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# Doubts regarding the origin of goods based on OLAF mission reports vs protection of confidence

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## Abstract

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This article concerns the administrative cooperation of the customs authorities of the exporting country and of the importing country when determining the preferential origin of goods in the law of the European Union (EU). It addresses specifically the legal significance of investigations by EU authorities such as the European Anti-Fraud Office (OLAF) vis-à-vis the protection of confidence of the importer in the authenticity and correctness of certificates of a preferential origin and the jurisprudence of the European Court of Justice (ECJ) concerning such protection of confidence. European Union (EU) customs law provides for protection of confidence of the importer in the authenticity and correctness of certificates of preferential origin which have been issued by third countries. The Article concludes that this protection of confidence may be undermined by OLAF missions investigating the authenticity and correctness of certificates of origin in third countries.

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## Allocation of risks concerning incorrect certificates of preferential origin

The system of administrative cooperation of the customs authorities of the exporting country and of the importing country when determining the preferential origin of goods can provide the basis for legitimate expectations of the importer, protecting their confidence in the correctness of a certificate of preferential origin which has been issued by the customs authorities of the exporting country. The jurisprudence of the European Court of Justice (ECJ) has significantly informed the development of this protection of legitimate expectations, bringing an end to the situation in which the importer bore an almost unlimited risk in trading. The protection of legitimate expectations of the importer, based on the system of administrative cooperation between the customs authorities of the exporting country and those of the importing country, provides a fair balance of the protection of the financial interests of the EU on the one hand and of the legitimate interest of foreign traders in a reliable determination of the origin of goods in the exporting country on the other hand.

However, this current system is an anathema to the European Commission because it is the EU rather than the importer which generally bears the risk of irregularities that have occurred in the exporting country. Consequently, the introduction of the registered exporter in the proposed amendment of Regulation (EEC) 2454/93 laying down provisions for the implementation of the Community Customs Code (CCC)<sup>1</sup> is meant to reverse this distribution of risk. According to the proposed changes to the generalised system of preferences, a statement on origin is to be made by a registered exporter in the beneficiary country instead of a certificate of origin being issued by the customs authorities of the beneficiary country. As

a result, it is questionable, at least, whether an importer will be able to invoke an error on behalf of the customs authorities pursuant to Art. 220 para. 2 lit. b) subpara. 2 of Regulation (EEC) No. 2193/92 establishing the Community Customs Code, if a statement on origin has been made incorrectly by a registered exporter.

Even if some legal questions remain disputed in the current system of administrative cooperation, the jurisprudence of the ECJ has provided clear guidelines on the invocation of legitimate expectations by the importer.

## **Jurisprudence of the ECJ concerning administrative cooperation between customs authorities**

According to the jurisprudence of the ECJ, the determination of the origin of goods is based on the allocation of responsibilities between the customs authorities of the exporting country and those of the importing country, which is monitored jointly by the administrative cooperation between the authorities concerned. In this system, the authorities of the exporting country are responsible for determining the origin of goods because they are in the best position to verify directly the facts on which that is based.<sup>2</sup> In order for this mechanism to function, the customs authorities of the importing country must accept the legally-made determination of the origin of goods made by the customs authorities of the exporting country.<sup>3</sup> Also, this system of administrative cooperation<sup>3</sup> cannot function properly unless the procedures for administrative cooperation are strictly complied with.<sup>4</sup>

## **Administrative cooperation regarding the verification of certificates of a preferential origin**

The procedure of administrative cooperation for determining the origin of goods is regulated in the protocols on the definition of the terms 'product of origin' and 'originating products' and on administrative cooperation of the various agreements on preferential trade between the EU and third countries. According to these protocols, the customs authority of the country of import makes a request for subsequent verification concerning the correctness and authenticity of a certificate of preferential origin to the authorities of the exporting state, if there are any doubts regarding the correctness and/or authenticity of the certificate of origin concerned. The customs authority of the importing country may, where appropriate, give reasons for the enquiry and shall forward any relevant documents and information which suggest that the information given on the certificate of origin is incorrect. The protocols on the definition of the terms 'product of origin' and 'originating products' and on administrative cooperation explicitly stipulate that the *a posteriori* verification of certificates of origin concerned must be carried out by the customs authorities of the exporting country. The result of the verification process is then communicated to the customs authorities of the importing country.

The customs authorities of the importing country do not participate in the process of the subsequent verification of certificates of origin, which may result in the revocation of these certificates of origin. Consequently, there is no room in the verification procedure for a mission by the EU to a third country with the purpose of reviewing the correctness and authenticity of certificates of preferential origin issued by the third country concerned. Hence, the findings obtained in the course of such a mission are, in principle, irrelevant for determining the correctness and authenticity of certificates of origin, irrespective of the European Commission's opinion that a professionally organised circumvention of the rules of origin in a third country can generally only be discovered by means of investigations by the EU in the third country concerned.

## The legal significance of investigations by European authorities in third countries concerning the preferential origin of goods

However, this does not mean that the findings of such an EU mission in a third country would be of no legal consequence whatsoever. The jurisprudence of the ECJ shows when a mission by the EU in a third country concerning the correctness and/or authenticity of certificates of origin may become relevant.

