JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

13 September 2005 *

In Case T-53/02,

Ricosmos BV, established in Delfzijl (Netherlands), represented initially by M. Chatelin, M. Fleers and P. Metzler, then by J. Hertoghs, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by M. van Beek and R. Tricot, then by M. van Beek and B. Stromsky, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision REM 09/00 of 16 November 2001 declaring that the remission of import duties in favour of the applicant which is the subject-matter of the application submitted by the Kingdom of the Netherlands is not justified,

* Language of the case: Dutch.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of J.D. Cooke, President, R. García-Valdecasas and V. Trstenjak, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2005,

gives the following

Judgment

Legal context

Rules on Community transit

1 Under Article 91(1)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, hereinafter 'the Customs Code'), the external transit procedure allows the movement from one point

to another within the customs territory of the Community of non-Community goods with a view to their being re-exported to a non-Member State, without such goods being subject to import duties and other charges or to commercial policy measures.

2 Under Article 96(1)(a) and (b) of the Customs Code the principal liable under the external Community transit procedure is responsible for production of the goods intact at the customs office of destination by the prescribed time-limit and with due observance of the measures adopted by the customs authorities to ensure identification, and of the provisions relating to the Community transit procedure.

3 Under Article 341 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the Customs Code (OJ 1993 L 253, p. 1, hereinafter 'the implementing regulation'), all goods which are to move under the external Community transit procedure must be the subject of a T1 declaration, that is a declaration on a form corresponding to the specimens in Annexes 31 to 34 to that regulation and used in accordance with the notes referred to in Annexes 37 and 38. It follows from Annex 37 that under the external Community transit procedure the following copies are to be used:

— copy 1 which is to be retained by the authorities of the Member State in which Community transit formalities are completed;

— copy 4 which is to be kept by the office of destination upon completion of the Community transit operation;

— copy 5 which is the return copy for the Community transit procedure;

— copy 7 which is used for statistical purposes by the Member State of destination.

4 Annex 37 to the implementing regulation also contains provisions concerning the matters to be entered in the various boxes of the forms relating to Community transit. Thus, the following matters are indicated in regard to Box No 18:

'18. Identity and nationality of means of transport at departure

This box is ... obligatory in the case of use of the Community transit procedure.

Enter the identity, e.g. registration number(s) or name of the means of transport (lorry, ship, railway wagon, aircraft) on which the goods are directly loaded when export or transit formalities are completed, followed by the nationality of the means of transport (or that of the vehicle propelling the others if there are several means of transport) using the appropriate Community codes. For example, if a tractor and trailer with different registration numbers are used, enter the registration number of the tractor and that of the trailer, together with the nationality of the tractor.

... .'

5 Under Article 350(1) and (2) of the implementing regulation, the goods are to be transported under cover of the copies of the T1 document which must be presented as required by the customs authorities. In that connection Article 356 of the implementing regulation states as follows:

'1. The goods and the T1 document shall be presented at the office of destination.

2. The office of destination shall record on the copies of the T1 document the details of controls carried out and shall without delay send a copy to the office of departure and retain the other copy.

3. A Community transit operation may be concluded at an office other than that specified in the T1 document. That other office shall then become the office of destination.

...'

6 Under Article 358 of the implementing regulation each Member State has the right to designate one or more central offices to which documents are to be returned by the competent offices in the Member State of destination.

7 Under Article 398 thereof the customs authorities of each Member State may authorise any person who fulfils the conditions laid down in Article 399 and who intends to carry out Community transit operations, referred to as 'the authorised consignor', not to present at the office of departure either the goods concerned or the Community transit declaration in respect of those goods.

8 Under Article 402(1) thereof, the authorised consignor must, not later than on consignment of the goods, duly complete the Community transit declaration. Under paragraph 2 thereof, following consignment, copy 1 of the T1 document is to be sent without delay to the office of departure. The other copies are to accompany the goods.

9 Article 349(1) provides that, as a general rule, identification of the goods is to be ensured by sealing. None the less, under paragraph 4 thereof the office of departure may dispense with sealing if, having regard to other possible measures for identification, the description of the goods in the T1 document or in the supplementary documents makes them readily identifiable.

10 Under Article 203(1) of the Customs Code a customs debt on importation is incurred through the unlawful removal from customs supervision of goods liable to import duties. Under paragraph 3 thereof, the debtors include where appropriate the person required to fulfil the obligations arising from the use of the customs procedure under which those goods have been placed.

Rules concerning repayment or remission of import or export duties

11 Article 239 of the Customs Code provides that import duties or export duties may be repaid or remitted in situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

12 Article 239 was elucidated and taken further by the implementing regulation, in particular by Articles 899 to 909. Under Article 905(1) of the latter instrument, where the national customs authority cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs has to transmit the case to the Commission.

13 Under Article 905(2) of the implementing regulation, as amended by Commission Regulation (EC) No 12/97 of 18 December 1996 (OJ 1997 L 9, p. 1), the case sent to the Commission must include all the facts necessary for a full examination of the case presented and must also include a statement, signed by the applicant for repayment or remission, certifying that he has read the case and stating either that he has nothing to add or listing all the additional information that he considers should be included. Should it be found that the information supplied by the Member State is not sufficient to enable a decision to be taken on the case concerned in full knowledge of the facts, the Commission may ask for additional information to be supplied.

14 Article 906a of the implementing regulation, inserted by Commission Regulation (EC) No 1677/98 of 29 July 1998 (OJ 1998 L 212, p. 18), provides that, where, at any

time in the procedure, the Commission intends to take a decision unfavourable towards the applicant for repayment or remission, it is to communicate its objections to the applicant in writing, together with all the documents on which it bases those objections. The applicant then has a period of one month within which to express his/her point of view in writing.

15 Article 907 of the implementing regulation, as amended by Regulation No 1677/98, reads as follows:

'After consulting a group of experts composed of representatives of all Member States, meeting within the framework of the Committee to consider the case in question, the Commission shall decide whether or not the special situation which has been considered justifies repayment or remission.

That decision shall be taken within nine months of the date on which the case referred to in Article 905(2) is received by the Commission. Where the Commission has found it necessary to ask for additional information from the Member State in order to reach its decision, the nine months shall be extended by a period equivalent to that between the date the Commission sent the request for additional information and the date it received that information.

Where the Commission has communicated its objections to the applicant for repayment or remission, in accordance with Article 906a, the nine-month deadline shall be extended by a period equivalent to that between the date on which the Commission sent the objections and the date on which it received the answer of the interested party or, in the absence of an answer, the date of the expiry of the period which was given to him/her to give his/her point of view.'

16 Under Article 908(2) of the implementing regulation the competent authority of the Member State decides whether to grant or refuse the application made to it on the basis of the Commission's decision. Finally, under Article 909, if the Commission fails to take a decision within the time-limit set in Article 907, the national customs authority is to grant the application.

Facts of the dispute

External Community transit operations at issue

17 At the material time the applicant formed part of the Kamstra Shipstores group, established in Delfzijl (Netherlands), whose business centres on the wholesale trade in various products, in particular cigarettes. The applicant, who is the holder of an authorisation as an authorised consignor, essentially performed logistical functions.

18 During the period between 16 February 1994 and 5 July 1994, the applicant established 11 T1 documents for the purposes of the transportation of consignments of cigarettes, whose destination was Slovakia, under the external Community transit procedure in respect of which it was the principal.

