OPINION OF ADVOCATE GENERAL JACOBS

delivered on 30 June 2005 [1]

1. In this request for a preliminary ruling, the Hof van Beroep te Antwerpen (Antwerp Appeal Court) refers a number of questions on the interpretation of Article 221 of the Community Customs Code. [2]

2. The main proceedings involve a claim for the recovery of a series of customs debts which were incurred between 1992 and 1994 but the existence of which was unknown either to the customs agent responsible or to the customs authorities until 1995, when it became apparent that the goods in question did not in fact qualify for importation free of duty. The customs agent argues that, in the case of at least some of the debts, the amount of the customs debt was notified out of time and/or that certain procedural requirements were not observed, thus precluding recovery.

3. The referring court therefore asks, with regard to those arguments, in substance:

— Must notification follow, or may it precede, entry of the amount in the accounts?

— If the debtor is notified after the expiry of the prescribed period of three years, is the debt extinguished or merely irrecoverable?

— Must a Member State specify the manner in which notification is to be made? Failing such specification, what criteria must be met?

4. A prior issue, however, also raised by the referring court, concerns the applicability of the Customs Code *ratione temporis*; certain of the customs debts were incurred before 1 January 1994 when the Customs Code became applicable, although the recovery procedure was not commenced until after that date.

1 — Original language: English.

2 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

Community customs legislation

5. Both the present legislation and that which it replaced contain provisions governing post-clearance recovery of a customs debt, that is to say the collection of duty after initial clearance of the importation or exportation which gave rise to it.

The Customs Code

6. The Community Customs Code was adopted in 1992 to replace provisions previously contained in a large number of regulations and directives by a single, simpler, more complete and more consistent body of rules. In accordance with Article 253, it applies from 1 January 1994.

7. Chapter 3 (Articles 217 to 232) of Title VII is entitled 'Recovery of the amount of the customs debt'. Section 1 of that chapter (Articles 217 to 221) covers 'Entry in the accounts and communication of the amount of duty to the debtor'.

8. Article 217(1) provides: 'Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called "amount of duty", shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).'

9. Articles 218 and 219 deal with time-limits for entry in the accounts.

10. Article 220 covers situations in which (correct) entry in the accounts is delayed. Under Article 220(1): 'Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate

the amount legally owed and to determine the debtor (subsequent entry in the accounts). ...'

The previous legislation

11. As worded at the material time, [3] Article 221(1) and (3) provide as follows:

12. Before the Customs Code became applicable, similar rules were contained in Council Regulations (EEC) No 1697/79 [4] and No 1854/89, [5] both repealed with effect from 1 January 1994 by Article 251(1) of the Customs Code.

'1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

Regulation No 1697/79

...

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. However, where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due, such communication may, in so far as the provisions in force so allow, be made after the expiry of such three-year period.'

13. As stated in Article 1(1), the regulation determined the conditions under which the competent authorities were to undertake post-clearance recovery of import duties or export duties on goods entered for a customs procedure involving the obligation to pay such duties for which, for whatever reason, payment had not been required of the person liable for payment.

3 — Paragraph 3 was replaced by new paragraphs 3 and 4, after the material time in the present case, by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17).

4 — 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 (OJ 1979 L 197 p. 1).

5 — Of 14 June 1989 on the entry in the accounts and terms of payment of the amounts of the import duties or export duties resulting from a customs debt (OJ 1989 L 186 p. 1).

14. Under Article 1(2)(c), for the purposes of the regulation 'entry in the accounts' meant 'the official act by which the amount of the import duties or export duties to be collected by the competent authorities is duly determined'.

15. Article 2 provided:

'1. Where the competent authorities find that all or part of the amount of import duties or export duties legally due on goods entered for a customs procedure involving the obligation to pay such duties has not been required of the person liable for payment, they shall take action to recover the duties not collected.

However, such action may not be taken after the expiry of a period of three years from the date of entry in the accounts of the amount originally required of the person liable for payment or, where there is no entry in the accounts, from the date on which the customs debt relating to the said goods was incurred.

