OPINION OF ADVOCATE GENERAL MISCHO

delivered on 14 March 2000 *

The legal background

1. Article 3 of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes,[1] as amended by Council Regulation (EEC) No 3193/80 of 8 December 1980,[2] provides:

'(1) The customs value of imported goods determined under this article shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community ...

(2) ...

(3) (a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller ...'.

2. Article 15 of Regulation No 1224/80 lays down:

'(1) The customs value of imported goods shall not include the cost of transport after importation into the customs territory of the Community provided that such cost is distinguished from the price actually paid or payable for the imported goods.

(2) ...'

3. Article 5 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

* Original language: French.

1 — OJ 1980 L 134, p. 1.

2 — OJ 1980 L 333, p. 1.

of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties,[3] provides:

'(1) ...

(2) The competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which were not collected as the 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.

...'

4. Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,[4] as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986,[5] provides:

'(1) Import duties may be repaid or remitted in special situations other than those referred to in sections A to D, which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

The situations in which the first subparagraph may be applied, and the detailed procedural arrangements to be followed for this purpose, shall be determined according to the procedure laid down in Article 25 ...'

5. The procedural arrangements to be followed are prescribed, since 1 January 1994, in Article 905 et seq. 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.[6] Accordance to those provisions, when the decision-making customs authority which has received a claim for repayment or remission is not in a position to decide the matter itself, the Member State is to transmit the case to the Commission. The Commission addresses its decision to the Member State. The customs authority then determines the claim on the basis of that decision.

3 — OJ 1979 L 197, p. 1.
4 — OJ 1979 L 175, p. 1.
5 — OJ 1986 L 286, p. 1.
6 — OJ 1993 L 253, p. 1.

Facts and issues in the main proceedings

6. The plaintiff in the main proceedings, Hans Sommer GmbH & Co. KG (hereinafter 'Sommer') had, before it had been cleared through customs, bought honey coming from the former USSR from Kessler & Co. Agrarproduckten-Handelsgesellschaft mbH (hereinafter 'Kessler').

7. The goods were delivered pursuant to contracts of sale c.i.f. Hamburg.

8. The deliveries were also the subject of supplementary agreements. They stipulated the costs of completing the transaction, calculated at a flat rate per tonne of honey. Those costs, invoiced separately by Kessler, included the expenses of unloading, taking possession of the goods until storage, removal from the warehouse by lorry, FOT costs, the costs of taking and analysing samples, and warehousing charges.

9. In its declarations of value for customs purposes, Sommer declared the c.i.f. prices which had been agreed with Kessler in the sale contracts, but not the costs of completing the transaction provided for in the supplementary agreements.

10. On a previous inspection at Sommer's offices, the customs authorities had raised no objection to this practice. Following a later inspection by the customs authorities in 1992, the defendant in the main proceedings, the Hauptzollamt (Main Customs Office) Bremen, Germany (hereinafter 'the HZA') decided that the flat-rate charges invoiced under the supplementary agreements should be included as an element of the price for the purposes of customs valuation. By an amended demand dated 29 July 1992, the HZA required payment by Sommer of DEM 96 352.77 by way of customs duties on importations made between 1989 and 1991.

11. Sommer lodged an objection against the amended demand and then, after that had been dismissed, appealed to the Finanzgericht (Finance Court) Bremen, Germany. By a judgment dated 12 April 1994, that court quashed the contested demand. The court decided that the flat-rate charges for completing the transaction were included in the customs value, but that post-clearance recovery of the customs duties was precluded by Article 5(2) of Regulation No 1697/79.

12. After delivery of the judgment of 12 April 1994, the HZA decided that it was not in a position to withdraw four other post-clearance recovery demands dated 29 April, 26 August and 9 September 1992, for a total of DEM 33 948.72, against which Sommer had also lodged objections. At the request of the HZA, the Federal Ministry of Finance, by a letter dated 27 March 1995, sought a decision by

the Commission on the interpretation of Article 13(1) of Regulation No 1430/79.

13. In Decision C(95) 2325 dated 28 September 1995, the Commission stated that the repayment of import duties was not justified in the absence of a special situation within the meaning of the said article, and that it had been established that Sommer's conduct had shown obvious negligence.

14. By decisions dated 20 February 1996, the HZA rejected the objections lodged by Sommer against the four post-clearance recovery demands of 29 April, 26 August and 9 September 1992, and also against a fifth demand of the same kind dated 2 December 1994.

15. Sommer appealed against those decisions to the Finanzgericht Bremen. That court considered that it could be deduced from the sale contracts that the seller had undertaken to deliver to Sommer honey which satisfied the quality requirements of the German regulations and that the completion of the analyses was a 'condition of sale' within the meaning of Article 3(3)(a) of Regulation No 1224/80, as amended. However, it considered it appropriate to refer this question to the Court of Justice since it needed to be settled before consideration of the questions which arose in the context of the proceedings for post-clearance recovery and remission. The Finanzgericht Bremen therefore decided to stay proceedings and to refer the following four questions to the Court of Justice for a preliminary ruling:

'(1) Does the transaction value, within the meaning of Article 3(1) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1,) as amended by Council Regulation (EEC) No 3193/80 of 8 December 1980 (OJ 1980 L 333, p. 1), of consignments of honey imported from 1989 to 1991 from the USSR include the "expenses" (Spesen) or the "costs of completing the transaction" (Abwicklungskosten), which the German importer invoices to the purchaser on the basis of separate contractual agreements, if the importer is obliged to take samples after importation in order to establish the quality of the honey in accordance with the applicable German regulations and to supply the chemical results of those analyses?

(2) If Question 1 is answered in the affirmative:

Is Commission Decision C(95) 2325 dated 28 September 1995 null and void?