The ECJ's judgment in the case 'Pascoal & Filhos Ltd.' concerns a situation in which Portugal as the Member State of importation asked the exporting country Greenland to conduct a joint subsequent verification procedure with the European Commission on the correctness and authenticity of four specific movement certificates EUR.1. As a result, the European Commission participated in the *a posteriori* verification procedure by the authorities of Greenland, resulting in a joint report on the findings of the procedure. On the basis of this report, the customs authorities of Greenland informed the Portuguese authorities that the movement certificates EUR.1 had been annulled, without also informing the Portuguese authorities about the report on the findings. The ECJ held that the notification on the annulment of the movement certificates EUR.1 concerned is binding for the Portuguese authorities and that it entitles the Portuguese authorities to subsequently enter customs duties into the accounts.<sup>5</sup> This shows that the European Commission is indeed entitled to participate in the subsequent verification procedure by the third country of exportation, if the authorities of the exporting country have the sovereignty over the verification procedure and if they, as a result of the verification procedure, annul the certificate of origin concerned.

Furthermore, the subsequent verification procedure must be initiated by a request by the customs authorities of the importing state, as becomes clear from the ECJ's judgment 'Sfakianakis'.<sup>6</sup> The facts of the case are as follows: At the instigation of the European Commission, the Hungarian customs authorities investigated the manufacturing and the value of vehicles made in Hungary which had been imported customs-free into Greece. In the context of these investigations, the Commission asked the Greek authorities to send the certificates of origin concerned to the Hungarian authorities for the purpose of subsequent verification. The request for *a posteriori* verification was answered by the Hungarian customs authorities who confirmed the correctness and authenticity of some movement certificates EUR.1 and who annulled some others. Further, the Hungarian authorities informed their Greek counterparts that some movement certificates EUR.1 had been revoked but that this decision had been challenged in the courts by the exporters concerned. The ECJ held that, in the context of administrative cooperation, the obligation of the customs authorities of the importing country (Greece) to accept the findings of the exporting country on the authenticity and correctness of certificates of origin also extends to judicial decisions of the exporting country and on legal remedies in the exporting country against the annulment of certificates of origin.<sup>7</sup>

Consequently, an EU mission may be carried out in advance of a request for subsequent verification, so that the findings of the mission become the reasons for the request for a subsequent verification procedure by the importing country. However, the request for *a posteriori* verification must still be made by the customs authorities of the importing state, according to the ECJ, even if it is made at the instigation of the European Commission because, otherwise, the system of administrative cooperation could not function.<sup>8</sup>

However, an EU mission cannot substitute for a subsequent verification procedure by the customs authorities of the exporting country and it is not sufficient for a proper verification procedure that the authorities of the exporting country merely accept the findings of an EU mission and adopt them as their own. Otherwise, the due process of law would be undermined because, in contrast to administrative decisions on the annulment or revocation of certificates of origin by the customs authorities of the exporting country, the findings of an EU mission in a third country are not subject to any possibility of appeal. In the 'Sfakianakis' judgment,<sup>9</sup> the ECJ holds:

As the Court has held on several occasions, the right to an effective judicial remedy is a general principle of Community law which underlies the constitutional traditions common to the Member States (Case 222/84 Johnston [1986] ECR 1651, paragraph 18). Since the Association Agreement is an integral part of the Community legal order, it is therefore for the competent authorities of the Member States to uphold the right to an effective legal remedy in respect of the application of the customs scheme provided for by that agreement.<sup>10</sup>

However, it must be differentiated between preferential tariff regulations based on international agreements between the EU and third countries on the one hand and autonomous preferential tariff regulations unilaterally adopted by the EU:

(24) It follows from those considerations, first of all, **that the need for the customs authorities of the Member States to recognize the assessments made by the customs authorities of the exporting country does not arise in the same way where the preferential system is established not by an international agreement binding the Community to a non-member country on the basis of reciprocal obligations, but by a unilateral Community measure.**

(25) That is the case a fortiori **where the competent authorities of a non-member country are disputing not the facts found by a mission of enquiry, but that mission's assessment of those facts in the light of the relevant customs rules.** There is nothing to suggest that the authorities of the non-member country have the power to bind the Community and its Member States in their interpretation of Community rules of the kind at issue in this case.

(26) Furthermore, the second factor on which the Court based its interpretation in the Rapides Savoyards judgement, namely **the existence of a procedure for settling disputes concerning origin, is missing in this case.**<sup>11</sup> [emphasis added]

The differences between a preferential tariff measure based on an international agreement and an autonomous, unilateral preferential tariff measure are:

Firstly, the functioning of an autonomous preferential tariff regulation, such as the one which was the subject of the 'Faroe Seafood' case, does not depend on the recognition of the findings of the exporting state to the same extent as the functioning of a preferential tariff regulation, which is based on a bilateral or multilateral international agreement.

Secondly, compliance with the procedural regulations on the *a posteriori* verification procedure in a system of administrative cooperation is indispensable for the clarification of doubts regarding the origin of goods. If an autonomous preferential system does not provide for a formal *a posteriori* verification procedure, the European Commission is not bound by the findings of the exporting country.