2. Within the meaning of paragraph 1 action for recovery shall be taken by notifying the person concerned of the amount of import duties or export duties for which he is liable.'

Regulation No 1854/89

16. Article 1(1) stated that the regulation concerned 'the entry in the accounts and terms of payment of the amounts of the import duties or export duties resulting from a customs debt'.

17. Article 1(2)(c) defined 'entry in the accounts' as 'the entry by the customs authority in the accounts books, or any other medium used in their stead, of the amount of import duties or export duties corresponding to a customs debt'.

18. Under Article 2(1):

'Each amount of import duties or export duties resulting from a customs debt — hereinafter called "amount of duty" — shall be calculated by the customs authority as soon as it has the necessary data, and entered in the accounts by that authority.'

19. The provisions of Articles 3 and 4 were essentially the same as those of Articles 218 and 219 of the Customs Code.

20. Under Article 5:

'Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 3 and 4 or has been entered in the accounts at a level lower than the amount legally owed, the entry in the accounts of the amount of duty to be recovered or remaining to be recovered must take place within two days of the date on which the customs authority noticed the situation and is in a position to calculate the amount legally owing and to determine the person liable for payment of that amount. ...'

21. Article 6(1) provided:

'As soon as it has been entered in the accounts, the amount of duty shall be communicated to the person liable for its payment, in accordance with the appropriate procedures.'

Facts and procedure

22. On a number of occasions between 9 April 1992 and 23 June 1994, Molenbergnatie NV ('Molenbergnatie'), acting as customs agent on behalf of another company, declared imports of video cassettes into Belgium from Macao.

23. Each importation was covered by a 'Certificate of Origin Form A' issued by the competent authorities in Macao and was thus free of duty under the generalised system of tariff preferences for goods originating in developing countries.

24. In March 1992, however, an investigation by a Community mission in Macao had indicated that the cassettes in question did not meet the required criteria of origin to qualify for that treatment.

25. Consequently, although not until 10 August 1994, the Committee on Origin [6] notified the Member States that the prefer-

6 — Set up by Article 12 of Regulation No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (OJ, English Special Edition 1968 (I), p. 165).

ential tariff should not be applied to those goods, which should be subject to both import duty and anti-dumping duty, as originating in China.

26. On 27 February 1995 the Belgian customs authorities informed Molenbergnatie of that situation by registered letter, without referring to the Customs Code but setting out the amounts of import and antidumping duties due, totalling BEF 712 228 and BEF 7 451 403 respectively.

27. Belgium in its observations states that the amounts were entered in the accounts on 7 March 1995. Molenbergnatie in its observations states that the date of entry in the accounts cannot be verified because the Belgian authorities refuse to produce an accounting document.

28. On 29 September 1995 the customs authorities sent Molenbergnatie a recovery notice for those amounts,[7] expressly stating that the claim was made in accordance with Article 220(1) of the Customs Code.

7 — With a small upwards adjustment to BEF 712 243 in the case of the import duty.

29. Molenbergnatie has challenged that demand, and the case is now before the Hof van Beroep, which seeks a preliminary ruling on the following questions:

'(1) Do Articles 217 to 232 of the Community Customs Code ... apply to the recovery of a customs debt which was incurred prior to 1 January 1994 but recovery of which was not undertaken or initiated prior to 1 January 1994?

(2) If so, must the notification prescribed in Article 221 of the Community Customs Code always take place after the amount of the duties has been entered in the accounts, or, in other words, must the notification prescribed in Article 221 of the Community Customs Code always be preceded by entry of the duties in the accounts?

(3) Does late notification of the amount of duties to the debtor — that is to say, notification made after expiry of the three-year period laid down in the original version of Article 221(3) of the Community Customs Code ... even though the customs authorities were in fact in a position to determine, within that three-year period, the precise amount of the duties legally due —

make it impossible to pursue recovery of the customs debt in question, lead to the cancellation of the customs debt in question, or have some other consequence in law?