(3) If Question 2 is answered in the affirmative:

Must the authorities refrain from post-clearance recovery of duty pursuant to Article 5(2) of Regulation (EEC) No 1697/79 if, at a previous on the spot inspection of importations, they raised no objection to the exclusion of flat-rate expenses from the customs value of similar transactions and it is not clear that the trader could have been in doubt about the correctness of the result of the inspection?

(4) If Question 3 is answered in the negative:

Do the circumstances described in Question 3 amount to a special situation within the meaning of Article 13 of Regulation No 1430/79 justifying the remission of duties?'

The first question

16. Both the Commission and the referring court consider that the expenses of the analyses at issue should be included in the customs value. By contrast, Sommer reaches the opposite conclusion, relying on a variety of arguments.

17. Sommer points out firstly that the sums at issue do not include any element which is for the benefit of Kessler, and thus capable of forming part of the price; in reality, they merely reimburse the expenses incurred by Kessler in employing third parties to undertake the services in question.

18. Sommer adds that it could itself have purchased the services in question from transport and warehouse undertakings and from food chemists. That is, moreover, what it had done until 1984, and the authorities then had always accepted the c.i.f. Hamburg price as constituting the customs value.

19. Sommer emphasises, furthermore, that even if it is accepted that Kessler is contractually bound to provide certificates showing that the delivered honey complies with the German Honigverordnung (Honey Regulation), it does not follow that Sommer could not simply take delivery of it c.i.f. Hamburg. If the analysis — which follows sampling which could be done equally well before or after customs clearance — shows lack of conformity, the honey could always be returned or the price reduced on the basis of the usual warranties relating to defects. It would in no case be necessary to determine the

product's compliance before the delivery takes place.

20. Sommer also emphasises that, under Article 3(1) of Regulation No 1224/80, the transaction value is 'the price actually paid or payable for the goods when sold for export to the customs territory of the Community'.

21. However, in the present case, the sums in dispute were paid for services provided in the Community by undertakings established there and in relation to goods already 'sold for export to the customs territory of the Community'. The contract governing these services did not conceal any payment for the sale of the honey c.i.f. Hamburg.

22. It would thus be appropriate to apply the case-law of the Court of Justice [7] according to which payment for services provided to the purchaser when purchasing imported goods does not form part of the customs value of the goods, subject to the adjustments provided for in Article 8 of Regulation No 1224/80.

23. That provision is rightly directed at ensuring that only costs incurred up to the point of introduction of goods into the customs territory of the Community are taken into account. By contrast, costs arising subsequently, for other services relating to the goods, are to be excluded from the transaction value.

24. Sommer points out in this context that the costs of the analyses in question should be treated in the same way as various services such as unloading or transport, which the Court has already decided should not be included in the transaction value. [8] There is no reason to treat transport within the Community, or warehousing, differently from the quality analysis of goods.

25. Finally, Sommer argues that the Court has already held that the cost of checking the quantities of goods reaching their destination should not be included in the customs value. [9] On that basis, it is not apparent why the costs of checking the quality of goods reaching their destination should be treated differently.

26. The referring court and the Commission argue essentially that the seller undertook to deliver honey of the quality pro-

7 — Case C-21/91 *Wünsche* [1992] ECR I-3647.

8 — Case 290/84 *Mainfrucht Obstverwertung* [1985] ECR 3909.

9 — Case 65/85 *Van Houten* [1986] ECR 447.

vided for in the sale contract by reference to a 'detailed analysis made by the seller in accordance with the applicable German legislation'. The contract moreover contains the following clause: 'other conditions: for a positive result from 10 samples per B/L (bill of lading) and subject to the outcome of corresponding analyses'.

27. According to the referring court and the Commission, it is only after completion of these analyses that the seller could have fulfilled his obligation to deliver honey certified as meeting the quality stipulated, since it is not in dispute that the honey coming from the USSR was not accompanied by a certificate. Therefore, the fact of undertaking the analyses should be considered a condition of the sale within the meaning of Regulation No 1224/80. Consequently, the payment by Sommer of a flat-rate sum to cover the cost of the analyses pursuant to the 'supplementary agreements' to the sale contract is also a condition of the purchase and the said sum must thus, in accordance with Article 3 of Regulation No 1224/80, be included in the customs value.

28. It is clear from the above that the difference between Sommer one the one hand, and the Commission and the referring court on the other, relates to the meaning of the expression 'a condition of sale of the imported goods' in Article 3(3)(a) of Regulation No 1224/80, cited above, which provides that the customs value includes 'all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller'.

29. In the context of contractual arrangements such as those in issue in the main proceedings, we are justified in examining the correct interpretation of this provision.

30. The Commission submits that the subject of the sale contract is honey of a quality determined by reference to analyses. We can effectively deduce from this, as the Commission does, that the completion of the analyses is 'a condition of sale' within the meaning of Regulation No 1224/80. But does it follow from that that the arrangements agreed between the parties with regard to the payment of the cost of these analyses are likewise 'a condition of sale'?

31. On that, it would be tempting at first sight to take the view that these arrangements are separable from the sale itself and are not therefore a condition of it.

32. The question is whether the buyer's failure to pay the costs of analysis would lead to the contract being void, or at least to the seller being able to seek its rescission.

33. It does not seem to me to be established beyond argument that the sale contract would necessarily be void if the buyer refused to pay the flat-rate sum due for the additional services provided to him by the seller, on the ground that he is dissatisfied with any particular one of them, but nevertheless paid the price of the goods themselves. There would, of course, be a dispute as to payment of the flat-rate sum, but it is conceivable that the dispute would not affect the validity of the transaction as a whole.