19 The 11 external Community transit operations at issue were respectively accompanied by the following customs documents:

— T1 Document No 120228 of 16 February 1994;

— T1 Document No 120274 of 25 February 1994;

— T1 Document No 120372 of 11 March 1994;

— T1 Document No 120404 of 19 March 1994;

— T1 Document No 120410 of 23 March 1994;

— T1 Document No 120674 of 9 May 1994;

— T1 Document No 120697 of 16 May 1994;

— T1 Document No 120733 of 24 May 1994;

— T1 Document No 120754 of 25 May 1994;

— T1 Document No 120936 of 28 June 1994;

— T1 Document No 120986 of 5 July 1994.

20 In those customs documents the final buyers of the cigarettes were stated as being Intertrade and Ikoma, allegedly undertakings established in Slovakia. None the less, the applicant had no direct contacts with the buyers which used the services of a purchasing agent, Mr C. The applicant had maintained business relations with that person for several years. The agent accompanied the transported goods to the office of destination.

21 In regard to the first nine customs operations at issue, namely those carried out between 16 February 1994 and 25 May 1994, the customs office of destination mentioned in the corresponding T1 documents was Schirnding (Germany). The office of destination indicated for the last two operations, namely those of 28 June 1994 and 5 July 1994, was Philippsreut (Germany). However, all the consignments were presented at the Philippsreut customs office.

22 The applicant sent a facsimile to the office of departure, that is to say the Delfzijl customs office, in order to notify it of the loading of each transport. That office normally verified the documents and checked the lorries at the place of loading. After the system of early notification of departure was introduced in the Netherlands on 1 April 1994, the last six documents, namely those relating to the operations effected between 9 May 1994 and 5 July 1994, were notified by the Delfzijl customs authorities through the intermediary of the Douane Informatie Centrum (Customs Information centre) to the office of destination stated. That system of early notification was introduced in Germany only in August 1994 owing to technical problems.

23 The registration numbers of the vehicles used was mentioned only on copy 4 of the T1 document intended for the office of destination. Those registration numbers were not therefore mentioned on copy 1 (copy retained by the authorities of the Member State of departure) or on copy 5 (copy to be sent to the office of departure).

24 After departure of each consignment the applicant sent copy 1 of the T1 document to the office of departure, the other copies accompanying the transport. The applicant handed to the driver of the lorry franked envelopes bearing the address of the clearing customs office in Coevorden (Netherlands). Those envelopes were to be provided to the authorities of the office of destination in order to be used by them for forwarding copy 5 of the T1 documents to the clearing office. However, the customs officer at the Philippsreut office to whom the transit documents were presented, Mr Mauritz, did not use those envelopes and therefore did not send copy 5 of the T1 documents directly by post to the clearing office. Nor were those transit documents sent through official channels, that is to say through the intermediary of the central transmitting authority of the German administration and the central return address in the Netherlands. In fact, the copy 5 documents were handed by Mr Mauritz to Mr C, the agent, or to the driver of the lorry who then brought them back to the Netherlands and returned them to the applicant. The applicant forwarded them to the clearing office by fax and by post.

25 The 11 Community transit documents at issue were stamped by Mr Mauritz with an original German customs seal. However, the numbers of those documents were not found in the German customs registers. In fact, the stamps on the customs documents and German customs numbers mentioned there were not registered in respect of the export of cigarettes and in respect of the T1 customs documents relating thereto but were entered in the registers in respect of other goods and other customs documents. The failure to record the consignments of cigarettes in the register of the Philippsreut customs office in particular meant that the German authorities did not inform the Czech customs authorities under the system of mutual information in place since January 1994 that those consignments were to be routed to the Czech Republic.

26 An investigation conducted by the Fiscale Inlichtingen en Opsporingsdienst (Netherlands fiscal information and detection service) subsequently revealed that the abovementioned transport documents had not been correctly cleared. The report of that investigation (hereinafter 'the FIOD report') is dated 30 December 1996.

27 The German customs officer, Mr Mauritz, and a former Czech customs official, Mr Sykora, were convicted in Germany of criminal offences in connection with their specific involvement in the falsification of documents. Two other persons, Messrs Chovan and Sanda, were convicted in the Czech Republic on account of their involvement with contraband cigarettes (judgment of the Vrchní Soud (High Court) of Prague of 30 November 2004). The Netherlands authorities initiated a prosecution against Messrs B. and FB., two employees of the applicant, seeking to establish their possible involvement with those contraband cigarettes. However, those proceedings were discontinued. Finally, the investigations conducted revealed that Intertrade and Ikoma, which were shown as the buyers in the documents relating to the operations in question, were not registered in the local companies register in Slovakia.

Administrative procedure

28 On 15 March 1995 the Netherlands authorities claimed from the applicant the sum of NLG 4 006 168.20 by way of import duties. In particular they considered that the goods at issue had not been presented to the office of destination and had not been correctly cleared. According to the Netherlands authorities this removal from customs supervision gave rise to a customs debt on importation in accordance with Article 203 of the Customs Code. The applicant contested the claim for recovery before the national courts. During the course of the procedure before those courts the Netherlands authorities reduced the amount claimed by way of import duties to NLG 2 293 042.50.

29 On 15 December 1997 the applicant lodged a claim for remission of import duties with the Netherlands customs authorities. On 8 February 1999 those authorities submitted to the Commission an application for remission of the duties at issue without, however, first giving the applicant access to the whole of the file. On

10 May 1999 the Commission informed the applicant that, since it had not been apprised of the whole contents of the file, the Commission was preparing to declare that application for remission inadmissible. In February 2000 the applicant finally gained access to the whole of the file prepared by the Netherlands authorities. On 2 May 2000 the applicant communicated to them its observations concerning the file.

30 By letter of 22 May 2000, which was received on 29 May 2000, the Netherlands authorities again lodged with the Commission an application for remission of import duties. That application was the subject of the procedure under reference REM 09/00, which forms the subject-matter of these proceedings.

31 By letter dated 27 October 2000 the Commission sought from the Netherlands authorities the communication of additional information. The replies by those authorities to the five questions raised by the Commission were sent to the Commission by letter dated 23 April 2001 and registered on 4 May 2001.

32 By letter dated 3 April 2001 the applicant asked the Commission for confirmation of the expiry of the period of nine months laid down for the examination of its application for remission, and of the fact that the Netherlands authorities were going to grant that application. On 4 April 2001 the Commission informed the applicant that the period had been suspended owing to the request for additional information which it had addressed to the Netherlands authorities on 27 October 2000.

33 By letter dated 23 April 2001 the Netherlands customs authorities informed the applicant of the suspension of the period of time and gave the applicant to understand that at this stage it could not be apprised of the questions posed by the Commission but that it could be if the Commission was minded to reject the application.

34 By letter of 13 June 2001 the Commission requested the Netherlands authorities to send it the FIOD report. On 5 July 2001 the Netherlands authorities informed the applicant of that second request for additional information and of the new extension of the period. By letter of 23 July 2001 registered on 2 August 2001 the Netherlands authorities transmitted the FIOD report to the Commission.

35 By letter of 21 September 2001 the Commission informed the applicant that it was minded to take an unfavourable decision on its application for remission, stating its objections to it. The Commission indicated to it that, for a period of one month, it would be afforded the possibility of consulting the non-confidential file documents, that is to say the application for remission of 22 May 2000 and its annexes, as submitted by the Netherlands authorities, together with a copy of the FIOD report.

36 On 3 October 2001 the applicant contacted the Commission by telephone requesting access to all the documents on the file. The applicant then also made that request to the Netherlands authorities which, by letter of 11 October 2001, sent it the FIOD report, their reply to the Commission's first request for information dated 27 October 2000, as well as the Commission's second request for information dated 13 June 2001 and their reply thereto. On 12 October 2001 the Commission, in reply to a new request by the Commission of the same date, sent it the complete list of the documents at its disposal.

37 By a letter dated 17 October 2001, which was received by the Commission on the same date, the applicant stated its views on the objections formulated by the Commission.