(4) Must Member States determine the manner in which notification of the amount of duties, as laid down in Article 221 of the Community Customs Code, must be made to the debtor? If so, can the Member State which has failed to specify how notification of the amount of duties as laid down in Article 221 of the Community Customs Code should be made to the debtor argue that any document in which the amount of the duties is set out and which (following entry in the accounts) was notified to the debtor may constitute notification to the debtor of the amount of duties, as prescribed in Article 221 of the Community Customs Code, even though that document does not in any way refer to Article 221 of the Community Customs Code or indicate that it relates to notification to the debtor of the amount of duties owed?'

30. Molenbergnatie, Belgium and the Commission have submitted written observations. No request has been made for a hearing, and none has been held.

Question 1: Applicability of Articles 217 to 232 of the Customs Code

31. It is clear that only the provisions of the Customs Code can apply to the recovery of the customs debts incurred after 1 January 1994.

32. For the first six debts, however, incurred before 1 January 1994, the question arises whether their recovery, initiated only after that date, should be governed by the previous legislation or by the Customs Code.

33. The starting point for the analysis must be the principle, which the Court has consistently followed, that procedural rules generally apply to all proceedings pending at the time when they enter into force, whereas substantive rules do not usually apply to situations existing before their entry into force. [8]

34. Belgium argues that Articles 217 to 232 of the Customs Code contain only substan-

8 — See, for a recent example, Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-6405, at paragraph 19, with the case-law cited there.

tive rules which thus do not apply to customs debts which arose on importations prior to 1 January 1994.

35. Molenbergnatie and the Commission however refer to *Salumi* [9] and consider that the articles in issue contain 'both procedural and substantive rules which form an indivisible whole and the individual provisions of which may not be considered in isolation, with regard to the time at which they take effect'. [10] According to that case-law, such articles are to be treated as not applying to situations existing before their entry into force unless there are sufficiently clear indications that they were intended to have retroactive effect, [11] and there are no such indications in the provisions in question or elsewhere in the Customs Code.

36. Both approaches thus lead to the conclusion that Articles 217 to 232 of the Customs Code do not apply to situations existing before 1 January 1994.

37. However, the parties differ as to when the relevant situation began to exist.

38. Belgium and the Commission take the view that the 'situation' came into existence when the customs debt was incurred on importation (in six cases before 1 January 1994). Molenbergnatie argues that the 'situation' is the recovery procedure, which began when the amount of duty was entered in the accounts (in all cases after 1 January 1994).

39. For my part, however, I cannot agree with Belgium's contention that the rules concerned are all substantive, and I differ from Molenbergnatie and the Commission as regards the applicability of the *Salumi* approach to the present case.

40. First, and most importantly, the rules contained in Articles 217 to 232 of the Customs Code appear to me to be predominantly and quite clearly of a procedural nature. Only a few of those rules concern substantive rights or obligations, and — on this point I disagree also with the Commission — none of them is to be found in Article 221, with which the national court's remaining questions are concerned. (It is true that if the answer to the third question were that the debt is extinguished, that would be a substantive rule, but I do not consider that to be the case — see point 73 et seq. below.)

9 — Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, at paragraphs 6 to 12; see also Case C-261/96 *Conserchimica* [1997] ECR I-6177, at paragraphs 14 to 22. Both judgments concerned Regulation No 1697/79.

10 — *Salumi*, paragraph 11.

11 — Ibid., paragraph 12.

41. That factor alone might be thought sufficient reason to follow the normal principle and not to apply the procedural rules in the previous legislation to the present case.

42. In addition, however, I consider that the *Salumi* approach, under which a mixed body of substantive and procedural rules should be treated as if they were all substantive, is inappropriate in the present case.

43. First, I think that approach must in general be used with caution. If followed too liberally, it would run the risk of undermining the basic distinction between applying new procedural rules to pending proceedings but not new substantive rules to pre-existing situations. Many measures contain both substantive and procedural rules, but it is only where the two are inseparably bound together that the *Salumi* approach is appropriate.

