OPINION OF ADVOCATE GENERAL MISCHO

delivered on 24 January 2002 [1]

1. Under Article 234 EC, the Tribunal Tributário de Primeira Instância de Lisboa (Fiscal Court of First Instance of Lisbon) (Portugal) has asked the Court to rule on several questions that have arisen in connection with a case concerning the customs duties payable on colour television sets imported from Turkey.

I — The legal framework

A — *The EEC/Turkey Association Agreement and the Additional Protocol*

2. This case must be viewed within the context of the Agreement establishing an association between the European Economic Community and Turkey (hereinafter the 'Association Agreement') signed at Ankara by the Republic of Turkey, on the one hand, and the Member States of the EEC and the Community, on the other (hereinafter the 'Contracting Parties'). The Association Agreement was approved by Council Decision 64/732/EEC of 23 December 1963 concluding the Agreement establishing an association between the European Economic Community and Turkey [2] and entered into force on 1 December 1964.

3. According to Article 2, the Agreement is intended to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties and comprises a preparatory stage, a transitional stage and a final stage.

4. Articles 22 and 23 of the Association Agreement provide for the setting up of an Association Council consisting of members of the Governments of the Member States and members of the Council and of the Commission, on the one hand, and of members of the Turkish Government, on the other, which, acting unanimously, has the power to take decisions in order to attain the objectives of the Agreement. Under Article 25, this Council may settle any dispute relating to the application or interpretation of the Agreement submitted to it by the Contracting Parties or decide to submit the dispute to the Court of Justice.

1 — Original language: French.

2 — JO 1964, 217, p. 3685.

5. With a view to laying down the conditions, arrangements and timetables for the implementation of the transitional stage for which the Association Agreement provides, on 23 November 1970, at Brussels, the Contracting Parties signed an Additional Protocol, which was approved by Council Regulation (EEC) No 2760/72 of 19 December 1972 on the conclusion of the Additional Protocol and of the Financial Protocol, signed on 23 November 1970, annexed to the Agreement establishing an Association between the European Economic Community and Turkey and on measures to be taken for their entry into force. [3] The provisions of this Protocol continued to apply up to 31 December 1995, when the final stage of the Association Agreement entered into effect.

6. In accordance with Article 3(1), the provisions of the Additional Protocol relating to the elimination of customs duties and quantitative restrictions (hereinafter the 'preferential regime') 'likewise apply to goods obtained or produced in the Community or in Turkey, in the manufacture of which were used products coming from third countries and not in free circulation either in the Community or in Turkey'. However, it is stipulated that the admission of such goods under cover of the preferential regime is subject to the charging by the exporting State of a countervailing levy.

7. On 29 December 1972, the Association Council took Decision No 5/72 on methods of administrative cooperation for implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement. [4] According to its Article 1, the preferential regime is granted upon submission of documentary evidence issued at the exporter's request by the customs authorities of Turkey or of a Member State. When the goods are transported direct from Turkey to a Member State, the documentary evidence in question will be movement certificate A.TR.1 (hereinafter the 'A.TR.1 certificate').

8. According to Article 4(2) of the Decision, this certificate 'may be endorsed only where it can serve as the documentary evidence required for the purpose of implementing the preferential treatment provided for in the Agreement'. [5]

B — *Community rules on the incurrence of customs debt, waiver of post-clearance recovery, and the repayment or remission of customs duties*

9. Article 2(1) of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt [6] states that:

3 — OJ 1972 L 293, p. 1.

4 — OJ 1973 L 59, p. 74.

5 — By the customs authorities of the exporting State, see Article 4(1).

6 — OJ 1987 L 201, p. 15.

'A customs debt on importation shall be incurred by:

(a) the placing of goods liable to import duties in free circulation...

...'

10. Article 2(1) of Council Regulation (EEC) No 1031/88 of 18 April 1988 determining the persons liable for payment of a customs debt [7] provides that:

'Where a customs debt has been incurred pursuant to Article 2(1)(a)... of Regulation (EEC) No 2144/87, the person liable for payment of such debt shall be the person in whose name the declaration or any other act with the same legal effects was made.

...'

11. Article 2(1) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties [8] stipulates that:

'Where the competent authorities find that all or part of the amount of import duties... legally due... has not been required of the person liable for payment, they shall take action to recover the duties not collected.

...'

12. Article 5(2) of Regulation No 1697/79 defines the conditions under which no action need be taken for the post-clearance recovery of customs duties. It reads as follows:

'The competent authorities may refrain from taking action for the post-clearance

7 — OJ 1988 L 102, p. 5.

8 — OJ 1979 L 197, p. 1.

recovery of import duties... which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned.

... '

13. Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, [9] as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986, [10] defines the conditions for the remission of customs duties, stipulating that:

'Import duties may be... remitted in special situations..., which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

...'

9 — OJ 1979 L 175, p.1.
10 — OJ 1986 L 286, p. 1.

14. Regulations Nos 1697/79 and 1430/79 were repealed by Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [11] (hereinafter the 'CCC'), which entered into force on 22 October 1992 and has been applicable since 1 January 1994 (Articles 251 and 253).

15. Article 201 of the CCC reads as follows:

'1. A customs debt on importation shall be incurred through:

(a) the release for free circulation of goods liable to import duties,

or

(b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

11 — OJ 1992 L 302, p. 1.