34. Uncertainty on that account is increased still further if the following hypothesis is considered: suppose that the seller delivers the goods, receives the price for them and is also paid the flat-rate sum in dispute before it is established that the honey in question is unsaleable because it does not reach the standard required. In that case, it is clear that the buyer could return the goods and obtain reimbursement of their price. Is it just as clear that the buyer could obtain reimbursement of the flat-rate payment, bearing in mind that it is supposed to cover the cost of services, such as the transport and the analyses, which have in fact been provided?

35. Similarly, if the honey does not match up to the quality provided for but is none the less saleable, the parties can negotiate a new sale at a lower price. The flat-rate payment at issue would in no way be affected, even though it could be considered that a different sale had been agreed.

36. Must it be concluded therefore that the flat-rate payment at issue is not 'a condition of sale' and that that sum is thus not part of the customs value within the meaning of Regulation No 1224/80?

37. Sommer relies for that argument on the decision in *Van Houten*, cited above, and contends that it is appropriate to treat the determination of quality, at issue in the present case, in the same way as that of quantity, which was at issue in *Van Houten*. Clearly, however, in that case it was the buyer who, at his own expense, conducted the weighing out of the goods when they were received. In the present case, the situation differs since the buyer entrusts the carrying out of the analyses to the seller and pays the seller therefor.

38. As we have seen, Sommer relies also on the judgment in *Wünsche*, cited above, which held that, by virtue of Article 3(1) of Regulation No 1224/80, 'payment for services provided to the buyer on the purchase of imported goods is not included in the customs value of the goods'. [10]

39. In that situation, however, there was a financing service which, although having the advantage of facilitating the acquisition by the buyer of the goods in question, nevertheless did not alter their intrinsic value.

10 — The judgment in *Wünsche*, cited above, paragraph 16.

40. The situation in the present case differs fundamentally. Without the analyses, the imported goods are of indeterminate quality and their marketability is uncertain. By contrast, once it is accompanied by a certificate of conformity with the provisions of the Honigverordnung, the imported honey clearly has added value because its quality, and thus its marketability, has become indisputable.

41. It is this consideration which is decisive. It is settled case-law [11] that the objective of Regulation No 1224/80 is to guarantee the use of values for customs purposes which are neither fictitious nor arbitrary, but which on the contrary correspond to the economic reality of the transactions in question.

42. As we have seen, goods whose quality is certified by the seller have a greater economic value than goods which do not possess such a certificate. It is this difference which justifies taking into account, for the purposes of customs valuation, the cost of paying to obtain this certification.

43. I observe also that the Court has already held in its judgment in *Malt* [12] that the costs of acquiring certificates of authenticity of imported beef had to be included in the customs value of the goods. Those certificates, which Community regulations required if the meat was to be imported without levy, fulfilled a function analogous to that fulfilled by the analyses now in dispute, since they guaranteed that the goods complied with certain specifications. There is thus a certain parallel with the present case, even though it is true that the Court based its decision on a ground different from that which I have just cited, since it justified its conclusion on the basis that the goods and the certificates were indissolubly linked.

44. The flat-rate payments at issue do not cover the costs of analysis alone, but also the port dues and the costs of intra-Community transport. It may therefore be wondered whether the fact that the cost of the analyses is part of the customs value suffices to bring within it the whole of the flat-rate payment. It should be noted that even though the question addressed to the Court refers to the flat-rate payments, it is none the less concerned specifically with the problem of the analyses.

45. I draw attention — but only as an alternative consideration — to the fact that the Commission and the referring court rightly point out that it is apparent from the case-law [13] of the Court of Justice that the costs of transport may be deducted

11 — See, for example, *Van Houten*, cited above, paragraphs 13 and 14 of the judgment, or further the judgment in Case C-11/89 *Unifert* [1990] ECR I-2275, at paragraph 35.

12 — Case C-219/88 [1990] ECR I-1481.

13 — See the judgment in *Mainfrucht Obstverwertung*, cited above.

from the customs value only if they have been invoiced separately from the price of the goods. That not having been the case here, the question of the proportion of the flat-rate payment to be excluded from the customs value if separately invoiced, does not arise.

46. I therefore consider that the answer to the first question should be as follows:

The transaction value, within the meaning of Article 3(1) of Regulation No 1224/80, as amended by Regulation No 3193/80, of consignments of honey imported from 1989 to 1991 from the USSR includes the 'expenses' (Spesen) or 'costs of completing the transaction' (Abwicklungskosten), which the German importer invoices to the purchaser on the basis of separate contractual agreements, where the importer is obliged to take samples after importation in order to establish the quality of the honey in accordance with the applicable German legislation and to supply the chemical results of those analyses.

The second question

47. In the event of the Court giving an affirmative reply to the first question, the referring court asks whether the Commission Decision of 28 September 1995 is null and void.

48. The Commission considers that there is no need to reply to this question because its Decision is no longer open to challenge. Thus, even though this measure was not addressed to Sommer but rather to the Federal Republic of Germany, Sommer was directly and individually concerned by it and should have commenced an action for its annulment in accordance with the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 173 EC), as soon as it had knowledge of it.

49. The Commission refers in this context to the decision of the Court in *TWD Textilwerke Deggendorf*[14] (hereinafter *'TWD'*), from which it is apparent that, if the person concerned could resist the implementation of a Decision of the Commission before a national court on the ground that it was illegal, that would amount to permitting him to circumvent the definitive character which the Decision acquires *vis-à-vis* him, after the expiry of the time-limit for an action for its annulment. In other words, the preliminary reference procedure should not be misused as a substitute for an action for annulment which has not been brought. The definitive character of the Decision prevents any examination of its validity in the context of a reference for a preliminary ruling.

50. In the present case, it has been established as a result of questions addressed by the Court to the parties in the main proceedings that the Commission's Decision of 28 September 1995 was sent to

14 — Case C-188/92 [1994] ECR I-833.

Sommer by the defendant, the HZA, by letter dated 27 November 1995. In that letter, Sommer's attention was drawn to the possibility of attacking the Commission's Decision under Article 173 of the Treaty.