38 On 9 November 2001 the Commission consulted the group of experts comprising representatives of all the Member States gathered within the Customs Code Committee concerning the request by the Netherlands authorities.

39 On 16 November 2001 the Commission adopted Decision REM 09/00 stating that remission of import duties was not justified ('the contested decision'). On 14 December 2001 the Netherlands authorities informed the applicant that the application for remission had been rejected.

Procedure and forms of order sought by the parties

40 By application lodged at the Registry of the Court of First Instance on 22 February 2002 the applicant brought the present action.

41 Upon hearing the report of the Judge-Rapporteur the Court of First Instance (First Chamber) decided to open the oral procedure. By way of measures of organisation of procedure the Court of First Instance requested the Commission to produce certain documents and requested the parties to reply in writing to certain questions. The parties acceded to these requests within the period allowed.

42 In its written pleadings the applicant offered to adduce detailed evidence in support of all its assertions. In particular, it proposed that the Court of First Instance should hear witness evidence from officials of the Netherlands customs authorities.

43 The parties presented oral argument and their replies to the questions posed by the Court of First Instance at the hearing on 1 March 2005.

44 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

45 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

46 In support of its action the applicant relies, first, on a plea alleging breaches of the procedure for the remission of import duties and of the principle of legal certainty; secondly, it alleges that there was no obvious negligence within the meaning of Article 239 of the Customs Code and of Article 905 of the implementing regulation and, third, that there was a breach of the principle of proportionality. At the hearing the applicant raised a fourth plea alleging the non-existence of the customs debt in respect of which the application for remission was rejected by the contested decision.

First plea based on breaches of the procedure for remission of import duties and of the principle of legal certainty

47 The applicant observes that under Article 907 of the implementing regulation the decision by the Commission must be adopted within a period of nine months from the date of transmission of the file by the national authorities; that period can be extended only on account of a request for additional information to the national authorities and the transmission to the claimant of the Commission's objections.

48 The applicant maintains that that period was not observed in the present case. In fact it challenges the validity of the extensions of that period occurring in the present case. Thus, the applicant points out first that the Commission omitted to inform it of the extension of the period and, in doing so, infringed the principle of legal certainty; secondly, the Commission did not afford it the possibility of taking cognisance at the appropriate time of the additional requests for information and the corresponding replies; thirdly, the Commission gave it belated access to the whole file; fourth, the periods elapsing between the date when the replies of the Netherlands authorities were sent and when they were received by the Commission were excessive and, fifth, that the time taken by those authorities to forward the FIOD report is not justified. Sixth, the applicant raises a plea based on the delay in processing the application for remission.

49 The Commission maintains that it observed the period of nine months laid down in Article 907 of the implementing regulation and that the administrative procedure is not vitiated by any irregularity.

1. The plea concerning the lack of notification concerning the extension of the period and concerning the infringement of the principle of legal certainty

— Arguments of the parties

50 The applicant argues that the Commission omitted to notify it at the appropriate time of the formulation of the two requests for supplementary information sent to the Netherlands authorities and thus of the extension of the period required for adoption of the decision.

51 The applicant maintains that, since the period laid down for adoption of the decision mainly serves the interests and rights of the applicant for remission, the period cannot be suspended without the applicant's being immediately informed of the suspension and of the circumstance justifying that suspension. It notes that, in fact, the nine-month period clearly and precisely laid down in the second paragraph of Article 907 of the implementing regulation seeks to guarantee the legal position of the applicant for remission and maintains that, unless it is notified of a valid extension, it was entitled, after expiry of that period, to be certain about acceptance of the remission. It adds that, since it received no notification from the Commission during that period, it thought that the Commission had abandoned the adoption of a decision. Accordingly, the subsequent adoption of the contested decision infringed the principle of legal certainty which seeks to ensure that legal situations and relations under Community law are foreseeable (judgment in Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20).

52 The Commission observes that Article 905 et seq. of the implementing regulation clearly provide that the procedure for remission on equitable grounds may be extended and maintains that no provision of that regulation requires it to inform the applicant for remission about requests for supplementary information concerning it and thus about the extension of the period. Thus, Article 907 of the implementing

regulation gives the person concerned no certainty of being able to obtain a decision within the period of nine months of receipt of its file. Consequently, the applicant is not, it is claimed, entitled to rely on the absence of information for nine months from the Netherlands authorities or the Commission in order to take the view that the period had expired and thus, under Article 909 of the implementing regulation, to count on its application for remission being granted.

— Findings of the Court

53 According to settled case-law, the principle of legal certainty requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable (*Duff and Others* judgment, cited above, paragraph 20, and judgment in Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 113).

54 Under the second paragraph of Article 907 of the implementing regulation the Commission's decision must be adopted within nine months of the date of receipt by it of the file concerning the application for remission. However, that provision also provides that, where the Commission has had to request the Member State for supplementary information in order to enable it to reach a determination, the period of nine months is to be extended by a period equivalent to that between the date on which that request was sent by the Commission and the date of the receipt by it of the reply by the national authorities.

55 It is unambiguously clear from Article 907 that the period allowed the Commission for adopting its decision may be extended. The applicant could not therefore be unaware that the procedure could be suspended. Furthermore, neither the Customs Code nor the implementing regulation provides that the person concerned must be informed without delay that the Commission is requesting additional information

from the national authorities. In particular, no such obligation arises under Article 905(2) or Article 906a of the implementing regulation (see paragraphs 61 and 62 below). It follows that the applicant could not be sure that simply because the period of nine months had expired the application for remission had been accepted, notwithstanding the fact that it had not been informed that the period had been extended. Finally, it must be pointed out that, in any event following the applicant's letter of 3 April 2001, the Commission immediately informed the applicant, on 4 April 2001, that the period had been suspended.

56 This plea must therefore be rejected.

2. Plea relating to the failure to communicate, in due time, requests for additional information

— Arguments of the parties

57 The applicant submits that the Commission failed to apprise it of the requests for further information addressed to the national authorities and of the corresponding replies. Thus the applicant was not informed of the request of 27 October 2000 until 4 April 2001, following the letter it sent to the Commission on 3 April 2001. Similarly, it was not until 5 July 2001 that it was informed by the Netherlands authorities that the Commission had requested new information on 13 June 2001. Furthermore, the Commission did not grant it access to the content of those requests for information or to the replies of the Netherlands authorities until 11 October 2001.

58 The applicant argues that it is plain from Article 905(2) and Article 906a of the implementing regulation and from the adversarial principle that the applicant must be kept informed of the stage of advancement of the remission procedure and must have access to the contents of documents exchanged by the Commission and the national authorities at the time when requests for information are made or answers provided.

59 Access at the correct time to the documents in the case cannot therefore be limited to the stages at which the national authorities are preparing the file or the Commission is sending its preliminary position unfavourable to remission. First of all, if the applicant could give its view only on the items on file initially sent to the Commission, its rights would depend on whether the file sent by the national authorities was complete or not, which might give rise to abuses by those authorities, possibly in concert with the Commission. The applicant states in this regard that the file sent by the Netherlands authorities to the Commission was incomplete because the Commission had twice to ask for further information. Secondly the applicant points out that it is not sufficient that it was able to submit its observation on the file when the Commission had already adopted a provisional decision on the application for remission since its rights can only be observed if it has had an opportunity to put forward its point of view at the correct time.

60 The Commission argues that, although it is bound to ensure that the person concerned is able to exercise rights of defence before taking its decision it is in no way required to keep the person concerned continuously informed of all stages prior to adoption of its decision. It states however that where, as in this case, an applicant so requests, it informs that person of the state of advancement in regard to examination of the application.