2. ...

3. The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor. Where a customs declaration in respect of one of the procedures referred to in paragraph 1 is drawn up on the basis of information which leads to all or part of the duties legally owed not being collected, the persons who provided the information required to draw up the declaration and who knew, or who ought reasonably to have known that such information was false, may also be considered debtors in accordance with the national provisions in force.'

16. Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 [12] became applicable on the same date as the CCC, that is to say on 1 January 1994. The procedure for the post-clearance recovery of customs duties is governed by Articles 868 et seq. The procedure for the remission of customs duties is governed by Articles 877 et seq. According to Article 878(1), any remission of customs duties must be specifically applied for by the person concerned. Under Article 13(2) of Regulation No 1430/79, as amended by Regulation No 3069/86, the application must be submitted within 12 months from the date on which the duties were entered in the accounts by the customs authority. This time-limit is also referred to in Article 239(2) of the CCC.

II — Facts and questions referred for a preliminary ruling

17. According to the order for reference, 'the facts conditionally established for the purposes of the present reference for a preliminary ruling' are as follows:

18. The claimant in the main proceedings Ilumitrónica — Iluminação e Electrónica L[da] (hereinafter 'Ilumitrónica') declared to the Portuguese customs authorities the importation of a consignment of colour television sets under a document dated 20 July 1992. The goods were accompanied by an A.TR.1 certificate, on the basis of which they were granted preferential treatment, in accordance with the Association Agreement and the Additional Protocol, as ratified by the Portuguese Republic by Decree No 3/92 of 21 January 1992.

19. On 19 July 1995, the defendant in the main proceedings notified Ilumitrónica that

12 — OJ 1993 L 253, p. 1.

it required payment of customs duties relating to the importation totalling PTE 7 534 264.

20. That order for payment was issued on the basis of a finding by the Commission staff, forwarded to the Portuguese customs authorities, according to which the goods did not fulfil the conditions for preferential treatment. Having received complaints from Community producers, the Commission initiated an investigation as a result of which its staff concluded that the colour television sets manufactured in Turkey contained components originating in non-Member States which had neither been released into free circulation nor subjected to a countervailing levy upon exportation to the Community.

21. Being uncertain as to how to interpret the relevant provisions of Community law, by order of 13 March 2000 the Tribunal Tributário de Primeira Instância de Lisboa decided to stay proceedings and to refer the following five questions to the Court for a preliminary ruling:

'(1) Is it permissible to require payment of the customs debt by importers who, acting in good faith and with due care, processed their declarations, over a number of years, unaware of any irregularities which were known to either the Turkish or Community authorities?

(2) Since the Turkish authorities were aware of the inaccuracy of the content of the ATR certificates, which they authenticated, is there no possibility of making the Turkish State liable for payment of the customs debt?

(3) Since the Commission suspected or was aware of the conduct of the Turkish authorities, referred to in point 2 above, was the Commission under a duty to warn the Community operators?

(4) Is breach of that possible duty such as to exonerate the (customs) declarants from liability where during all those years they acted in good faith in respect of the contents of their declarations?

(5) Is the decision of the Commission and of the Portuguese customs authorities, on the advice of the former, to proceed to post-clearance recovery of the import duties valid without previously putting in motion the procedure provided for by Articles 22 and 25 of the EEC/Turkey Association Agreement (signed in Brussels on 23 November 1970)?'

Preliminary observations

22. The national court describes the purpose of the reference as being, firstly, the interpretation of Article 201(3) of the CCC and, secondly, the assessment of the validity of the Commission's decision.

23. This second aspect forms the subject of the fifth question and I shall therefore examine it when I come to consider that issue.

24. As regards the first aspect, I should point out, as do most of the parties, that this provision is not applicable, *ratione temporis*, to the importation at issue, which formed the subject of a declaration dated 20 July 1992, that is to say a declaration made prior to the entry into force of the CCC. As the provision in question is a substantive rule, it cannot be applied to goods imported before it entered into force. [13]

25. Moreover, as noted by the Commission, the question of the person responsible for the customs debt, to which this provision relates, is irrelevant for the purposes of this case. Under both this provision and, indeed, Article 2(1) of Regulation No 1031/88 which preceded it and applies *ratione temporis*, the person liable for payment of the customs debt is, in any event, the person on whose behalf the import declaration is made.

26. The fact that this person may have acted in good faith and may have received a post-clearance demand for the payment of duties which he did not expect to have to pay has no bearing on his status as the person responsible for the debt.

27. Whether circumstances such as those at issue might enable the person responsible to avoid having to pay the duties demanded is governed by the provisions on post-clearance recovery. Under those provisions the circumstances in question might conceivably affect the duties finally collected. On the other hand, they have no bearing on the designation of the person responsible for the debt under the customs regulations.

28. The questions posed by the national court, which, incidentally, do not mention Article 201(3) of the CCC, must therefore be understood to concern the post-clearance recovery regulations.

13 — Judgment in Case C-97/95 *Pascoal & Filhos* [1997] ECR I-4209, paragraph 25.

29. In this connection, the third and fourth questions, which both relate to a possible duty on the part of the Commission to warn the operators concerned, need to be examined jointly.