44. In order to determine whether that is the case, it cannot be sufficient to view the combined rules in isolation; they must also be compared with the previous regime before it can be decided whether the procedural aspects can be applied independently to proceedings which arose under that regime.

45. In that regard, the transition from the previous Community legislation to the Customs Code may in my view be distinguished from the earlier transition from a disparate collection of national rules to a unified Community regulation, which was the situation in *Salumi*.

46. Proceedings pending at the time when Regulation No 1697/79 came into force had been governed by a variety of national rules on post-clearance recovery, in particular as regards the obligation to proceed to recovery and the time-limits within which recovery was to be effected; even the rules on the incurrence of a customs debt had not yet been harmonised. [12] As the Court pointed out at paragraph 14 of its judgment in *Salumi*, to apply the new Community rules to such proceedings could have resulted — depending on differences in national practice in bringing proceedings — in unjustified differences in treatment with regard to transactions effected in similar circumstances, infringing the principles of equality and justice.

12 — That was effected by Council Directive 79/623/EEC of 25 June 1979 on the harmonisation of provisions laid down by law, regulation or administrative action relating to customs debt (OJ 1979 L 179, p. 31), which was to be implemented by 1 January 1982.

47. That is not at all the case in the present context, where the pre-1994 legislation and procedures were uniform throughout the Community and are now to a very large extent simply consolidated in the Customs Code. In those circumstances, I see no necessity to depart from the more basic principle by considering Articles 217 to 232 of the Customs Code to form an indivisible whole the procedural elements of which cannot be applied to proceedings pending when they entered into force. Even to the extent that those elements differ from the procedural rules previously in force, their application *ex nunc* does not give rise to any clash since they operate within a harmonised and largely unchanged framework. And, it may again be stressed, the provisions in issue here are those of Article 221, which are purely procedural.

48. If the *Salumi* approach were to be followed here, it would moreover have some problematical or surprising implications.

49. It would for example involve distinguishing 16 of the Customs Code's 253 articles as forming a separate, indivisible whole, although they form two of the five chapters of the title on customs debt, itself clearly a coherent unit, within a code which has been specifically drafted as a whole body of law. Such partitioning seems neither easy nor desirable.

50. It would also mean — in the present case but in all probability in any other case still likely to arise with regard to the legislation in question — reviving the procedural provisions of a repealed measure in order to apply them to proceedings not yet pending at the time of the repeal and to a situation not then even known to exist. Such a result is certainly not required by, and may even be seen as running counter to, the requirements of legal certainty and legitimate expectation. If it is generally the case that new procedural rules apply to pending proceedings, that must be true a fortiori to proceedings which have yet to be initiated.

51. Finally, I would point out that, in *Netherlands* v *Commission*,[13] the Court considered a number of provisions of the Customs Code — including Article 221, in issue in the present case — together with their counterparts in the previous legislation. Whilst making it clear that the procedural rules were to be applied to proceedings pending on 1 January 1994 but the substantive rules were not to be applied retroactively, the Court did not seek to follow the *Salumi* approach but treated each rule

13 — Case C-156/00 [2003] ECR I-2527; see especially paragraphs 35, 36 and 62 to 67.

separately. Although no reason is given in the judgment for that treatment, it might be surmised that considerations of the kind I have set out above were relevant.

52. I therefore take the view that the answer to the national court's first question should be that procedural rules contained in Articles 217 to 232 of the Community Customs Code apply to the recovery of a customs debt incurred prior to 1 January 1994; substantive rules do not apply to situations existing before their entry into force.

53. Since the rules in issue in the remaining questions all appear, at least on analysis, to be procedural in nature, it is therefore Article 221 of the Customs Code which should apply; I shall none the less consider both that provision and the previous legislation when examining those questions.