— Findings of the Court

61 The first subparagraph of Article 905(2) of the implementing regulation provides that the case sent to the Commission by the national authorities is to include all the facts necessary for a full examination of the case presented and must also include a statement, signed by the applicant for repayment or remission, certifying that he has read the case and stating either that he has nothing to add or listing all the additional information that he considers should be included. That enables an operator who seeks a remission and has not necessarily been involved in the preparation of the case by the competent national authorities to exercise effectively its right to be heard during the first stage of the administrative procedure, which takes place at national level (Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 44). That provision cannot constitute the basis for an obligation to inform the person concerned and immediately communicate to him any requests for information made by the Commission to the national authorities during the second stage of the procedure which is conducted within the Commission. In that regard it is important to point out that, contrary to the applicant's assertions, the fact that the Commission regards it as necessary to request information does not mean that the file is incomplete but simply that it considers the production of further information to be appropriate in order, as the third subparagraph of Article 905(2) of the implementing regulation states, to be able to take a decision on the case concerned in full knowledge of the facts.

62 For its part Article 906a of the implementing regulation establishes that where, at any time in the procedure, the Commission intends to take a decision unfavourable towards the applicant for remission, it is to communicate its objections to the applicant in writing, together with all the documents on which it bases those objections. As the wording of that provision makes clear, the obligation to inform and communicate arises only when the Commission, after examining the application for remission, has reached a preliminary view unfavourable to remission. The provision does not therefore state that the Commission is bound to keep the person concerned continuously informed of the progress of the procedure.

63 It must therefore be concluded that the customs rules do not provide that the person concerned must be informed without delay that the Commission has requested further information from the national authorities or must be informed of their replies or must immediately be notified of the content of such exchanges.

64 Furthermore, it must be pointed out that in this case the applicant was, during the procedure, sufficiently informed concerning those requests for further information and was afforded the opportunity to put forward its point of view effectively. Therefore, with regard to the first request for information of 27 October 2000 the applicant was informed of this on 4 April 2001; the Netherlands authorities' reply was sent to the Commission on 23 April 2001. As to the second request of 13 June 2001 the applicant was informed of this on 5 July 2001; the Netherlands authorities replied on 23 July 2001. The applicant was apprised of the content of the requests and the replies thereto on 11 October 2001 and submitted its comments on the Commission's objections on 17 October 2001 before the adoption of the contested decision on 16 November 2001.

65 Accordingly, this plea must be rejected.

3. Pleas of late and incomplete access to the file

— Arguments of the parties

66 The applicant observes that, when the Commission sent the letter of 21 September 2001 stating its objections to the remission, the Commission did not actually send all

the documents on which those objections were based. That failure to transmit relevant documents infringed Article 906a of the implementing regulation. The applicant argues that the period for adopting a decision was thus not suspended because it was not able to benefit fully from the adversarial principle. It points out, finally, that the fact that the Netherlands authorities sent it part of their correspondence with the Commission on 11 October 2001 is not sufficient to ensure observance in this case of the adversarial principle. It points out that, on this occasion, the Netherlands authorities did not send it the Commission's first request for additional information dated 27 October 2000.

67 In the alternative, the applicant argues that, even if the Commission was not required actually to send it the documents in the case, it was, in its view, in any event entitled to have access to all the documents in the case including those which the Commission did not consider relevant. However, the Commission did not afford it full access to the case until 12 October 2001, the date on which the applicant was apprised of the list setting out all the documents to which it could claim to be entitled to access.

68 The applicant also points out that, as is clear from the letter which the Netherlands authorities sent it on 23 April 2001, the Commission orally put questions to them concerning the request at issue at a meeting of the Customs Code Committee held on 20 September 2000. Some of those questions and the replies given thereto were not transcribed with the result that the applicant was not apprised of them or able to submit observations on them. At the hearing, the applicant maintained that the Commission also infringed the rights of the defence, by failing to afford it an opportunity to submit observations at the meeting of the group of experts composed of representatives of all the Member States on 9 November 2001 in the context of the Customs Code Committee to deal with the application for remission in question, by failing to inform it of the content of discussions and by not communicating to it the opinion adopted by the committee or the minutes of the meeting.

69 Finally, the applicant objects that the Netherlands authorities were not at liberty, without its authorisation, to produce minutes drawn up in the context of an investigation of a criminal nature since that would contravene the principle of the proper conduct of the procedure.

70 The Commission observes that all the facts on which its refusal was based were already in the file lodged with it by the Netherlands authorities on 22 May 2000 and to which the applicant had access. The applicant also had an opportunity to apprise itself of the entire file as from 21 September 2001 but its lawyer did not, however, wish to avail of that possibility before being in possession of an exhaustive list of the documents therein contained. The Commission says that such a request is unusual and is not founded on any provision of the Community customs rules: Article 906a of the implementing regulation merely requires it to allow the applicant access to the documents on which its objections are based. The principle of observance of the rights of the defence entails only that the party concerned should be placed in a position in which he may effectively make his views known as regards the evidence on which the Commission has based its decision on the application for remission, but therefore does not require the Commission, acting on its own initiative, to grant access to all the documents which may have some connection with the case at issue. It is therefore for the party concerned to request access to the documents he deems necessary, since the institutions are not required to grant access spontaneously to all documents relating to the background of the case at issue (Case T-205/99 *Hyper* v *Commission* [2002] ECR II-3141, paragraphs 63 and 64).

— Findings of the Court

71 As regards the applicant's plea that, in sending to the applicant its objections concerning the application for remission the Commission did not actually communicate the documents on which those objections were based, but merely

informed the applicant of the existence of the documents to which it was entitled to have access, the Court notes that Article 906a of the implementing regulation merely provides for the Commission to send the applicant for remission any documents on which it is basing its objections. The Court considers that the Commission sufficiently complied with that obligation by making the file documents available to the applicant (see, by analogy, judgment in Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 99).

72 As regards the question concerning which documents form part of the file to which the applicant must have access, the Court cannot accept the Commission's argument that it only has to communicate of its own motion documents which it has used as the basis for its objections. Whilst it is true that Article 906a of the implementing regulation only requires the Commission to communicate documents on which its objections are based, it is none the less the case that the principle of observance of the rights of the defence has extended the scope of the obligations to which the Commission is subject. According to that principle, it cannot be for the Commission alone to decide which documents are useful to the person concerned for the purposes of the remission procedure. The administrative file may include documents favourable to remission which the person concerned could use in support of his request even if the Commission has not used them. The applicant must therefore be able to have access to all the non-confidential documents on file including those which have not been used as the basis for the Commission's objections (see, to that effect, Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 81, and Case T-50/96 *Primex Produkte Import-Export and Others* v *Commission* [1998] ECR II-3773, paragraph 64).

73 The Court points out that, in the field of competition law, it is settled case-law that the Commission must grant access to the entire investigation file, including items both in favour of the undertakings involved and detrimental to them (Case T-175/95 *BASF* v *Commission* [1999] ECR II-1581, paragraph 45), even if the person concerned does not expressly request them (Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraphs 335 to 340). That case-law may be transposed to this case (*Eyckeler & Malt* v *Commission*, paragraph 80, and *Primex Produkte Import-Export and Others* v

Commission, paragraph 63). That obligation is also consistent with the development of the case-law relating to customs fairness which is intended fully to guarantee the adversarial nature of the procedure for the remission or repayment of import and export duties by further securing observance of the rights of the defence. Finally, it must be recalled that under Article 906a of the implementing regulation the applicant has only one month to state in writing his point of view on the Commission's objections. To require the applicant expressly to request access to all the documents on file necessarily risks considerably reducing the period the applicant has for preparing and submitting his observations.