51. Must it then be concluded that the rule in *TWD* applies to this case?

52. In this connection, it is appropriate to make the following observations.

53. At paragraph 25 of the judgment in *TWD*, the Court made it clear that its interpretation held good 'in factual and legal circumstances such as those in the main proceedings in this case'.

54. *TWD* concerned a Commission Decision addressed to the Federal Republic of Germany finding that aids granted by that Member State to the firm of Deggendorf had been made in breach of the provisions of Article 93(3) of the EC Treaty (now Article 88(3) EC) and were accordingly unlawful. The Commission had requested the Federal Republic of Germany to seek repayment of the aid, which it had done. Deggendorf had then lodged an appeal before the German courts against the administrative measure adopted by the national authorities in implementation of the Commission's Decision.

55. It will be observed in the first place that the present case, in contrast to *TWD*, does not concern state aid and, at first sight, it gives rise to different 'factual and legal circumstances'.

56. It is true that, in two cases not concerning state aid,[15] the Court has referred to *TWD*. But those judgments do not allow us to draw conclusions as to the scope *ratione materiae* of that case-law because, in the two cases in question, the Court alluded to it only for the purpose of declaring that, in any event, a further condition for its application had not been fulfilled.

57. The position with regard to state aid differs in several respects from that in the present case. Thus the need for legal certainty, which the Court held in *TWD* precluded the unlimited possibility of challenging the validity of a Decision, is not necessarily the same here. In the area of state aid the decision at issue is often of crucial importance not only for the undertaking to which the decision applies but also for its competitors. In relation to the remission or repayment of duties, there is no such impact.

15 — Case C-241/95 *Accrington Beef and Others* [1996] ECR I-6699, and Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315.

58. Moreover, a further argument relied upon in support of the application of the rule in *TWD* is that where the author of the contested measure has had to undertake complex economic evaluations, the procedure in a direct action, with its exchange of written pleadings, is more appropriate than that of the preliminary ruling; that argument does not hold good in the present case, since no evaluation of that kind is at issue.

59. Furthermore, the 'factual and legal circumstances' of the present case are much closer to those in *Foto-Frost* [16] than those in *TWD*. *Foto-Frost* also concerned a problem relating to the post-clearance recovery of customs duties. In that case also, the validity of a Commission decision was challenged before a national court by a trader who had not brought an action for annulment within the time-limit imposed by Article 173 of the Treaty. The Court none the less accepted that the national court was entitled to seek a preliminary ruling on the decision's validity.

60. It is true that in *Foto-Frost* the Commission decision at issue was based on the regulation concerning post-clearance recovery and not, as in the present case, on that concerning remissions and repayments. But I do not see how that difference is relevant to the relationship between the action for annulment and the reference for a preliminary ruling.

16 — Case 314/85 [1987] ECR 4199.

61. It is equally true that it is not stated in the *Foto-Frost* judgment whether or not the trader had, as in the present case, been informed of the decision adversely affecting him and of the legal remedies available. But that consideration is not significant because, in that judgment, the Court accepted the admissibility of the request for a preliminary ruling without even considering whether the trader would have been in a position to commence an action for annulment.

62. In addition to these general considerations, there is one circumstance specific to this case which must be emphasised.

63. The dispute began with an amended duty demand dated 29 July 1992 addressed by the competent customs authorities to Sommer.

64. On 11 August 1992, Sommer lodged an objection to the demand. Its objection was dismissed and, following an appeal to the Finanzgericht Bremen, that court, by order dated 12 April 1994, quashed the amended duty demand in the version it took following the decision on the objection.

65. After the judgment of 12 April 1994, the competent customs authority did not consider itself able to withdraw, consistently with the judgment, other post-clear-

ance recovery demands which had been challenged by Sommer. Instead, the authority referred the matter to the Federal Ministry of Finance which, on 27 March 1995, asked the Commission whether the duties should be remitted or reimbursed.

66. The Commission decided on 28 September 1995 that the repayment of import duties was not justified. The customs authority then, by four decisions dated 20 February 1996, rejected as unjustified the objections lodged against the duty demands.

67. On 21 March 1996, that is to say after the expiry of the time-limit laid down in Article 173 of the Treaty, Sommer lodged an appeal against the amended duty demands, in the version they took following the decisions on the objections.

68. It is apparent from the circumstances described above that one of the essential conditions for the application of the *TWD* case-law is not satisfied in this case. At paragraph 24 of that judgment the Court emphasised that the trader had been fully aware of the Commission's decision and that it could without doubt have challenged it under Article 173 of the Treaty.

69. However, in the instant case, Sommer was confronted by a Commission decision about the remission of duties, at a time when it was seeking annulment of national decisions whose objective was different, since they concerned post-clearance recoveries. A doubt could thus legitimately have arisen in Sommer's mind as to whether it could challenge that decision. That is even more the case in that it does not appear from the file that the national authorities had informed Sommer that they had brought the matter before the Commission, or of the basis on which they had done so.

70. Indeed, following the judgment of the Finanzgericht on 12 April 1994 holding that post-clearance recovery should be discontinued, Sommer should have expected a decision by the Commission on the basis of Regulation No 1697/79 (post-clearance recovery), rather than one based on Regulation No 1430/79 (remission and reimbursement).

71. In such a context, it was not only possible for Sommer to doubt the possibility of challenging the measure in question but, *a fortiori*, to doubt even the need to do so. It could not reasonably be expected of Sommer that it should have seen that in failing to challenge that measure it would lose any prospect of succeeding in its appeal before the national court — an appeal which it had put forward on the basis of a different regulation from that on which the Commission's decision is based.