Question 2: Chronological order of entry in the accounts and notification to the debtor

54. The national court's second question concerns a matter of timing.

55. In any event, under both the former and the present legislation, when it becomes clear that a customs debt has arisen but has not been entered in the accounts, it must be entered within two days from the date on which the amount and the debtor can be ascertained by the customs authorities [14] and notified forthwith to the debtor. [15] Such notification may not now however validly be made more than three years after the date on which the customs debt was incurred; [16] previously the limitation period was three years from the date of 'entry in the accounts' within the meaning of Regulation No 1697/79. [17]

56. The first importation took place on 9 April 1992. Within three years from that date, on 27 February 1995, the customs authorities informed Molenbergnatie that duty was due. According to the Belgian Government, they entered the amount in the accounts on 7 March 1995, still within the three years. They then sent a recovery notice on 29 September 1995, after the expiry of the three years from the first importation, but within three years from the date of the remaining importations.

14 — Article 220(1) of the Customs Code; Article 5 of Regulation No 1854/89.

15 — Article 221(1) of the Customs Code; Article 6(1) of Regulation No 1854/89.

16 — Article 221(3) of the Customs Code.

17 — Article 2(1), second subparagraph, of Regulation No 1697/79.

Regulation No 1697/79

57. The Commission, which considers that the question must be answered in the context of Regulation No 1697/79, cites the Court's ruling in *Antero*:[18] 'The expression "entry in the accounts" used in Article 1(2)(c) and in the second subparagraph of Article 2(1) of [Regulation No 1697/79] refers to the administrative act determining the amount of the import or export duties to be collected by the competent authorities and not to the entry by the customs authorities in accounts books, or on equivalent computer media, of such amount. Such entry is not a condition prior essential to the taking of action for post-clearance recovery.'

58. It may be added that in *William Hinton & Sons*,[19] cited in the above order, the Court took the view that, for the relevant purposes, entry in the accounts is an official act which does not necessarily consist in an actual entry in the account books, but which precedes notification and recovery inasmuch as it must be regarded as having been adopted at the latest on the date on which the amount is notified to the person liable for payment.

18 — Order of 8 July 2002 in Case C-203/01, not published in the ECR; see OJ 2002 C 274, p. 16.

19 — Order in Case C-30/00 [2001] ECR I-7511, paragraphs 45 and 46.

59. Thus, whether notification was effected by the letter of 27 February 1995 or by that of 29 September 1995, entry in the accounts for the purposes of Regulation No 1697/79 must be deemed to have preceded it.

60. There may however be a simpler approach to the issue which the national court has to decide, if Regulation No 1697/79 does indeed apply and if, as the Belgian Government states in its observations, the amount of the debt was in fact entered in the account books on 7 March 1995.

61. Under Regulation No 1697/79, the time-limit for commencing action to recover duties is 'three years from the date of entry in the accounts of the amount originally required of the person liable for payment or, where there is no entry in the accounts, from the date on which the customs debt relating to the said goods was incurred'.

62. It is clear on that basis that the notice of 29 September 1995, whose validity does not appear to be otherwise contested by Molenbergnatie, was sent after, and within three years of, the physical entry in the accounts on 7 March 1995 — if that date can be established — itself within three years of the dates of all the importations.

The Customs Code

63. However, the national court's second question specifically seeks an interpretation of Article 221 of the Customs Code, which I consider to be applicable, rather than Regulation No 1697/79.

64. In that event, the time-limit is not three years from the date of entry in the accounts but three years from the date on which the customs debt was incurred, that is to say the date of importation. [20] The question thus arises whether the letter of 27 February 1995 can constitute valid notification, inasmuch as it apparently preceded entry in the accounts whereas the provisions of the Customs Code appear to postulate entry before communication.

65. The orders in *Antero* and *Hinton* were based on a concept of 'entry in the accounts' specific to Regulation No 1697/79, that of an official act duly determining the amount to be collected, which must logically be deemed to have taken place before the amount was communicated.