III — The first question referred for a preliminary ruling

30. The aim of the national court in asking this question is to establish whether the fact that the irregularity of which the operator is accused was known to both the Commission and the Turkish authorities, whereas it was not known to the operator who acted in good faith and with due care, and continued over a number of years was sufficient to render the post-clearance recovery of import duties unlawful.

31. The Portuguese, Netherlands and French Governments and the Commission are agreed that the circumstances described by the national court have no bearing on the identity of the person responsible for the debt or the extent of his liability.

32. The Netherlands Government adds that, in so far as the first question is to be understood as referring to the conditions of post-clearance recovery, an irregularity known to the Community authorities could not, in principle, be described as an error. There should therefore be post-clearance recovery. To the extent that the question concerns the remission or repayment of duties, it should go unanswered, inasmuch as it is not apparent from the order that clarification of this point has been requested.

33. What are we to make of these various arguments?

34. First of all, it should be recalled that, in accordance with the case-law of the Court, [14] even though Article 5(2) of Regulation No 1697/79 states that the national authorities 'may' refrain from taking action for post-clearance recovery, the person liable is entitled to the waiver of recovery if all the requirements laid down in that provision are fulfilled.

35. There are three of these requirements, which must be fulfilled simultaneously: the duties must not have been collected as a result of an error made by the competent authorities themselves; it must have been impossible for the person liable, acting in good faith, to have detected the error; and all the provisions in force relating to the customs declaration must have been observed.

14 — Judgment in Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 22.

36. Even though, as follows from the case-law, [15] it is for the national court making the reference to verify whether, in the light of the circumstances of the case, these three requirements have been fulfilled, the following observations are still pertinent.

37. The notion of an 'error made by the competent authorities themselves', the subject of the first condition, must be interpreted in the light of the purpose of Article 5(2) of Regulation No 1697/79, and it follows from the settled case-law that this provision is intended to protect the legitimate expectations of the person liable. [16]

38. For the actions of the competent authorities to fulfil a person's legitimate expectations, certain conditions must be satisfied. According to the Court, 'it follows from the wording of Article 5(2) [of Regulation No 1697/79] itself that the legitimate expectations of the person liable attract the protection provided for in that article only if it was the competent authorities "themselves" which created the basis for those expectations. Thus, only errors attributable to acts of the competent authorities confer entitlement to the waiver of post-clearance recovery of customs duties'. [17] On the other hand, a mere failure to act or omission on the part of the administration could not, in principle, be construed as expressing a position calculated to arouse legitimate expectations in the importer.

39. It is therefore a matter of determining whether, in this particular case, the 'competent authorities' committed an 'error' within the meaning of the judgments cited above.

40. It follows from the case-law [18] that 'since no precise and exhaustive definition of the "competent authorities" is provided in Regulation No 1697/79... 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" within the meaning of Article 5(2) of Regulation No 1697/79. That applies in particular to the customs authorities of the exporting Member State which deal with the customs declaration'.

41. In *Kaufring and Others* v *Commission*, [19] which concerned the remission or

15 — Judgment in Joined Cases C-47/95 to C-50/95, C-60/95, C-81/95, C-92/95 and C-148/95 *Olasagasti and Others* [1996] ECR I-6579, paragraphs 33 to 35.

16 — Judgment in Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 87.

17 — See judgments in the abovementioned *Faroe Seafood* case, paragraph 91, and Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 23.

18 — See the abovementioned *Faroe Seafood* (paragraph 88) and *Mecanarte* (paragraph 22) judgments.

19 — Judgment in Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 [2001] ECR II-1337, paragraph 252.

repayment of duties on television sets imported from Turkey into Member States of the European Union, the Court, referring to the text I have just cited, held that the Turkish customs authorities which issued the A.TR.1 certificates on the basis of which the sets had been imported duty-free were 'competent authorities' within the meaning of the Regulation and that the same applied to Turkey's central customs authorities. I share this view, since we are faced with an association agreement which (through its additional protocol) reproduces, to a large extent, the text of the EEC Treaty.

42. However, it should be pointed out at once that this should not be taken to mean that the Republic of Turkey finds itself, in every respect, in exactly the same situation as an existing Member State of the Community.

43. Thus, with regard to the evidence that goods are entitled to preferential treatment under the Association Agreement, the last recital of Decision No 5/72 of the Association Council states that 'methods should be laid down which are similar to those applied by the Community up to the end of the transitional period referred to in Article 8 of the Treaty establishing the European Economic Community'.

44. According to Article 4(2) of that Decision, 'Movement certificate A.TR.1 may be endorsed only where it can serve as the documentary evidence required for the purpose of implementing the preferential treatment provided for in the Agreement'. It follows that the Turkish customs authorities have a duty to verify, in each case, whether the goods qualify for an A.TR.1 certificate.

45. In my opinion, it also follows that if these authorities endorse a certificate when the goods are not entitled to preferential treatment, they commit an error within the meaning of Regulation No 1697/79.

46. On the other hand, the Commission, which, like the other parties to have submitted observations, does not cite this provision, maintains that the competent Turkish authorities did not commit an 'active error' since they were misled by the exporters.

47. It bases its argument on the abovementioned judgment in *Faroe Seafood*, in paragraph 92 of which the Court held that the condition laid down in Article 5(2) of Regulation No 1697/79 cannot be regarded as fulfilled where 'the competent authorities have been misled — in particular as to the origin of the goods — by incorrect declarations on the part of the exporter whose validity they do not have to

check or assess. In those circumstances, it is the person liable who must bear the risks arising from a commercial document which is found to be false when subsequently checked'.