72. Such would be the consequence of applying the rule in *TWD* to this case.

73. In addition, it should be noted that in the Court's recent judgment of 14 September 1999 in *Commission* v *AssiDomän Kraft Products and Others*,[17] the Court held that the rule in *TWD* is essentially based on the consideration that the time-limits for actions are intended to guarantee legal certainty by avoiding Community acts which have legal effect being liable to be called into question indefinitely, and also on the requirements of good administration of justice and procedural economy (paragraph 61 of the judgment).

74. However, in a case such as the present one, these same considerations of good administration of justice and procedural economy ought to lead the Court not to demand of a plaintiff that it should commence an action before the Community judicature in addition to an appeal before the national court, if only because, bearing in mind the doubts which it was entitled to have, the trader would then be led to commence an action for annulment purely to safeguard its position.

75. Nor would it be reasonable, from the point of view of the time involved in the proceedings and their costs, to require the plaintiff to commence such an action. In its reply to the question put by the Court, Sommer argues — rightly I think — that having regard to the amount in dispute, the costs of such further proceedings would be prohibitive. Sommer states that any party thinking in terms of cost-effectiveness would then be obliged to abandon the enforcement of its rights, which would amount to a limitation on its right to be heard. Sommer also explains why the costs of the preliminary ruling procedure are markedly lower than those of a direct action. It adds that, by reason of the work already undertaken by the national court, the parties can forgo an oral procedure with much more confidence, so that they avoid the expense of travelling to the hearing.

76. For the reasons set out above, I am unable therefore to accept the Commission's argument that the rule in *TWD* is applicable to this case.

77. It is thus necessary to examine the validity of the Commission's decision. As to that, the referring court sets out the following considerations.

78. Firstly, it states that according to the case-law of the Court of Justice and of the Court of First Instance, in proceedings such as those in issue here, the plaintiff had the right to be heard. That right was infringed since the Commission took its decision on the basis of only a previous judgment of the national court, and a brief document from

17 — Case C-310/97 P [1999] ECR I-5363.

the Ministry of Finance to which the plaintiff had had no access. Moreover, at no time did the Commission allow the plaintiff to submit any observations.

79. I accept this analysis, on which the Commission does not comment.

80. It is indeed apparent from the case-law of the Court [18] that the rights of the defence must be respected in any procedure liable to culminate in a decision adversely affecting a person, even in the absence of specific procedural requirements. Respect for the rights of the defence is thus a precondition for the validity of decisions by the Commission in connection with the remission or repayment of import duties. [19]

81. It follows that the fact that the Commission's decision in this case had been taken before the amendment to the Community Customs Code, by the addition of Article 906a [20] laying down rules of procedure, does not mean that the rights of the defence are not applicable in this case.

82. Moreover, as the referring court correctly states, it is relevant to recall that the Court, in its judgment in *Technische Universität München* [21] concerning relief from customs duty on the import of a scientific apparatus, held that in the case of an administrative procedure which involves complex technical evaluations, the existence of a discretion on the part of the Commission was inseparable from respect for the guarantees conferred by the Community legal order, prominent among which is the right of an interested party to present his point of view.

83. It is true that the application of Article 13 of Regulation No 1430/79 does not require complex technical evaluations by the Commission. But it is not the technical or non-technical character of the evaluations which the Commission is called upon to undertake which seems to me to be decisive, but rather the existence itself of a discretion.

84. In the present case, as the Court of First Instance pertinently observed in its judgment in *France-Aviation* v *Commission*, [22] the application of this provision, which the

18 — See, for example, Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, at paragraph 39 of the judgment.

19 — See, for example, Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873.

20 — This provision was inserted by Commission Regulation (EC) No 1677/98 of 29 July 1998, amending Regulation No 2454/93 (OJ 1998 L 212, p. 18), and lays down an obligation on the Commission when it 'intends to take a decision unfavourable towards the applicant for repayment or remission' to communicate 'its objections to him/her in writing, together with all the documents on which it bases those objections. The applicant for repayment or remission shall express his/her point of view within a period of one month from the date on which the objections were sent.'

21 — Case C-269/90 [1991] ECR I-5469.

22 — Case T-346/94 [1995] ECR II-2841, at paragraphs 32 to 34.

Court has on several occasions described as a 'general equitable provision',[23] presupposes a degree of discretion on the part of the Commission. The Commission must, in particular, decide whether there is a 'special situation' within the meaning of the provision which implies, as the Court of First Instance has observed, the identification and balancing of all the elements of fact and law relevant to the decision to be taken.

85. The Commission must likewise establish whether there has been negligence, which must also be 'obvious', or 'deception' on the part of the person concerned; it is thus obliged to assess the conduct of the dutypayer.

86. It is all the more important that the dutypayer should have had an effective opportunity to make his views known.

87. It must however be observed that in the present case, as in the case of *France-Aviation* v *Commission*, cited above, the Commission reached the conclusion that there were grounds to attribute 'obvious negligence' to the dutypayer without, at any time, allowing him to make representations.

88. It is apparent furthermore that the Commission's decision was essentially taken on the basis of a report from the Ministry of Finance, which the referring court tells us expressed an opposite point of view to that of the plaintiff.

89. On the other hand, the referring court does not state that the plaintiff's arguments were communicated to the Commission. In fact, the Commission took its decision solely on the basis of the report mentioned above and the previous judgment of the referring court. Although it may be supposed that a reading of the latter document enabled the Commission to take into account some part of Sommer's case, it must be borne in mind that that judgment was concerned with the validity of other post-clearance recovery demands. It is thus not possible to conclude that the Commission could have been aware from that source of all the arguments that Sommer could have adduced in the context of the application for the remission or repayment of duties which, it should be noted, was made by the Ministry of Finance only after the judgment had been given.

90. It must therefore be concluded that the Decision of the Commission, which reaches the serious finding that the plaintiff was guilty of obvious negligence, was taken without that person being in a position to put forward his submissions effectively. The Decision must thus be declared invalid for infringement of the rights of the defence.