66. Article 217(1) of the Customs Code however defines the same term as the act by which the amount of duty is 'entered by [the customs] authorities in the accounting records or on any other equivalent medium', a definition clearly derived not from Regulation No 1697/79 but from Regulation No 1854/89 — 'entry by the customs authority in the accounts books, or any other medium used in their stead'.

67. It therefore does not seem possible to deem entry in the accounts, for the purposes of the Customs Code, to take place at any moment other than that of the actual recording on the appropriate medium.

68. Under Article 221(1) of the Customs Code, the amount of duty is to be communicated to the debtor '[a]s soon as it has been entered in the accounts'. That wording, which is borne out by other language versions, cannot refer to any sequence other than entry followed by communication.

69. I do not consider that interpretation to be affected by the judgments in *De Haan*, [21]

20 — More precisely, the date of acceptance of the customs declaration (see Article 201(2) of the Customs Code).

21 — Case C-61/98 [1999] ECR I-5003, paragraph 34.

cited in *Antero*, or *Covita*,[22] cited in *De Haan*, to the effect that failure to comply with the time-limits in Articles 3 and 5 of Regulation No 1854/89 does not preclude action for post-clearance recovery since those time-limits are relevant only as regards relations between the Member States and the Community, with a view to ensuring rapid and uniform implementation of the rules by the customs authorities.

70. First, the time-limits referred to in those cases concern entry in the accounts within a specified period after the authorities have become aware of the existence of the debt, not notification to the debtor within a specified period after entry in the accounts. Second, Article 221 of the Customs Code is a new provision with a new structure; it places the definition of entry in the accounts derived from Regulation No 1854/89 in a direct relationship with the time-limit for notification to the debtor derived from Regulation No 1697/79, and cannot be read as concerned only with relations between the Member States and the Community.

71. I am therefore of the view that the answer to the national court's second question should be that Article 221 of the Community Customs Code requires the amount of duty to be entered in the accounts before it is communicated to the debtor.

72. Consequently, in the present case the letter of 27 February 1995 was sent within the three-year period in all cases but was not validly preceded by entry in the accounts; the letter of 29 September 1995 was sent within the three-year period with regard to all the importations except the first, and was validly preceded by entry in the accounts if the authorities can establish that the date of that entry was indeed 7 March 1995.

Question 3: Legal consequences of notification more than three years after the date on which the customs debt was incurred

73. Article 221(3) of the Customs Code stipulates that communication to the debtor may normally[23] not take place more than three years after the date on which the customs debt was incurred, in this case on importation. The national court asks what the legal consequences of notification outside that period are, and more specifically whether the debt is extinguished or merely irrecoverable.

74. The first importation took place on 9 April 1992. On the basis of the answers I propose to the first two questions, no valid notification can be deemed to have taken

22 — Case C-370/96 [1998] ECR I-7711, paragraphs 36 and 37.

23 — See point 77 below.

place within the three years following that date, though the problem does not appear to arise in the other cases if the authorities can establish entry in the accounts on 7 March 1995. If Regulation No 1697/79 were held to apply, however, the time-limit under that regulation would in any event have been complied with — see points 57 to 62 above.

75. Molenbergnatie, Belgium and the Commission all agree that the effect of expiry of the three-year period is not that the debt is extinguished but that it may no longer be recovered. That appears to me to be the correct analysis.

76. It is, as Belgium points out, inherent in the Court's judgment in *SPKR.*[24] The corresponding rule in Regulation No 1697/79 was moreover described by the Court in *Conserchimica*[25] as a 'rule on limitation of actions'. And, as has been noted in all three sets of observations, Articles 233 and 234 of the Customs Code exhaustively list the situations in which a customs debt may be extinguished; they do not include expiry of the time-limit in Article 221(3).

77. It must moreover be borne in mind that, also under Article 221(3), communication may, subject to certain conditions, be made after the expiry of the three years where it is as a result of a criminal act that the authorities were unable to determine the amount due. And under the present version of that provision,[26] the period is suspended for the duration of proceedings in any appeal against a decision of the customs authorities. Expiry of the three-year period is thus not in all circumstances a bar to proceeding with recovery, a factor which confirms that the debt is not thereby extinguished.