48. At the same time, it should be recalled that the judgment in *Faroe Seafood* also contains a paragraph 95 which reads as follows:

'However, where the exporter has declared that the goods are of Faroese origin in reliance on the actual knowledge by the competent Faroese authorities of all the facts necessary for applying the customs rules in question, and where, notwithstanding such knowledge, those authorities have raised no objection concerning the statements made in the exporter's declarations, thereby basing their certification of the Faroese origin of the goods on a misinterpretation of the rules of origin, it must be considered to be the result of an error on the part of the competent authorities themselves in initially applying the relevant rules that no duty was charged when the goods were imported....'

49. The same reasoning could certainly be applied, *mutatis mutandis*, to the dispute in the main proceedings here.

50. The Commission then refers, without offering any evidence to show that the exporter used by Ilumitrónica misled the Turkish authorities, to a decision, reference REM 14/96, which it gave at the request of the German authorities in a case involving the repayment of import duties in circumstances analogous to those of the case now before the Court. In that decision it stated that it was the incorrectness of the exporter's declaration that had misled the Turkish authorities, to whom, therefore, no active error could be attributed.

51. It should, however, be noted that that decision was quashed by the Court of First Instance in *Kaufring* v *Commission* when it held that the mere fact that the exporters had certified that the conditions for obtaining preferential treatment were met did not in itself constitute proof that the Turkish customs authorities which issued the A.TR.1 certificates were misled. [20] As the Court based that part of its reasoning on paragraph 95 of the abovementioned judgment in *Faroe Seafood*, I share that point of view.

52. Finally, the main proceedings here feature a very import additional element that was absent in the *Faroe Seafood* case. As the French Government points out, it was not until 1994, that is to say well after the import operations at issue had taken place, that the Turkish authorities intro-

20 — See paragraph 249 of the abovementioned judgment in *Kaufring* v *Commission*.

duced regulations providing for the charging of a countervailing levy, at the level required by the relevant decision of the Association Council. Accordingly, the Turkish customs authorities must have known that the components of the television sets at issue could not have been subjected to the levy.

53. Moreover, they could not have thought that certain components from third countries might already have been released into free circulation in Turkey, since that could not have happened without their knowledge.

54. Admittedly, it is conceivable that, in the present case, the exporter might have misled the Turkish authorities as to the provenance of the components of the television sets. However, it should be noted that, as the French Government points out,[21] Turkey had set up a specific export incentive scheme which allowed duty-free imports of components from third countries on condition that those components were included in goods subsequently exported to the Community or third countries without, of course, the collection of an export levy.

21 — In paragraph 244 of its judgment in *Kaufring* v *Commission*, the Court of First Instance noted that the existence of this scheme was not disputed.

55. It therefore appears that, in general, the Turkish authorities were not only aware of the existence of trade flows involving the importation of components of third-country origin with a view to their incorporation in goods intended for export to the Community but were even encouraging such operations. It is therefore very unlikely that an exporter would have seen any point in misleading the authorities as to the provenance of the components of his television sets, especially as the Turkish regulations in force did not provide for the collection of a levy.

56. It follows from the above that in order to determine whether in this case there was an error within the meaning of Article 5(2) of Regulation No 1697/79 it is not sufficient merely to invoke, as does the Commission, the possibility of the incorrectness of the exporter's declarations having misled the Turkish authorities. It is for the national court to take into consideration the entire context of the implementation of the decisions of the Association Council by the Turkish authorities, as did the Court of First Instance and as the French Government proposes.

57. I note in passing that the national court appears to have taken the same approach as the French Government since, in the first and second questions, it mentions the fact that the inaccuracy of the certificates was known to the Turkish authorities.

58. A word also needs to be said about the argument of the Netherlands Government according to which that knowledge would rule out an error on the part of the competent authorities.

59. It is true that, in the strict sense of the term, a course of action adopted with full knowledge of the facts cannot be described as an 'error' since there has been no mistake. It would, however, be paradoxical to interpret Regulation No 1697/79 as meaning that an 'error' knowingly committed would not confer entitlement to waiver of recovery. It is important to bear in mind the aim of protecting legitimate expectations pursued by the Regulation, and an operator should certainly be able to count on the competent authorities not to act knowingly in breach of the rules.

60. It follows from the above that an irregularity that the competent authorities (in the broad sense) of the country of exportation not only knew about but even encouraged should be regarded, in accordance with the abovementioned judgments in *Faroe Seafood* (paragraph 91) and *Mecanarte* (paragraph 23), as an error attributable to acts of the competent authorities and conferring entitlement to the waiver of post-clearance recovery of customs duties.

61. However, there is a second requirement that must also be met, namely that 'the person liable must have acted in good faith, or in other words that he must not have been reasonably able to detect the error of the authorities'.[22] To determine whether this is the case in the present instance, the national court should take into consideration the precise nature of the error, the professional experience and diligence of the person liable, and the complexity of the regulations concerned.[23]

62. In that connection, it should be recalled that, according to the case-law, the nature of the error may be assessed, in particular, in the light of the period of time during which the authorities persisted in their error.[24] As the French Government points out, the dubious certificates were issued over a period of 20 years.