23 — See, for example, the judgment in Case 283/82 *Schoellershammer* v *Commission* [1983] ECR 4219, at paragraph 7.

91. The referring court, relying similarly on the case-law of the Court of Justice and of the Court of First Instance, argues in addition that the reasoning of the decision at issue is insufficient.

92. The Commission, with a terseness which recalls the style of the decision at issue, merely observes that it considers its decision to be sufficiently reasoned.

93. On this point as well, I share the analysis of the referring court. It has to be said that the decision is composed essentially of a sequence of unreasoned assertions.

94. In the first place, the Commission's finding that the sums in issue were part of the customs value — a finding which the referring court considers that it was not in fact within the Commission's competence to make — could not in any event amount to a reason for the rejection of remission or repayment.

95. This finding implies that the duties were payable, which is a precondition for the issue of remission or repayment to be considered, but one cannot draw from it any conclusion as to whether or not the remission or repayment is justified.

96. As to the existence of special situations, whose presence Regulation No 1430/79 requires for the repayment or remission of duties, the Commission's Decision contains only two brief statements.

97. It avers, firstly, that the fact that the national authorities had detected no error on an earlier inspection does not amount to a special situation within the meaning of Regulation No 1430/79.

98. The Commission does not however explain how it reaches that conclusion, even though that is the whole question. The objective of the procedure is to permit the correct application of Article 13 of Regulation No 1430/79 to the instant case, which presupposes a determination as to whether the factual circumstances described by the national authorities constitute a 'special situation' within the meaning of this provision. But the Commission contents itself with the assertion, without more, that such is not the case.

99. It is thus not possible, by reading the decision, to ascertain the considerations upon which the Commission bases this interpretation of Article 13 of Regulation No 1430/79.

100. Secondly, in a similarly terse and peremptory assertion, the Commission states that 'the legal situation created by the national court' cannot call into question the application of Community law and could not constitute a special situation within the meaning of Article 13 of Regulation No 1430/79. Here also we do not find any reference to the reasoning on the basis of which the Commission reached this conclusion.

101. The decision at issue argues, again in a single sentence, that 'it is proved that the trader has shown obvious negligence' and did not include the expenses in dispute in its declaration as part of the customs value.

102. As the referring court rightly states in its analysis of the similar point of view expressed by the Federal Ministry of Finance, this last assertion misunderstands the real problem. The trader did not include the disputed amounts in its declaration because, on the occasion of an earlier inspection during which all the documents had been placed before the customs authority, the failure to include the disputed amounts in the customs value had not been criticised.

103. The essential issue now to be addressed is the effect of this silence on the part of the administration in the context of the application of Article 13 of Regulation No 1430/79.

104. The assertion by the Commission that there was 'obvious negligence' on the part of the trader cannot fail to bewilder. To support this serious reproach the decision at issue mentions only the fact that the amounts in question were not included in Sommer's declaration, without even alluding to the question of its link with the outcome of the earlier inspection.

105. The Commission has thus failed to give sufficient reasons for its view that Sommer had shown 'obvious negligence'. It is far from clear at first sight that Sommer's conduct in this case can be categorised as such.

106. The fact of having committed an error of law as to the consequences to be drawn from the administration's silence cannot be equated purely and simply with negligence, still less with serious negligence.

107. Nor does the Decision show the basis on which the Commission declares that it is 'proved' that there was obvious negligence, since the decision makes no reference to any evidence at all.

108. It follows from what has been said that the text of the decision is very far from complying with the requirements of the

Treaty and the case-law in relation to the need for Community acts to be reasoned. It is settled case-law that the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must disclose clearly and unequivocally the reasoning followed by the adopting body in such a way as to allow the persons concerned to ascertain the reasons for the measure and to defend their rights and to enable the Court to exercise its review. [24]

109. However, the wording of the decision at issue permits neither the trader concerned nor the Court, when exercising its review, to determine on what basis the decision was made.

110. For this reason also, the Commission's decision must be declared invalid.

111. Consequently, I propose that the answer to the second question should be:

Commission Decision C(95) 2325 dated 28 September 1995 is invalid.

The third question

112. The referring court states that, in spite of the Commission's view to the contrary, it remains of the view that the conditions for the waiver of post-clearance recovery laid down in Article 5(2) of Regulation No 1697/79 were satisfied in this case.

113. The national court considers, in effect, that Sommer was entitled to conclude from an earlier inspection that the costs in question did not form part of the customs value. It concludes, citing the case-law [25] of the Court, that the error of the administration could not 'reasonably have been detected', within the meaning of Article 5(2) of Regulation No 1697/79, by Sommer.

114. Sommer is of the same view as the referring court, and makes it clear that its new practice with regard to its customs declarations goes back to 1984. Before that date, Sommer took delivery of the honey c.i.f. Hamburg, warehoused it itself and arranged for the taking of samples and for the analyses. The sale contract was drawn in the same terms as in the present case, but the contract for supply of the services did not yet exist. The latter was concluded subsequently when it appeared that Kessler was able to offer these services to Sommer under more favourable conditions than those which Sommer had obtained previously.

24 — See, for example, the judgment in *CT Control (Rotterdam) and JCT Benelux* v *Commission*, cited above, at paragraph 31.

25 — Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535, at paragraph 24 of the judgment.

115. Sommer adds that, until 1984, the c.i.f. Hamburg price alone constituted the transaction value. After its change of practice, Sommer was the subject of an inspection in the course of which it drew to the attention of the customs authorities both the main and the supplementary agreements. No concern was expressed about its declaration of customs value.

116. Sommer considers, finally, that it had no reason to expect any concern, since the sole difference between its new practice and the previous situation lay in the fact that it obtained the services in question from the seller rather than a third party, as it had done before.