Thirdly, in autonomous preferential tariff regulations, the EU is not bound by the interpretation of EU law by the authorities of third countries, in contrast to preferential tariff regulations based on international agreements which, according to the jurisprudence of the ECJ, may only be interpreted by a mutual agreement of all parties to the agreement.

## Conclusions

In the framework of agreements on the preferential origin of goods between the EU and third countries, the current system of administrative cooperation between the customs authorities of the exporting country and those of the importing country provides for a fair allocation of risk between the customs authorities and the importer concerning irregularly issued certificates of origin. The jurisprudence of the ECJ has provided clear guidelines on the protection of legitimate expectations of the importer on the correctness and validity of certificates of origin: The customs authorities of the importing country must accept the legally made determinations on the origin of goods by the customs authorities of the exporting country.

If the customs authorities of the country of import hold any doubt about the correctness or validity of a certificate of origin, they may request a verification by the exporting country but are not entitled to review the validity of a certificate of origin themselves. The authorities of the importing country, in particular the European Commission or OLAF, may assist in the verification procedure as long as the authorities of the exporting country have the sovereignty over the procedure, but their own findings may not substitute for a true verification procedure by the authorities of the exporting country.

In this context, the German Federal Finance Court (Bundesfinanzhof) has recently made a reference for a preliminary ruling to the ECJ (case C-409/10). The Federal Finance Court has posed the question of whether it is compatible with the verification process regulated in Art. 32 of Protocol 1 of the ACP-EU Partnership Agreement, if the European Commission essentially takes it upon itself to undertake a subsequent verification of proofs of origin in the exporting country, albeit with the assistance of the authorities of that country, and whether it constitutes a result of verification if these results are obtained by the European Commission and recorded in a report that is co-signed by a representative of the government of the exporting country. This borderline case may result in the further clarification of the issues addressed in this article.

## Endnotes

- 1 Compare this with TAXUD/2046/2007.
- 2 ECJ, judgment of 12.07.1984, 218/83 *SARL Les Rapides Savoyards et al. v. Directeur Général des Douanes et Droits Indirects* [1984] ECR 3105, para. 26; judgment of 07.12.1993, C-12/92 *Criminal Proceedings against Edmond Huygen et al.* [1993] ECR I-6381, para. 24; judgment of 17.07.1997, C-97/95 *Pascoal & Filhos Ld. v. Fazenda Pública* [1997] ECR I-4209, para. 32.
- 3 ECJ, judgment of 12.07.1984, 218/83 *SARL Les Rapides Savoyards et al. v. Directeur Général des Douanes et Droits Indirects* [1984] ECR 3105, para. 27; judgment of 07.12.1993, C-12/92 *Criminal Proceedings against Edmond Huygen et al.* [1993] ECR I-6381, para. 25; judgment of 14.05.2006, C-153/04 and C-204/04 *R. v. Commissioners of Customs & Excise, ex parte: Faroe Seafood Ltd., Føroya Fiskasøla L/F and Commissioners of Customs & Excise, ex parte: John Smith and Celia Smith trading as Arthur Smith* [1996] ECR I-2465, para. 19; judgment of 17.07.1997, C-97/95 *Pascoal & Filhos Ld. v. Fazenda Pública* [1997] ECR I-4209, para. 33.
- 4 ECJ, judgment of 05.07.1994, C-432/92; *R. v. Minister of Agriculture, Fisheries and Food, ex parte: S.P. Anastasiou (Pissouri) Ltd. et al.* [1994] ECR I-3087, para. 40.
- 5 ECJ, judgment of 17.07.1997, C-97/95 *Pascoal & Filhos Ld. v. Fazenda Pública* [1997] ECR I-4209, para. 14.
- 6 ECJ, judgment of 09.02.2006, C-23/04, C-24/04 and C-25/04 *Sfakianakis AEVE v. Elliniki Dimosio* [2006] ECR I-1265.
- 7 ECJ, judgment of 09.02.2006, C-23/04, C-24/04 and C-25/04 *Sfakianakis AEVE v. Elliniki Dimosio* [2006] ECR I-1265, para. 21, 26.
- 8 ECJ, judgment of 09.02.2006, C-23/04, C-24/04 and C-25/04 *Sfakianakis AEVE v. Elliniki Dimosio* [2006] ECR I-1265, para. 31.
- 9 ECJ, judgment of 09.02.2006, C-23/04, C-24/04 and C-25/04 *Sfakianakis AEVE v. Elliniki Dimosio* [2006] ECR I-1265, para. 28.
- 10 See, to that effect, C-12/86 *Demirel* [1987] ECR 3719, para. 7 and 28.
- 11 ECJ, judgment of 14.05.2006, C-153/04 and C-204/04 *R. v. Commissioners of Customs & Excise, ex parte: Faroe Seafood Ltd., Føroya Fiskasøla L/F and Commissioners of Customs & Excise, ex parte: John Smith and Celia Smith trading as Arthur Smith* [1996] ECR I-2465, para. 24 to 26.

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