63. It should also be noted that the regulations in question, which are described in detail by the French Government and the Commission, may objectively be described as complex.

64. Thus, it was not enough for an operator to be acquainted with Articles 2 and 3 of the Additional Protocol concerning preferential treatment. He also needed to be aware of the contents of Decisions Nos

22 — See the abovementioned judgment in *Faroe Seafood*, paragraph 83.

23 — Judgment in Case C-292/91 *Weis* [1993] ECR I-2219, paragraph 17.

24 — Judgment in Case C-38/95 *Foods Import* [1996] ECR I-6543, paragraph 30.

2/72 and 3/72 of the Association Council which concern the application of those provisions and establish, in particular, the rate of the countervailing levy. As the French Government points out, without being contradicted by the Commission, those two decisions have never been published in the *Official Journal of the European Communities*.

65. Accordingly, the operators too had no means of verifying the consistency of the Turkish regulations with those decisions.

66. It could, of course, be argued that an operator exercising due care and attention might have noticed that the Turkish legislation did not provide for the collection of a countervailing levy. However, as Decisions Nos 2/72 and 3/72 had not been published in the *Official Journal of the European Communities*, such an operator could not have been expected to know that a rate for that levy had been established and therefore might well have attributed the lack of relevant Turkish provisions to the fact that a rate had not yet been fixed.

67. Moreover, as noted by the French Government, it is difficult to criticise an economic operator for not knowing that the Turkish authorities were in breach of their obligations when the Commission itself, whose task was to ensure the proper implementation of the Agreement and which had at its disposal all the resources needed to do so, took nearly 20 years to discover that the Republic of Turkey was not complying with the Additional Protocol.

68. As far as this requirement is concerned, it may therefore be concluded that, unless it can be proved otherwise, the person liable acted in good faith, that is to say he was not reasonably able to detect the error of the competent authorities in so far as some of the relevant provisions had not been published in the *Official Journal of the European Communities* or transposed into the law of the associate country.

69. As for the third requirement, namely that all the provisions in force relating to the customs declaration must have been observed, it appears from the file not to be at issue in this case.

70. One final observation is called for. Most of the parties have argued that, even if the requirements of Article 5(2) of Regulation No 1697/79 are assumed not to have been met, the present case would, in any event, constitute a 'special situation' within the meaning of Article 13(1) of Regulation No 1430/79. From this it would follow that a repayment or remission of duties was justified.

71. It is true that, in *Hewlett Packard France*,[25] the Court held that 'Article 13 of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79 pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations. Seen in that light, the question whether the error was detectable, within the meaning of Article 5(2) of Regulation No 1697/79, is linked to the existence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79, and therefore the conditions laid down by the latter provision must be assessed in the light of those laid down in Article 5(2) of Regulation No 1697/79'.

72. The fact that these two provisions pursue the same aim does not prevent them from having a different scope.

73. Indeed, it follows from the settled case-law of the Court[26] that Article 13 of Regulation No 1430/79 constitutes a general equitable provision designed to preclude the possibility of an economic operator, in a special situation, having to suffer injury which he would not have had to suffer if that situation had not arisen. On the other hand, the aim of Article 5(2) of Regulation No 1697/79 is more limited, even though, in my opinion, it too is based on equitable considerations. It is intended to ensure observance of a specific principle, namely that of the protection of legitimate expectations, in well-defined circumstances, namely in the event of an error on the part of the administration.

74. It is therefore logical that, in *Hewlett-Packard France*, the Court should have held that a situation that did not constitute an 'error of the competent authorities themselves', within the meaning of Article 5(2) of Regulation No 1697/79, could nevertheless be considered a 'special situation', within the meaning of Article 13 of Regulation No 1430/79.

75. Accordingly, it is legitimate to enquire whether, should the Court consider that, in this particular case, the requirements for the waiver of recovery are not met, it should not examine the question of the applicability of Article 13(1) of Regulation No 1430/79.

76. However, I am obliged to conclude, as the Netherlands Government and the Commission have done, that no application for remission or repayment appears to have been lodged. It follows both from Article 239(2) of the CCC and Article 905(1) of Regulation No 2454/93

25 — Judgment in Case C-250/91 [1993] ECR I-1819, paragraph 46.

26 — See, for example, the judgment in Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani* v *Commission* [1987] ECR 1303, paragraph 10.

that remission or repayment is granted on application to the customs authority. In this case, therefore, there is no need to determine whether or not the requirements for remission or repayment have been met.

77. For the above reasons it is proposed that the first question be answered as follows:

'There is an "error made by the competent authorities themselves", within the meaning of Article 5(2) of Regulation No 1697/79, where the competent authorities of the country of exportation have knowingly and systematically endorsed A.TR.1 certificates for goods incorporating components which were not released into free circulation in that country and were not subjected to a countervailing levy.

In the absence of proof to the contrary, the person liable has not been reasonably able to detect that error where some of the relevant provisions were not published in the *Official Journal of the European Communities* and were not applied in the law of the country of exportation.'

IV — Second question referred for a preliminary ruling

78. This question, by which the national court invites the Court of Justice to rule on the possibility of making the Turkish State liable for the payment of the customs debt, can be understood in two ways.