117. The Commission, in the first place, stresses that in its opinion the question asked by the referring court is misconceived. The Commission considers that it is incorrect to state that it is not apparent that the trader could have been in doubt as to the precise outcome of the inspection. According to the Commission, a prudent trader ought, on the contrary, to have realised that the administration had made an error. The mere fact that the Customs did not, on the occasion of an inspection, object to Sommer's practice is of no significance in this context, since the silence of the administration cannot be regarded in the same light as information about the legal position binding the competent authority.

118. The Commission asserts, moreover, that according to the settled case-law of the Court [26] Article 5(2) of Regulation No 1697/79 would only permit the national authorities to refrain from post-clearance recovery if three conditions are satisfied at the same time: the failure to collect duties must have been caused by an error by the competent authorities themselves; the person liable, acting in good faith, must have been unable to detect the error, and all the provisions in force concerning the customs declaration must have been complied with.

119. As we have seen, the Commission considers that these conditions are not all satisfied in this case. In particular, the Commission contends that Sommer did not act in good faith and that it ought to have detected the error.

120. The national court asks, essentially, whether in the circumstances of this case Article 5(2) of Regulation No 1697/79 requires the national authorities to refrain from post-clearance recovery: the subject of the main proceedings is the appeal by Sommer against the decision of the national authorities to proceed to such a recovery.

121. It is apparent from the case-law of the Court [27] that, even though Article 5(2) of Regulation No 1697/79 provides that the

26 — Case C-370/96 *Covita* [1998] ECR I-7711, at paragraphs 25 to 33 of the judgment.

27 — See, for example, *Foto-Frost*, cited above, at paragraph 22 of the judgment.

national authorities 'may' refrain from post-clearance recovery, the person liable is entitled to such a waiver if the conditions laid down in that provision are satisfied.

122. The question asked by the national court refers to the second of the three conditions that I have just set out, pointing out that when a previous on the spot inspection took place the authorities did not object to the non-inclusion in the customs value of flat-rate expenses for similar transactions, and that it does not appear that the trader could have been in any doubt about the correctness of the outcome of the inspection.

123. It follows from what has been said that if there was an error on the part of the authorities which was not detectable by the trader and, of course, if the condition regarding compliance with the provisions in force is satisfied (which is not in dispute in this case), the authorities may not proceed to post-clearance recovery.

124. The difficulty in the present case, as the referring court has made clear, arises from the fact that the Commission does not share the analysis of the Finanzgericht in regard to the detectablility of the error.

125. It is consistent case-law of the Court,[28] that this question must be addressed in the light of three criteria: it is necessary to take account of the nature of the error, the professional experience of the trader concerned and the care which the latter has shown.

126. The same judgments indicate that it is matter for the referring court to determine in the light of these criteria whether or not the error was detectable in the case actually before it. That is exactly what the Finanzgericht has done in this instance. The order for reference makes clear the national court's reasoning on this point, a reasoning which is based on the three criteria adopted by the Court of Justice.

127. It follows that the Court of Justice cannot here, as suggested by the Commission, reformulate the question asked, which would amount to re-examining the question of the detectability of the error. The application to the present case of the criteria laid down by the Court is a matter, as I have pointed out, for the referring court.

128. I propose therefore that the answer to the question posed by the Finanzgericht

28 — See, for example, Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, at paragraph 22 of the judgment.

should be that the authorities must not proceed to post-clearance recovery of duties pursuant to Article 5(2) of Regulation No 1697/79 when, at the time of a previous on the spot inspection of imports, they did not object to the non-inclusion of flat-rate expenses in the customs value of similar transactions, and it does not appear that the trader could have been in doubt as to the correctness of the outcome of the inspection.

129. For the sake of completeness, it should be noted, lastly, that Article 2 of Commission Regulation (EEC) No 1573/80 of 20 June 1980[29] laying down provisions for the implementation of Article 5(2) of Regulation No 1697/79 states as follows:

'Where the competent authority of the Member State in which the error was committed which resulted in insufficient duty being collected is able to ascertain by its own means that all the conditions referred to in Article 5(2) of the basic regulation are fulfilled, it shall decide not to take action for the post-clearance collection of the uncollected duties, provided that the amount of the duties involved is less than ECU 2 000.'

29 — OJ 1980 L 161, p. 1.

130. This provision should be seen together with Article 4 of the same regulation, which provides that:

'Where the competent authority of the Member State in which the error was committed is not able to ascertain by its own means whether all the conditions set out in Article 5(2) of the basic regulation are fulfilled, or where the amount of the duties involved is equal to or greater than ECU 2 000, it shall request the Commission to take a decision on the case, submitting to it all the necessary background information.'

131. This threshold of ECU 2 000 which, when it is exceeded, requires the national authorities to seek authority from the Commission to refrain from post-clearance recovery was maintained by the different regulations[30] which in turn replaced Regulation No 1573/80, and has been provided for in Article 869 of Regulation No 2454/93.

132. This provision was amended by Regulation No 1677/98 which now provides for a threshold of ECU 50 000.

30 — Commission Regulation (EEC) No 2380/89 of 2 August 1989 (OJ 1989 L 225, p. 30), and Commission Regulation (EEC) No 2164/91 of 23 July 1991 (OJ 1991 L 201, p. 16), on the implementation of Article 5(2) of Regulation No 1697/79.

133. I therefore propose that the Court should answer the third question as follows:

The authorities must refrain from the post-clearance recovery of duties pursuant to Article 5(2) of Regulation No 1697/79 where, on the occasion of a previous on the spot inspection, they did not object to the non-inclusion of flat-rate expenses in the customs value for similar transactions and it does not appear that the trader could have been in doubt as to the correctness of the outcome of the inspection.