74 Accordingly, it must be concluded that the Commission must, at the time when it communicates its objections, give the applicant an opportunity to examine all the documents likely to be relevant in support of the request for remission or repayment; in order to do so the Commission must at the very least provide the applicant with a complete list of the non-confidential documents on file containing sufficiently precise information for the applicant to assess, in full knowledge of the facts, whether the documents described are likely to be useful to it.

75 With regard to the applicant's plea that it was given late and incomplete access to the file it must be pointed out that, by letter of 21 September 2001, the Commission, when communicating its objections, informed the applicant that it could apprise itself of the application for remission and the annexes thereto, as submitted by the Netherlands authorities, and of a copy of the FIOD report. On 3 October 2001 the applicant requested access to all the documents on file. On 12 October 2001 the Commission sent it a complete list of the documents available to it.

76 Whilst the Commission did not, on communicating its objections, immediately send the applicant all the documents on file it must be concluded that, regard being had

to the circumstances of the case, that omission did not adversely affect the rights of the defence. It is plain from the file, and the applicant acknowledged as much at the hearing, that on 21 September 2001 it was already apprised of the existence of all the documents forming part of the Commission's administrative file and that it was also apprised of the contents of all those documents save four, that is to say the two requests for information from the Commission to the Netherlands authorities and their replies. Yet the applicant was in a position to consult those documents as from 21 September 2001. In addition, by letter of 11 October 2001 from the Netherlands authorities, the applicant received the second request for information from the Commission dated 13 June 2001, the Netherlands authorities' reply of 23 April 2001 to the first request for information, which repeated in full the questions put by the Commission on 27 October 2000 and the reply from the Netherlands authorities of 23 July 2001 to the second request for information, which included the FIOD report.

77 At the hearing the applicant none the less maintained that it had not been apprised of the contents of two documents whish are also relevant to this procedure: a letter from the Commission to the Netherlands authorities informing them that the request for remission submitted by them on 8 February 1999 was not admissible and the opinion or minutes of the group of experts composed of representatives of all the Member States meeting in the context of the Customs Code Committee consulted on 9 November 2001 by the Commission at the behest of the Netherlands authorities pursuant to a request by it dated 22 May 2000.

78 With regard, first of all, to the Commission's letter to the Netherlands authorities, it must be noted that this item of correspondence was intended to inform the authorities that the request for remission submitted by them on 8 February 1999 was not admissible because the applicant had not been afforded prior access to the whole file collated by those authorities. Yet, it must be noted that on 10 May 1999 the Commission itself informed the applicant that it was preparing to declare the request for remission inadmissible for that reason.

79 With regard, secondly, to the work of the group of experts composed of representatives of all the Member States meeting in the context of the Customs Code Committee, which was consulted by the Commission on 9 November 2001, the applicant's argument that the Commission infringed the rights of the defence by not affording it an opportunity to submit its comments at that meeting and by not informing it of its content and result must be rejected. The implementing regulation does not provide for the attendance of applicants for remission at meetings of the Customs Code Committee; nor does it contain an obligation to inform the applicant of the opinion formed by the committee. It is also important to note that consultation of that group is the last stage in the remission procedure before the Commission adopts its final decision. The consultation must occur after the applicant for remission has had the opportunity to have access to the file and to submit its observations, as the committee's opinion is based on the allegations and documents on file of which the applicant is already apprised. Similarly, with regard to the applicant's plea that it was not able to apprise itself of certain oral exchanges which took place between the Commission and the Netherlands authorities at an earlier meeting of the Customs Code Committee, that of 20 September 2000, that argument cannot be accepted either. Nothing in the contested decision leads to the conclusion that the Commission based its decision to refuse remission on information which did not appear in the documents in the administrative file.

80 It follows that the Commission did not infringe the applicant's right of access to the file.

81 Finally, with regard to the plea relating to the transmission to the Commission of the FIOD report without the applicant's prior permission, it is sufficient to state that it was the applicant itself who, when verifying the file assembled by the Netherlands authorities, complained in a letter of 2 May 2000 to those authorities that the file contained very selective quotations from the report, even though the report contained a good number of points in its favour and decided that it was essential to complete the file with documents forming part of the FIOD report. In addition it must be pointed out that the national authorities must communicate to the Commission all the documents relevant to the adjudication of the application for remission, without being obliged first to request the permission of the person concerned.

82 Those pleas must therefore be rejected.

4. Plea relating to the delay in receiving the Netherlands authorities' replies

— Arguments of the parties

83 The applicant observes that, according to the contested decision, the replies of the Netherlands authorities to the Commission's requests for information, which were sent on 23 April and 23 July 2001, only reached the Commission on 4 May and 2 August 2001 respectively, which is to say a little more than a week and a half later. The applicant considers this delay to be unreasonable and to lack credibility, given the time it takes for post to reach Belgium, as indicated by the Netherlands post office, which is four to six working days for ordinary post and two to three working days for priority packages. In addition, the relevant date is that on which the letter was received by the Commission and not when it was registered. Since therefore the applicant has no way of monitoring the actual date of receipt it is for the Commission to prove it. In the absence of such proof one must take the longest period indicated by the Netherlands authorities, which is six working days. In the final analysis it was wrong for the period of nine months to be extended until 4 May and 2 August 2001.

84 The Commission maintains that the extension of the period ends on the day of actual receipt of the information and not on a theoretical date on which it should have received the correspondence.

— Findings of the Court

85 Article 907 of the implementing regulation lays down that, where the Commission requests additional information from the national authorities, the period allowed to it for expressing a view on the application for remission is to be extended until the date of receipt of that information. As the Commission rightly states, the relevant date is thus the date of actual receipt of the documents. It is clear from an examination of the two documents at issue that they were received by the relevant Commission departments on 4 May and 2 August 2001 respectively. Conversely, the dates proposed by the applicant calculated on the basis of the periods for postal delivery, as indicated purely by way of information by the Netherlands post office, are irrelevant.

86 Accordingly, this plea must be rejected.

5. Plea concerning the delay by the Netherlands authorities in sending the FIOD report

— Arguments of the parties

87 The applicant points out that the Netherlands authorities took more than five weeks, that is to say from 13 June to 23 July 2001, to send the FIOD report requested by the Commission. However, a simple request for a specifically identified document to be sent cannot require more than two weeks to be acted upon. The period of nine months can be extended only in exceptional circumstances which must be strictly interpreted. Thus, the summer holiday period cannot justify such a delay. Similarly, owing to the fact that the remission procedure is entirely governed by Community

law and in light of the Commission's role in it, the latter must be entirely liable for the delays of the national authorities and the Court is competent to determine the allegations concerning their actions. Accordingly, the applicant considers that the nine-month period can have been extended only by 15 days.

88 The Commission points out that the period of five weeks was a little long, though not unreasonable. It also maintains that the implementing regulation contains no provision specifying the period available to the national authorities for providing additional information to the Commission.

— Findings of the Court

89 Although Articles 906a and 907 of the implementing regulation lay down a period within which the person concerned is to formulate observations on the Commission's objections, there is no provision laying down a similar period for the transmission by the national authorities of the information requested by the Commission. Likewise, alleged delays stemming solely from acts or omissions of national authorities cannot be imputed to the Commission, save in exceptional circumstances, in particular if the Commission does not react with a certain diligence when faced with inaction on the part of the national authorities over a long period. In any event, the Court finds that in this case the period of five weeks taken for despatch was not excessive having regard in particular to the fact that the Commission's request was made during the summer holiday period.