79. Firstly, it could concern the determination of the person liable for the customs debt, assuming that the Turkish authorities can be considered to have acted improperly. Secondly, it could relate to the more general problem of the responsibility of those authorities for their acts.

80. These two aspects of the question will be considered in turn.

81. With regard to the first aspect, it is immediately apparent that, even if the Turkish authorities were at fault, that would not affect the determination of the person liable for the customs debt.

82. As the Netherlands Government points out, under Article 2 of Regulation No 1031/88, which was applicable at the

material time, the declarant is to be regarded as the debtor. The regulation lists a number of situations in which another person may be regarded as the debtor, for example, where goods are introduced unlawfully into the customs territory of the Community (Article 3) or where goods are removed from customs supervision (Article 4).

83. In all these situations, liability rests with a 'person' as defined by Article 1 of Regulation No 1031/88, that is to say either a natural person, a legal person or, where appropriate, an association of persons.

84. I subscribe to the Netherlands Government's analysis according to which this notion clearly cannot include the organs of a non-Member State. Indeed, international law would not permit the Community to define the liability of such bodies unilaterally, by regulation.

85. Finally, it should be noted, I have already found that, in this particular case, the Turkish authorities are to be regarded as 'competent authorities' within the meaning of Regulation No 1697/79, which necessarily rules out any possibility of their also being liable for the customs debt.

86. It follows that, whatever the answer to the question posed, it would have no effect on the identity of the person liable for the customs debt and hence on the ability of the Portuguese authorities to proceed with post-clearance recovery.

87. With regard to the second aspect of the question posed by the national court, the possibility that the person liable might be able to seek redress from whoever he considers responsible for the injury he has suffered has no bearing on the ability of the authorities to proceed with post-clearance recovery.

88. It follows that, thus understood, the question posed would be irrelevant to the main proceedings since, in any event, the possible liability of the Turkish authorities would have no effect on the possibility of effecting post-clearance recovery of the customs debt from the person liable. There would therefore appear to be no need to answer the second question referred for a preliminary ruling.

89. I would point out, in the alternative, that the possibility of putting the Turkish authorities' liability in issue cannot follow from the Community customs regulations, whether that be taken to mean Regulation No 1031/88 or Article 201(3) of the CCC, to which, as we have seen, the national

court refers and which the Portuguese Government has analysed. As explained above, there is no way in which these regulations could be considered to govern the liability of the organs of a non-Member State.

90. The possibility of obtaining compensation on the basis of Turkish law is a different matter on which the Court is clearly not competent to rule.

91. Finally, though it is true that the right of the Contracting Parties to resort to the dispute settlement mechanism provided by Article 25 of the Association Agreement might make it possible to examine whether the Republic of Turkey assumes any liability with respect to the other parties to the Association Agreement, it could have absolutely no effect on the determination of the person liable under the Community customs regulations.

92. For those reasons, it is proposed that the second question referred for a preliminary ruling be answered as follows:

'The actions of the Turkish authorities in a case such as the present have no bearing on the determination of the person liable for the customs debt.'

V — The third and fourth questions referred for a preliminary ruling

93. These questions of the national court are essentially aimed at determining whether the Commission has a duty to warn Community operators whenever its staff entertain suspicions concerning the validity of an A.TR.1 certificate and whether a breach of that duty is such as to exonerate the declarant.

94. The Netherlands Government, citing the case-law of the Court of First Instance, [27] maintains that the Commission has a duty to take timely and effective measures to deal with any problems that may arise under an import procedure. The Commission has a general duty to ensure that Community law is correctly applied and, in general, to warn the operators concerned if it detects or suspects problems of a general nature associated with the application of an import procedure which, if not brought to the attention of the operators in time, could expose the latter to significant financial risks.

95. It concludes that any failure by the Commission to fulfil its obligations would constitute a 'special situation' within the

27 — Judgments in Cases T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401 and T-50/96 *Primex Produkte Import-Export and Others* v *Commission* [1998] ECR II-3773.

meaning of Article 13(1) of Regulation No 1430/79 and would therefore justify a remission or repayment of duties. It acknowledges, however, as we have seen, that an application to that effect does not appear to have been lodged in this particular case.

96. According to the Portuguese Government and the Commission, the latter has no such duty. In support of its argument, the Commission cites in particular the judgment in *De Haan* [28] from which, in its view, it follows by analogy that, even if the Commission had been aware of the possibility of fraud or an irregularity involving ATR certificates, it was under no obligation to warn importers that they might become liable for customs duties as a result of that fraud or irregularity, even though the importer concerned may have acted in good faith.

97. At the same time, the Commission acknowledges that, in the event of the breach of such a duty, Article 13(1) of Regulation No 1430/79 would be applicable, while noting the absence, in this particular case, of an application to that effect.

98. However, it should be borne in mind that the questions posed by the national court are to be viewed in the context of post-clearance recovery and, in any event, within that context the possible existence of a duty on the part of the Commission would only be relevant if its breach could be categorised as an 'error' within the meaning of Article 5(2) of Regulation No 1697/79.

99. It therefore appears that, in posing these two questions, the national court is seeking to determine whether the fact that the Commission did not inform the Community operators constitutes an 'error made by the competent authorities'.

100. In this respect, the Commission points out that in *De Haan* the Court held that a possible 'deliberate omission by the customs authorities, in the interests of the investigation, to inform the principal person liable of the possibility of fraud in which he was not involved' does not constitute an 'error made by the competent authorities' within the meaning of the above provision.