The fourth question

134. The Finanzgericht asks in essence whether, in the event of the Court giving a negative answer to the third question, it would be right to conclude that, in any event, the conditions required in Article 13 of Regulation No 1430/79 are satisfied.

135. Since I have suggested that the previous question be answered in the affirmative, and since the national court only asks this question if the answer is in the negative, I propose that the answer should be that there is no need to answer the fourth question. A number of observations, none the less, seem to me to be useful.

136. As the referring court rightly emphasises, the Court of Justice [31] has already clarified the connection between the provisions which are the subject of the third and fourth questions respectively.

137. In this regard, the Court has held that 'Article 13 of Regulation No 1430/79 and Article 5(2) of Regulation 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.'

138. It follows that, to the extent that it must be considered as relating to the condition requiring the absence of fraud or deception, the question is in effect unnecessary since that condition corresponds to the concept of detectable error, which is the subject of the previous question.

31 — See the judgment in *Hewlett Packard France*, cited above, paragraph 46.

139. It is important, however, to recall that it is consistent case-law of the Court of Justice [32] that Article 13 of Regulation No 1430/79 is a general equitable provision intended to prevent, in special situations, a trader being obliged to bear a loss which would not have occurred in the absence of that situation. By contrast, the purpose of Article 5(2) of Regulation No 1697/79 is to ensure the application of a specific principle, namely that of legitimate expectation, in precise circumstances, namely those of official error.

140. It must thus be noted that, in the judgment in *Hewlett Packard France*, cited above, the Court held that a situation which did not amount to an 'error made by the competent authorities themselves' within the meaning of Article 5(2) of Regulation No 1697/79, could none the less be a 'special situation' within the meaning of Article 13 of Regulation No 1430/79.

141. It follows that, to the extent that the question asked should be understood as referring also (as its wording indicates) to the concept of 'special situations', the answer to it would not necessarily be determined by the answer to the previous question about Article 5(2) of Regulation No 1697/79. It is thus necessary to ask what that concept means in the context of the present case.

142. In this connection, it must be noted that the list of 'special situations' set out in Commission Regulation (EEC) No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4a, 6a, 11a and 13 of Regulation No 1430/79 [33] is not exhaustive, and that the case-law of the Court of Justice and the Court of First Instance includes a number of instances of the concept which are not found there.

143. The various situations described by Regulation No 3799/86 are clearly exceptional in character, since they are situations such as the theft of goods, their inadvertent withdrawal from a customs procedure, the impossibility of unloading them or a judicial order prohibiting the marketing of the goods.

144. As to possible situations envisaged in the case-law, it is apparent that the Court of Justice has tended to give a restrictive interpretation to the term 'special situations' as used in the legislation in question. Thus, the fact that a trader was the victim of false certificates did not amount to a 'special situation'. [34] Likewise, in *Oryzomyli Kavallas and Others* v *Commission*, [35] where the Court accepted that the conduct

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

33 — OJ 1986 L 352, p. 19.

34 — Joined Cases 98/83 and 230/83 *Van Gend & Loos and Expeditiebedrijf Wim Bosman* v *Commission* [1984] ECR 3763, and Case C-446/93 *SEIM* [1996] ECR I-73.

35 — Case 160/84 [1986] ECR 1633, at paragraph 16 of the judgment.

of the national authorities amounted to a special situation, the Court itself described it as exceptional.

145. It is true that in *Hewlett Packard France* the Court accepted that incorrect information given by the authorities of another Member State to a company belonging to the same group as the importer amounted to a special situation within the meaning of Regulation No 1430/79.

146. Must it be considered therefore that in this case there is also a special situation?

147. Such is not the case. In fact it appears from the case-law which has been cited that the purpose of Article 13 of Regulation No 1430/79 is to prevent a trader, in a special situation for which it could not be blamed, from suffering a loss which he would have avoided in the absence of that situation.

148. In the present case, the trader is faced with a demand for payment of sums which, by virtue of the Community legislation, were due in any event. The only difference from a 'normal' import transaction is the fact that the amount of the duties was claimed later.

149. It may indeed be argued that if the trader had known that the duty liability would be higher than expected, the trader could have reverted to its previous practice and thus avoided an increase in the customs value. Sommer admits itself that it changed its practice in order to reduce costs. It seems therefore that the change of practice did not have only negative consequences. We can only conclude that the trader would have abandoned the change had it known that the customs duties would be higher than foreseen.

150. I conclude from this that it is not established that here we are in the presence of a situation involving loss for the trader which would have been avoided if the national authorities had not conducted themselves in a way which created that situation.

151. It follows therefore from the case-law cited that there is no basis for applying Article 13 of Regulation No 1430/79 in this case.

152. Since these observations are made only in the alternative, I suggest that the Court should answer that there is no need to answer the fourth question.

Conclusion

153. I believe therefore that it is appropriate to answer the questions referred by the Finanzgericht Bremen as follows:

Question 1

The transaction value, within the meaning of Article 3(1) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the value of goods for customs purposes, as amended by Council Regulation (EEC) No 3193/80 of 8 December 1980, of consignments of honey imported from 1989 to 1991 from the USSR includes the 'expenses' (Spesen) or 'costs of completing the transaction' (Abwicklungskosten), which the German importer invoices to the purchaser on the basis of separate contractual agreements, where the importer is obliged to take samples after importation in order to establish the quality of the honey in accordance with the applicable German legislation and to supply the chemical results of those analyses.

Question 2

Commission Decision C(95) 2325 dated 28 September 1995 is invalid.

Question 3

The authorities must refrain from post-clearance recovery of duties pursuant to 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, on the occasion of a previous on the spot inspection, they did not object to the non-inclusion of flat-rate expenses in the customs value for similar transactions and it is not clear that the trader could have been in doubt as to the correctness of the outcome of the inspection.

Question 4

There is no need to reply to the fourth question.