90 This plea must therefore be rejected.

6. Plea that the application for remission was dealt with excessively slowly

— Arguments of the parties

91 The applicant considers that the period of time taken to deal with the application for remission was far too long, namely almost four years, and that the length of that period is entirely attributable to the competent authorities. The applicant points out that on 15 December 1997 it filed its application with the Netherlands authorities. On 15 May 1998 it was informed that the authorities were going to submit the application to the Commission and was requested to sign a statement of conformity. However, since it had not been given sight of the file in its entirety it refused to sign the statement. On 8 February 1999 the application was none the less transmitted to the Commission. By letter of 10 May 1999 the Commission informed it that the case could not be dealt with without the statement. On 24 February 2000 it was finally given access to the whole of the Netherlands authorities' file. On 22 May 2000 the application for remission was sent a second time to the Commission. The application then took one and a half years to be dealt with, since the Commission did not act with due diligence, particularly in relation to the dilatoriness of the national authorities.

92 The Commission points out that the applicant was not entitled to any certainty stemming from the nine-month period laid down in Article 907 of the implementing regulation. It also argues that no criticism can be levelled at it in regard to the time taken to deal with the file by the Netherlands authorities.

— Findings of the Court

93 It must be pointed out at the outset that the period which elapsed from 15 December 1997, when the applicant applied to the Netherlands authorities for remission, and 29 May 2000, the date of receipt by the Commission of the second application for remission from those authorities in respect of the applicant, cannot be attributed to the Commission. That period predates the start of the administrative procedure before the Commission. The Commission is therefore not responsible for any delays on the part of the national authorities in dealing with an application for remission. In that connection it must be noted that the applicant does not challenge the Commission's decision declaring inadmissible the first application by the Netherlands authorities submitted on 8 February 1999. The reason for that rejection was to ensure that the applicant's right to have access to the file prepared by the Netherlands authorities was upheld, as the applicant itself acknowledges in its reply (see paragraph 29).

94 Nor can the applicant's argument with regard to the time taken by the Commission in dealing with the case be accepted. Since Articles 907 and 909 of the implementing regulation lay down a strict deadline for the Commission to adopt its decision on the application for remission, the Court must limit itself to determining whether that deadline was in fact observed. That question has been analysed in the context of the previous pleas relating to the legality of the successive extensions of the deadline and the Court has already ruled on the legality of the procedure in this connection.

95 This plea must therefore be rejected.

7. Conclusion on the first plea

96 It follows from all of the foregoing that the suspensions of the procedure for remission of import duties conducted by the Commission complied with the relevant provisions of the customs legislation. It must therefore be considered that the Commission adopted the contested decision within the deadline laid down. The Court also finds that the Commission did not infringe the procedure for remission of import duties or the rights of the defence.

97 Accordingly, this plea must also be rejected.

Second plea: no obvious negligence within the meaning of Article 239 of the Customs Code and Article 905 of the implementing regulation

1. The concept of obvious negligence and the relevant criteria for assessing whether there was such negligence in this case

— Arguments of the parties

98 The applicant points out that the Commission assessed in the contested decision whether this case involved a specific situation, namely fraud on the part of a customs official. It observes that the Commission acknowledged that it could not be accused of any fraudulent conduct. However, the Commission found the applicant to have been obviously negligent since, notwithstanding the nature of the goods concerned,

it did not draft the documents intended for customs transit particularly carefully or check all the aspects of the consignments.

99 The applicant challenges the Commission's argument that the nature of the goods is crucial when assessing whether or not there has been obvious negligence. The general rule, it claims, is that all goods must be treated with the same degree of care unless the legislature has laid down special rules for specific goods. In addition, it observes that customs operations relating to cigarettes do not attract greater clearance problems than those relating to other types of goods. It also points out that the care taken by it must be assessed in light of the circumstances prevailing at the time of the transportation in question; it was at the time unthinkable to traders that customs officials might be corrupt and cigarette fraud was a phenomenon unknown at that time.

100 The applicant notes that the Court in construing the concept of obvious negligence within the meaning of Article 239 of the Customs Code has stated that the criteria to be taken into consideration are the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader (Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 56). However, the Commission took account only of the criterion of care taken.

101 The applicant observes that the Commission based its assessment of the existence of obvious negligence in particular on the following four circumstances: firstly, the omission of the registration numbers from copy 5 of the transit documents; secondly, non-presentation of the goods at the office of destination indicated on the transit document; thirdly, the method of transmission of copy 5 of the transit document and, fourthly, the failure to obtain sufficient information concerning the purchasers of the goods. It maintains that those circumstances, taken in isolation or

as a whole, are not sufficient to establish obvious negligence on its part. The applicant finally argues that the Commission has not proven that there was any causal link between the alleged negligence and the specific situation being assessed.

102 The Commission points out that the fraudulent actions of the German customs officer do in fact constitute a special situation within the meaning of Article 905 of the implementing regulation but argues that the applicant was guilty in the present case of obvious negligence. It takes the view that assessing whether such negligence exists means determining whether the applicant did everything in its power to comply with the customs rules as a whole, acting with the appropriate degree of care given its professional experience. It also argues that account must be taken of the type of goods transported when assessing the degree of care to be taken by a trader engaging in Community transit.

— Findings of the Court

103 Article 905 of the implementing regulation, the provision which sets out and expands on the rule in Article 239 of the Customs Code, constitutes a general fairness clause intended in particular to cover exceptional situations which, in themselves, do not fall within any of the cases provided for in Articles 900 to 904 of the implementing regulation (Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraph 18). It is clear from Article 905 that repayment of import duties is subject to two cumulative conditions, namely, first, the existence of a special situation and, secondly, the absence of deception or obvious negligence on the part of the economic operator (Case T-282/01 *Aslantrans* v *Commission* [2004] ECR II-693, paragraph 53). Accordingly, repayment of duties must be refused if either of those conditions is not met (Case T-75/95 *Günzler Aluminium* v *Commission* [1996] ECR II-497, paragraph 54, and *Aslantrans* v *Commission*, paragraph 53).

104 It follows from the contested decision that the condition of the existence of a special situation is satisfied in this case, inter alia, because there was fraud in which a customs official was actively involved, which was the origin of the customs debt in question. Similarly, the Commission concluded that the applicant had not engaged in any deception. However, it considered that the applicant acted with obvious negligence. Accordingly, the Court's assessment must focus exclusively on whether the Commission was wrong in its assessment of whether there had been obvious negligence on the part of the applicant.

105 In that regard it should be noted at the outset that *Söhl & Söhlke*, which the applicant cites, does not set out an exhaustive list of the criteria which may be taken into consideration when determining whether there has been obvious negligence. Paragraph 56 of the judgment merely states that account must be taken 'in particular', and thus not exclusively, of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, the professional experience of, and care taken by, the trader. Accordingly, other criteria may assist in determining whether there has been obvious negligence (see, to that effect, Case C-222/01 *British American Tobacco* [2004] ECR I-4683, paragraph 71). Furthermore, it must be pointed out that, contrary to the assertions of the applicant, the Commission did not merely assess the care taken by the applicant but also took account, in the contested decision, of the applicant's professional experience and of his knowledge of the applicable rules.

106 The applicant's argument that the type of goods to which the operations at issue related should not have been taken into account by the Commission cannot be accepted. In fact the Court has held that, in assessing whether there has been obvious negligence, particular attention must be paid to the type of goods transported (*British American Tobacco*, paragraph 72). In particular customs operations relating to heavily taxed goods, such as cigarettes, carry a particular risk of fraud and theft, especially during transportation.

107 In that connection it must be noted that cigarette fraud was a widespread phenomenon at that time. Even before 1994, when the facts in this case occurred, the cigarette market was particularly favourable to the development of illegal trafficking (see, to that effect, *British American Tobacco*, paragraph 72). With regard to the applicant's claim that traders found it unthinkable at that time that customs officials might be involved in corruption, it must be pointed out that, even if that is true, it is not relevant in this case. In fact, in its assessment of whether there was a special situation, the Commission took account of the fact that traders may legitimately expect that the exercise of administrative functions is not tainted by corrupt customs officials.

