trading firm for which M worked. It is also apparent from the file as a whole that, as the applicant claims, the commercial relationship for the purchase of the right to use the licences in dispute was established solely between it and M, which, at the hearing, the Commission accepted was not in dispute. Moreover, nothing in the contested decision or in the Commission's written pleadings calls into question the applicant's assertion that M carried out his activity as an intermediary independently or indicates that M had fraudulently carried out that activity. Therefore, the Commission's arguments rehearsed in paragraph 105 above cannot be upheld, since they are based on the idea, which also emerges from the contested decision, that recourse to an intermediary, who was, moreover, employed by an international trading firm, to purchase right to use the licences in dispute presented an increased risk of fraudulent practices.
- 108 In the circumstances of the present case, when account is also taken of what is stated in paragraph 102 above, neither the applicant's negotiations directly with M for the purchase of the use of the licences in dispute, nor the payments for all of those purchases into M's personal account, nor the lack of a request to M for proof of receipt of the licences used that it returned to M show that the applicant displayed a lack of due care.
- 109 Thirdly, the applicant claims that the use of pro forma invoices is a standard trading practice, used with other intermediaries and by other importers, those invoices constituting order forms on the basis of which it paid M, who subsequently established the final invoices. The fact that the invoices had been sent by Spanish companies which the applicant did not know, did not constitute a particularity which ought to have encouraged it to be more vigilant, as the operators in question were undertakings unknown in the banana sector and all of the contacts with those operators were managed by M, while the Commission does not adduce evidence of obvious negligence.
- 110 The Commission considers it is the circumstances in which the pro forma invoices were used, namely that they were sent by fax from unknown persons from unknown addresses, which is problematic. For that reason, the applicant ought to have carried out checks.

111 On that point, it must be borne in mind that, in recital 65 of the contested decision, the Commission stated:

‘[T]he purchase of the use of the licences was charged using pro forma invoices sent by fax by the two Spanish companies mentioned above. It transpires from the file that some of these pro forma invoices were sent by fax from unknown addresses or by unknown persons. The Commission doubts that it is standard trading practice to pay very large sums of money on the basis of pro forma invoices received by fax in such circumstances. However, there is nothing in the file to suggest that this raised the slightest concern on the part of the [applicant].’

112 First of all, it must be noted that the measures of organisation of procedure and the hearing revealed a divergence of opinion on one fact. In response to the questions raised by the General Court, the Commission produced invoices from four undertakings from which the applicant had bought the right to use the licences in dispute. However, first, the applicant disputed, at the hearing, the truth of those facts, claiming that only one of the undertakings in question had sold it the right to use the licences in dispute. Secondly, those facts are inconsistent with the facts recorded by OLAF, in the working document of 22 September 2000, which state that two Spanish undertakings were involved, one for 1998 and the other for 1999, and with the contested decision (recitals 11 and 65).

113 It must also be noted that, to substantiate the applicant’s lack of diligence, the Commission relies particularly on the fact that the pro forma invoices for the purchase of the rights to use the licences in dispute were sent from unknown faxes and by unknown persons. More specifically, the Commission pointed out, at the hearing, that the pro forma invoices in question originated from Spain, that the fax numbers were Spanish and that the reference to Spanish ‘copy shops’ appeared on the invoices received by fax.

114 However, it is apparent from the file as a whole that the rights to use the licences in dispute, which concerned solely 1999, were purchased from a Spanish undertaking (see paragraph 112 above). The pro forma invoices from that undertaking, produced by the Commission in response to measures of organisation of procedure, all include a postal address and a telephone number, referred to in their letterheads. One of the invoices includes the reference ‘casa de fotocopia’ (photocopy service) in the upper margin and another includes a fax number, apparently in Spain, and the reference ‘cemon’ in the top margin.

115 Although the facts referred to in paragraph 114 above are not specifically stated in the contested decision, it may be considered that the Commission referred to them by noting, in recital 65, that the pro forma invoices had been sent by fax from unknown addresses. Nevertheless, that fact does not suffice to show lack of diligence on the part of the applicant in the present case. First, the fact that a pro forma invoice originating from an undertaking having its registered office in Spain is sent from a fax machine situated in that country does not appear to be a fact such as to lead the operator receiving that invoice to raise his level of diligence. Second, the fact that one of the five invoices sent by that Spanish undertaking to the applicant had been sent from what appeared to be a photocopy service cannot, in itself, give rise to doubts on the part of the applicant as to its commercial relationship with that undertaking or as to the authenticity of the invoices in dispute. Without other detailed information in support of the objection relating to the use of the pro forma invoices, it cannot be held that the Commission’s doubts, as to whether the fact that the payment of very large sums of money, paid on the basis of invoices such as those received in the circumstances referred to above, falls within standard trading practice, are established.

116 Accordingly, the Commission does not establish, by the facts stated in recital 65 of the contested decision, that the applicant displayed, in the present case, a lack of due care.

- 117 Without there being any need to rule on the first, second and sixth arguments of the second plea in law in this action, it follows from paragraphs 103, 108 and 116 above that the second plea in law is well founded, since the Commission did not adduce the evidence, which the case-law restated in paragraph 86 above requires, of lack of due care on the part of the applicant, and, therefore, of its obvious negligence.
- 118 Consequently, without there being any need to rule on the first, third and fourth pleas in law of this action, it is necessary to declare that Article 1(3) of the contested decision is annulled and to dismiss the remainder of the application.

Costs

- 119 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, according to Article 87(3), where each party succeeds on some and fails on other heads, the General Court may order that the costs be shared or that each party bear its own costs.
- 120 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.
- 121 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. In present case, the Kingdom of Belgium must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

- 1. annuls Article 1(3) of Commission Decision C(2010) 2858 final of 6 May 2010 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 but is not justified in the particular case of another debtor;**
- 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;**
- 4. orders the Kingdom of Belgium to bear its own costs.**

Forwood

Dehousse

Schwarcz

Delivered in open court in Luxembourg on 19 March 2013.

[Signatures]