101. However, the situation was different from that with which we are now concerned since the silence of the customs authorities was justified by the requirements of an ongoing investigation whereas, in the present case, there does not seem to be any such explanation for the Commission's inaction.

28 — Case C-61/98 [1999] ECR I-5003.

102. Must that inaction therefore be regarded as an 'error' within the meaning of Regulation No 1697/79?

103. It should be recalled that the purpose of this provision is to protect legitimate expectations. It follows from the case-law cited above that for their conduct to have aroused legitimate expectations the authorities must have made an active error. Such expectations cannot therefore be based on the inaction of the authorities, even where, as in the present case, their passivity appears, at first sight, to be particularly reprehensible.

104. It should also be noted that, in many cases in which the Court has refused to recognise the existence of an 'error' or even a 'special situation' it has been a question of the competent authority accepting the treatment requested by the operator and then subsequently changing its position on the basis, where appropriate, of the results of a post-clearance check.

105. Accordingly, if this initial acceptance by the competent authority does not constitute an 'error', it is even harder to see how the silence of the authority could be thus described.

106. Moreover, as the *De Haan* case shows, the authorities may have a good reason for remaining silent, such as an ongoing investigation.

107. It follows that operators, even if acting in good faith, may not assume that the fact that the Commission has not given them any warning amounts to an assurance on its part that there is no problem with their transactions.

108. Thus, there is no alternative but to conclude that, even though they were acting in good faith, the fact that the Commission did not warn the operators concerned is not such as to constitute an 'error made by the competent authorities' within the meaning of Article 5(2) of Regulation No 1697/79.

109. On the other hand, it follows from what was said in relation to the first question that the national court should assess the operator's ability to detect the error of the Turkish authorities. In this connection, it is clear that the silence of the Commission is relevant since, if it had warned the operators, which it did not, the latter would no longer be in a position to argue that the error was undetectable.

110. For the sake of completeness, two further observations are called for.

111. Firstly, it is not necessary to consider whether the Commission's inaction constitutes a 'special situation' allowing import duties to be repaid or remitted since, as mentioned above, no corresponding application appears to have been lodged.

112. Secondly, the fact that the Commission's passivity did not constitute an active error within the meaning of Regulation No 1697/79 does not mean that its behaviour was above all reproach and, consequently, leaves open the question of the Commission's possible liability for any injury suffered by operators.

113. Indeed, under Article 211 EC, it is for the Commission to ensure that Community law, including the Association Agreement and decisions taken pursuant to that Agreement, is applied. Thus, it is responsible, in particular, for ensuring the correct application of the relevant provisions by the Turkish authorities, which it clearly failed to do since almost 20 years were to pass before the Commission took steps to address the problems relating to the application of the Additional Protocol.

114. In this connection, it should be pointed out that, in paragraph 268 of the judgment in *Kaufring* v *Commission*, the Court of First Instance held that the Commission 'failed to fulfil its obligation of diligence in not informing Community importers (including the applicants) at the earliest possible date of the potential risks they incurred in importing colour television sets from Turkey'.

115. However, the Court of First Instance arrived at that conclusion within the framework of its analysis of the existence, in the circumstances of the case before it, of a 'special situation' within the meaning of Article 13(1) of Regulation No 1430/79, a concept which, as we have seen, the Court of Justice considered capable of including situations not covered by the category of 'errors' within the meaning of Regulation No 1697/79. [29]

116. In the light of the above, it is proposed to give the following answer to the third and fourth questions referred for a preliminary ruling:

'The fact that when the staff of the Commission suspected or became aware of the procedure followed by the Turkish authorities it did not warn the operators concerned is not such as to constitute an "error made by the competent authorities" within the meaning of Article 5(2) of Regulation No 1697/79 and therefore has no bearing

29 — See the abovementioned judgment in *Hewlett Packard France*.

on the conditions of post-clearance recovery. On the other hand, an operator who had been warned would no longer have been able to argue that the error made by the authorities was undetectable.'

VI — Fifth question referred for a preliminary ruling

117. The national court enquires as to the validity, in relation to the Association Agreement, of the decision by the Commission, and that of the Portuguese authorities made 'on the advice of the former', to proceed to post-clearance recovery without previously putting in motion the procedure provided for by Articles 22 and 25 of the Association Agreement.

118. The French and Netherlands Governments, together with the Commission, argue that this is not a case of a 'decision by the Commission', adding that the national court gives no details that might enable the decision mentioned in the question to be identified.

119. As for the Portuguese Government, it considers that the Commission's action formed part of the mutual assistance provided for by Council Regulation (EEC) No 1468/81 of 19 May 1981. [30]

120. The wording of the fifth question reveals a dual purpose. It concerns, on the one hand, the 'decision of the Commission' and, on the other, that of the national authorities.

121. As regards the former, the Commission is right to point out that, a priori, it could only have been a question of a decision concerning the waiver of post-clearance recovery or the remission or repayment of duties. It then insists that in the Ilumitrónica case it never took any such decision.

122. It must indeed be acknowledged that there is nothing in the wording of the order for reference that would make it possible to identify such an act. The national court merely refers to the 'advice' of the Commission and to a 'finding of the Commission staff', without providing any further details.