108 In light of the foregoing considerations, the circumstances on which the Commission based its contested decision in assessing whether there was obvious negligence on the applicant's part must be examined, together with the applicant's plea that there was no causal link between the special situation and the obvious negligence of which the Commission accused it.

2. No registration numbers on copy 5 of the T1 documents

— Arguments of the parties

109 The applicant acknowledges that in no case did copies 1 and 5 of the T1 documents at issue identify the transport vehicles but points out that their registration numbers were entered by hand on copy 4. It points out that the lorries were not yet identified at the time when the T1 documents were completed. Copy 1, it says, was detached from the others and a consignment docket was attached to the back of each copy. It says that when the lorry arrived its registration number was entered on copy 4 but

that entry could not be reproduced on other copies owing to the presence of the consignment dockets. Detaching copy 1 and not stating the registration number on copy 5 are common practice in the Netherlands and generally accepted by the customs authorities, as is plain from the written statement by Mr FB of 6 August 2002.

110 The applicant also points out that most of the consignments in question were checked on the spot by the Netherlands authorities which did not express any objections in regard to the relevant T1 documents. It observes that, as from 1 April 1994, the registration number was also stated on the advance notices which were sent by the office of departure to the office of destination. The identity of the transport was thus known to both the office of departure and the office of destination. Furthermore, the applicant showed particular assiduousness in sealing each transport even though it was not bound to do so. The seal establishes a link between the transit document and the transport since the applicant's authorisation number appeared on the transit document, the consignment docket and the seal.

111 In addition the applicant argues that the indication of the registration numbers on copies 5 and 7 of the T1 documents adds nothing of further value to the checking process since checks at the office of destination are carried out using copy 4. Similarly, it is not the vehicle which is the subject of checks but the container or trailer which in the event were sealed, with the seal numbers appearing on copies 4, 5 and 7 of the T1 documents.

112 The Commission argues that it is clear from Article 341 of and Annex 37 to the implementing regulation that there is a legal obligation that the identity of the means of transport be known at the time of departure. Yet the applicant knowingly

did not mention the registration number on copy 5 of the T1 documents in question which made it particularly difficult for the customs authorities to verify the proper conduct of the transportation of the goods. The affixing of seals bearing the applicant's authorised consignor number is not sufficient for the purposes of verification.

— Findings of the Court

113 Annex 37, Title II, point A 18 of the implementing regulation provides that the identification and nationality of the means of transport must be stated in box 18 of the T1 document. It is absolutely clear from that annex that the customs declaration must inter alia state the registration number of the vehicle as well as that of the trailer if the trailer bears a different registration from that of the lorry. Box no 18 must be used where the Community transit procedure applies and is to be found on all copies of the T1 document. It follows that the registration numbers must be stated on all the copies of the T1 document for use in the Community transit procedure.

114 In the present case it is not disputed that the registration numbers of the means of transport appeared only on copy 4 of the T1 documents, which is the one intended for the office of destination. They did not therefore appear on copy 1, which the office of departure keeps, or on copy 5, which is the copy to be returned by the office of destination to the office of departure. It should be noted first that the applicant has not managed satisfactorily to explain why the registration number was not marked on copies 1 and 5. Even though, as it notes, copy 1 was detached from the others and because of the consignment dockets the entries on copy 4 could not automatically be reproduced on all the copies, there was nothing to prevent the

applicant from entering by hand the registration number on copies 1 and 5, as it did on copy 4 (see, to that effect, Annex 37 to the implementing regulation, Title 1, point C, second paragraph). That information should have been entered at the time when the identity of the means of transport was known or, at the latest, when the goods were despatched.

115 Furthermore, it is clear from the FIOD report (paragraph 9.7, p. 45) that the vehicle registration numbers were omitted by the applicant on purpose because it knew, at the time when the customs documents were drawn up, the exact registration number of the lorry which was to transport the goods. It also follows from that report (paragraph 9.7, p. 46) that, according to his own statements, Mr FB, the person responsible for completing the applicant's customs formalities, had received express instructions from Mr C, the intermediary, not to state the registration numbers on the T1 documents. Since Mr FB is employed by the applicant, his actions in this case must be attributed to it.

116 The applicant argues that, as from 1 April 1994, the registration number was also indicated on the advance notifications transmitted by the office of departure to the office of destination. However, it must be pointed out that the system of advance notification was not used for the first five operations carried out between 16 February and 23 March 1994; the German authorities only instituted that system in August 1994, that is to say after the last of the operations at issue had been carried out, on 5 July 1994.

117 The applicant also points out that the containers or the trailer had a seal the number of which was stated on the transit document. In that regard it points out that it is not the vehicle that is subject to checks but the containers or the trailer. It must be noted that the affixing of seals was in this case an optional step whilst it was mandatory to state registration numbers. Furthermore, the seal numbers establish a link only as between the goods to which the declaration in question relates and the

containers or trailer used for the transport, and not with the vehicle itself. In that connection it must be recalled that Annex 37 to the implementing regulation expressly states that the declaration must give the registration number of the vehicle and of the trailer. It must therefore be concluded that in this case the use of seals cannot justify the failure to mention the registration numbers of the means of transport.

118 The applicant also maintains that stating the registration numbers on the copies other than copy 4 does not enhance verification since verification at the office of destination is carried out by means of copy 4. However, if, as the customs rules require, the office of departure had known the registration numbers of the vehicles transporting the goods subject to the transit procedure, that office might have been in a position either to ask other customs offices, in particular the office of destination indicated in the T1 documents, to inspect the vehicles in question when the goods arrived or to request the competent authorities to inspect the vehicles en route. Yet, since the office of departure did not have the reference of the vehicles on either copy 1 or copy 5, the possibility of ex post facto verification of those operations was very limited.

119 Finally, the applicant notes that the failure to indicate the registration number on copy 5 is common practice in the Netherlands and accepted by the customs authorities. Furthermore, it states that, at the time when the goods were despatched, the Netherlands authorities in most cases checked the T1 documents and did not issue objections. Even if those allegations were established, it must be pointed out that the applicant, as a very experienced declarant, cannot rely on a certain practice in the sector or on the initial failure on the part of the Netherlands customs authorities to react in order not to comply with its formal obligations under the customs procedure.

120 Consequently, it cannot but be concluded that the applicant failed to fulfil its obligations as a declarant. Yet the infringement of a formal obligation under the Community transit procedure, such as the failure to mention the registration numbers of the means of transport used, may give rise to a finding of obvious negligence on the part of the economic operator (see, to that effect, the judgment in *British American Tobacco*, paragraph 70). Moreover, it must be concluded that that infringement was likely in the present case to complicate verification of the customs operations. In fact, in the event the registration number appeared only on copy 4 of the T1 documents, that is to say on the copy signed by the corrupt customs official. Conversely, the office of departure did not have those registration numbers available to it, on copies 1 and 5. As already stated, that fact was prejudicial to the opportunities for the office of departure to check the operations at issue.

121 Consequently, it cannot but be concluded that the Commission did not err in finding that the applicant's failure to indicate the vehicle registration numbers on copy 5 of the T1 documents constituted obvious negligence on the applicant's part.

3. Change of customs office of destination indicated on the customs documents

— Arguments of the parties

122 The applicant acknowledges that all the consignments in question arrived at the Philippsreut office even those in respect of which the transit documents indicated Schirnding as the office of destination. None the less, it says that Article 356(3) of the implementing regulation expressly authorises a change of office of destination. It explains that under Articles 204 and 96(1) of the Customs Code the declarant is

responsible for presenting the goods at a customs office, no matter which one; the declarant in practice has no influence on the choice of office and itinerary determined by the transporter. Moreover, in the context of the system of advance notifications, the office where the goods are presented is required to give notice thereof so that the office of departure and the office of destination stated in the customs document may be kept abreast of the change.