78. The answer to the national court's third question should therefore be that if the amount of duty payable is not communicated to the debtor within the three-year period prescribed in Article 221(3) of the Community Customs Code, the customs debt is not extinguished but action may no longer be taken for its recovery other than in the cases specifically provided for in that article.

Question 4: Form of notification

79. The national court's fourth question is essentially whether Member States must

24 — Case C-112/01 [2002] ECR I-10655, especially at paragraphs 30 to 32.

25 — Cited in footnote 9; at paragraph 20.

26 — See footnote 3.

define the 'appropriate procedures' in accordance with which the debtor is to be notified of the amount of duty and whether, if they do not, any document sent to the debtor and setting out the amount of duty may constitute notification even if it does not refer to Article 221 of the Customs Code or indicate that it constitutes notification of the amount of duty owed.

80. This question is relevant to the issue in the main proceedings only if the communication was made within the relevant three-year period and was in other respects valid.

81. I have indicated [27] that if, as I consider, the Customs Code applies, the letter of 27 February 1995 was sent within the three-year period in all cases but was not validly preceded by entry in the accounts; and that the letter of 29 September 1995 was sent within the three-year period with regard to all the importations except the first, and was validly preceded by entry in the accounts if the authorities can establish that the date of that entry was indeed 7 March 1995. If the former legislation were to apply, however, both letters were validly preceded by 'entry in the accounts' within the meaning of Regulation No 1697/79.

27 — See point 72.

82. Article 221(1) of the Customs Code states that the amount of duty is to be communicated to the debtor 'in accordance with appropriate procedures'; the wording of Article 6(1) of Regulation No 1854/89 is slightly different but the differences, which vary according to the language versions, do not appear in any way substantive. Article 2(2) of Regulation No 1697/79 provided that action for recovery was to be taken 'by notifying the person concerned of the amount of import duties or export duties for which he is liable'.

83. It does not appear possible to read into that wording any obligation on Member States to define any particular form or procedure for communication. Nor is any particular form or procedure specified by the Community legislation.

84. However, under the Customs Code and Regulation No 1854/89, the procedure must be 'appropriate'.

85. Molenbergnatie and the Commission cogently argue that, in any event, to ensure legal certainty and the protection of legitimate expectation, a debtor must be able to ascertain clearly the nature, grounds and effects of the communication, and the date on which it produces those effects. However,

as the Commission points out, in the absence of any specific rules in that regard, compliance with those criteria is a matter of fact, to be assessed by the relevant national court.

86. The answer to the national court's fourth question should therefore be that Member States are not required to specify the form in which the amount of duty is to be communicated to the debtor for the purposes of Article 221 of the Customs Code, but that communication must be made in such a way as to enable the debtor to ascertain clearly its nature, grounds and effects, in particular with regard to the amount of duty, the event by virtue of which duty was incurred and the date on which it produces its effects.

Conclusion

87. I am therefore of the opinion that the Court should give the following answers to the Hof van Beroep te Antwerpen:

'(1) Procedural rules contained in Articles 217 to 232 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code apply to the recovery of a customs debt incurred prior to 1 January 1994; substantive rules do not apply to situations existing before their entry into force.

(2) Article 221 of the Customs Code requires the amount of duty to be entered in the accounts before it is communicated to the debtor.

(3) If the amount of duty payable is not communicated to the debtor within the three-year period prescribed in Article 221(3) of the Customs Code, the customs debt is not extinguished but action may no longer be taken for its recovery other than in the cases specifically provided for in that article.

(4) Member States are not required to specify the form in which the amount of duty is to be communicated to the debtor for the purposes of Article 221 of the Customs Code. However, that communication must be made in such a way as to enable the debtor to ascertain clearly its nature, grounds and effects, in particular with regard to the amount of duty, the event by virtue of which duty was incurred and the date on which it produces its effects.'