30 — Regulation on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1981 L 144, p. 1).

123. Admittedly, the concept of a decision needs to be analysed from the standpoint of substance rather than form. Thus, an act described as 'advice' might very well take the form of a mere recommendation while actually, by virtue of its content, constituting a decision with possible legal consequences. Therefore the words used by the national court do not necessarily rule out the existence of a decision in this case.

124. It also seems likely that when the customs of the Member States receive from the Commission a message informing them of an irregularity and the countermeasures that need to be taken, they generally act on it.

125. Nevertheless, the national court does not mention any binding decision by the Commission itself (as opposed to a 'finding' by its staff) whose validity might have a bearing on the main proceedings. Accordingly, the Court is not in a position to rule on this aspect of the question.

126. As regards the second aspect, the Portuguese Government argues that the national authorities merely acted in a manner consistent with their obligations by strictly applying the Community customs regulations.

127. However, even assuming that the national authorities acted in conformity with Regulation No 1468/81, to which they refer, it does not necessarily follow that they thereby fulfilled all their obligations.

128. Clearly, they were also under an obligation to comply with the relevant provisions of the Association Agreement. It is therefore appropriate to consider whether, as the national court enquires, these provisions required the Portuguese authorities to put in motion the procedure provided for by Articles 22 and 25 of the Agreement before proceeding to post-clearance recovery.

129. First of all, it should be noted that this question is formulated in the same terms regardless of whether the actions concerned are those of the national authorities or those of the Commission.

130. Article 22 of the Association Agreement defines the powers of the Association Council, the procedure for submitting a dispute to the Council being laid down in Article 25 of the Agreement. As the Commission correctly points out, according to Article 25 'the Contracting Parties *may* submit to the Association Council any dispute relating to the application or interpretation of this Agreement'.

131. Thus, there can be no doubt that this is a right and there is therefore no way of deducing from this provision an obligation to submit the dispute to the Association Council, even in circumstances such as those of the present case, where the Portuguese authorities proceeded to the post-clearance recovery of customs duties on goods imported under conditions defined in the context of the implementation of the Association Agreement.

132. That is confirmed by the case-law of the Court. Thus, from *Pascoal & Filhos* it follows that even where a mechanism exists for regulating differences arising between the parties to an association agreement, the authorities of the State of importation can in any event proceed to post-clearance recovery on the basis of the results of verification alone, without being obliged to have recourse to that mechanism. [31]

133. It is true that, as the Commission points out, the verification in that case was made by the authorities of the State of exportation whereas, in the present case, the post-clearance checks were carried out by the staff of the Commission under the Community legislation applicable.

134. However, I agree with the Commission that there is no reason not to regard these two situations as analogous for our present purposes, especially as in *Pascoal & Filhos* the post-clearance verification in the State of exportation was carried out in cooperation with the Commission. Indeed, there seems to be no reason why the ability of the authorities of the State of importation to proceed to post-clearance recovery without having recourse to dispute settlement, following a post-clearance check, should depend on the precise degree of involvement of the Commission and the authorities of the State of exportation, respectively, in carrying out that check.

135. Moreover, whilst Article 25 of the Association Agreement concerns the settlement of disputes between the Contracting Parties, it does not appear that, in this particular case, there was such a dispute. Indeed, the Commission's description of its contacts with the Turkish authorities, once finally established, and the reaction of those authorities to the results of the Commission's investigations show that there was no disagreement concerning the Commission's conclusions or concerning the measures taken to ensure the recovery of the duties at issue.

136. In the light of the above, it is proposed that the fifth question referred for a preliminary ruling be answered as follows:

'Articles 22 and 25 of the Association Agreement do not oblige either the national

31 — See the aforementioned judgment in *Pascoal & Filhos*, paragraph 38.

customs authorities acting on the advice of the Commission or, as the case may be, the Commission itself, to resort to the procedure for which they provide before proceeding to the post-clearance recovery of import duties.'

Conclusion

137. For the reasons given above, it is proposed that the questions of the Tribunal Tributário de Primeira Instância de Lisboa be answered as follows:

First question

'There is an "error made by the competent authorities themselves", within the meaning of Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties, where the competent authorities of the country of exportation have knowingly and systematically endorsed A.TR.1 certificates for goods incorporating components which were not released into free circulation in that country and were not subjected to a countervailing levy.

In the absence of proof to the contrary, the person liable has not been reasonably able to detect that error where some of the relevant provisions were not published in the *Official Journal of the European Communities* and were not applied in the law of the country of exportation.'

Second question

'The actions of the Turkish authorities in a case such as the present have no bearing on the determination of the person liable for the customs debt.'

Third and fourth questions

'The fact that when the staff of the Commission suspected or became aware of the procedure followed by the Turkish authorities it did not warn the operators concerned is not such as to constitute an "error made by the competent authorities" within the meaning of Article 5(2) of Regulation No 1697/79 and therefore has no bearing on the conditions of post-clearance recovery. On the other hand, an operator who had been warned would no longer have been able to argue that the error made by the authorities was undetectable.'

Fifth question

'Articles 22 and 25 of the EEC/Turkey Association Agreement do not oblige either the national customs authorities acting on the advice of the Commission or, as the case may be, the Commission itself, to resort to the procedure for which they provide before proceeding to the post-clearance recovery of import duties.'