123 The applicant points out that in each case it entered the office of destination in accordance with the instructions of Mr C, the intermediary, since it maintained no direct contacts with the end purchasers, and emphasises that the transporters were not acting on its instructions but on those of the purchasers. It also observes that since the two alleged purchasers were established in Slovakia the choice of the Schirnding office was the most logical. None the less, as is apparent from a 1993 investigation by the organisation of Netherlands road hauliers, that customs post frequently suffered major delays which explained, in the applicant's view, the fact that transporters changed their itineraries en route.

124 Moreover, the applicant observes that, when it found that all the T1 documents relating to the operations at issue were stamped by the Philippsreut office, it indicated that office as the office of destination, which it did for the final two operations (T1 documents nos 120936 of 28 June 1994 and 120986 of 5 July 1994).

125 The Commission states that the criticism which it levels at the applicant does not concern the change in the office of destination during transportation but the fact that, in at least nine of the 11 T1 documents at issue, it mentioned an office of destination although it knew or ought to have known that that statement was inaccurate. It was only on 28 June 1994 at the earliest, that is to say after four

months and nine consignments, that the applicant mentioned the Philippsreut office on the T1 documents. Accordingly, it did not act with the requisite diligence in regard to the accuracy of the information provided on the T1 forms.

— Findings of the Court

126 It cannot but be noted that all the consignments which were the subject of the customs operations at issue were presented at the Philippsreut customs office. That office is therefore the office of destination for those operations for the purposes of the external Community transit procedure. Yet it is undisputed that of the 11 declarations at issue at least the first nine gave a different office of destination, namely the Schirnding office.

127 The applicant maintains that Article 356(3) of the implementing regulation enables a Community transit operation to terminate in an office other than that stated in the relevant T1 document. None the less, it must be stated that, as the Commission rightly points out, the criticism levelled at the applicant is not that it changed the office of destination en route but that it provided, knowingly or negligently, incorrect information to the customs authorities when submitting declarations.

128 As is clear from Article 199 of the implementing regulation and of Annex 37 thereto, the lodging with a customs office of a declaration signed by the declarant is deemed to render him responsible for the accuracy of the information given in the declaration and the authenticity of the documents attached. It follows that the fact of knowingly or negligently providing inaccurate information in a customs declaration infringes the obligations imposed on the declarant.

129 It may be deduced from various documents in the case-file that the applicant, contrary to its assertions, already knew at the time when the customs documents were drawn up that the office of destination stated by it was not the one where the goods were going to be presented. In fact, in the FIOD report, the Netherlands authorities concluded that the applicant had knowingly stated a false office of destination. The report states (at paragraph 5.1, p. 24) that 'in the T1 documents (save for the last two consignments), and in the departure information drawn up by the accused [FB] in the middle of March 1994 and lodged with the Delfzijl customs, on each occasion deliberately and on the instructions of [Mr C, the intermediary], Schirnding is mentioned as the office of destination whereas in reality it was Philippsreut, which the accused [B] and [FB] also knew. The report also contains (at paragraph 5.3.1, p. 25) the following statement by Mr FB: 'I knew that the cigarettes were leaving via Philippsreut. ... Acting on the instructions of [C, the intermediary,] I was always to mention Schirnding as the office of destination'. In that regard it should be noted that in the context of the present case Mr FB contradicted his previous statement by asserting in a statement of 30 September 2002 that he did not know, at the moment when the consignments left, that they were going to be presented at the Philippsreut office. None the less the Court considers that that statement made solely for the purposes of the present proceedings cannot detract from the probative value of the statements made by Mr FB to the Netherlands authorities during the investigation conducted by them.

130 Accordingly, it must be concluded that in respect of the majority of the operations at issue the applicant knowingly stated an incorrect office of destination in the customs declarations that it made. That conduct not only constitutes a breach of the applicant's formal obligations as the declarant and the principal in respect of the operations at issue but it was also of such a nature as to prejudice the possibilities for the customs authorities to supervise those operations. In fact the office of departure was not informed that the consignments of cigarettes were going to be presented to the Philippsreut office; it was therefore unable to give that office advance warning of that fact. That fact therefore facilitated the fraudulent activities of the corrupt customs official, Mr Mauritz, inasmuch as his colleagues at the Philippsreut office were not kept informed of the expected arrival of major consignments of cigarettes.

131 That assessment cannot be invalidated by the applicant's argument that, under the system of advance notifications, the office where the goods have in fact been presented is in fact required to give notice thereof to the office of departure and to the office of destination stated in the customs document. Indeed, even if it is regarded as established that that system was used effectively in the present case, it cannot but be noted that providing inaccurate information concerning the office of destination compromises the very objective of the system of advance notifications, which is to enable the office of destination to be informed in advance that a consignment of goods at risk is on its way.

132 Accordingly, it must be concluded that the Commission has not committed any error in taking the view that the applicant had knowingly entered an office of destination in respect of which it knew in advance that it was inaccurate and in taking that matter into account in its assessment of whether there had been obvious negligence on the part of the applicant.

4. Method of return of copy 5 of the T1 documents

— Arguments of the parties

133 The applicant explains that transmission of the customs documents from the office of destination to the clearance office through official channels was subject to considerable delay and that it had been informed by the Netherlands authorities that return of copy 5 of the T1 documents directly by the office of destination was permitted. It was for that reason, it says, that it handed to the driver and to Mr C, the

intermediary, franked envelopes bearing the address of the Coevorden office, which were to be handed to the German authorities. However, the German customs officer did not use those envelopes because it entrusted copy 5 to the driver or to Mr C, the intermediary, who are said to have handed them to the applicant which in its turn transmitted them to the Netherlands customs authority. Yet, according to the applicant, that system of despatch which was not the usual one was none the less not contrary to Article 356(2) of the implementing regulation which is silent as to the manner in which the T1 document is to be sent by the office of destination.

134 Furthermore when it turned out that copy 5 of the T1 document of 16 February 1994 (T1 document No 120228) relating to the first of the operations at issue had not been sent to the Coevoerden office, the applicant contacted the clearance division of that office, first by telephone and then by fax dated 25 February 1994, first sending a copy and then the original of the copy in question. By faxes of 15 and 28 March 1994 it also sent copies of the copy 5 relating to the operations of 25 February and 23 March 1994 (T1 documents Nos 120274 and 120410). The applicant used that procedure also for the subsequent transports. Therefore, the Netherlands authorities were kept fully abreast of the transmission procedure used and expressly accepted the customs documents at issue.

135 Finally, the applicant maintains that, should the Court consider the procedure used to be contrary to the customs rules, the complexity of those rules should be taken into account in the present case in the assessment of the concept of obvious negligence, in accordance with the *Söhl & Söhlke* case.

136 The Commission maintains that Article 356(2) of the implementing regulation leaves no room for any doubt as to the procedure to be followed for the purposes of the return of copy 5 of the T1 document. Nor may any inference be drawn from that provision as to the permissibility of intervention by a third party. It is a purely administrative procedure which enables the customs authorities to verify that the transit is being correctly effected. As an experienced operator in the transport sector the applicant should never have agreed to become actively involved in the return of copy 5.

— Findings of the Court

137 Under Article 356(2) of the implementing regulation provides that, when the goods are presented to it, the office of destination is to record on the copies of the T1 document the details of controls carried out and is without delay to return a copy to the office of departure. Article 358 of that regulation provides in its turn that the Member States have the right to designate one or more central offices to which documents must be returned by the competent offices in the Member State of destination. It follows that copy 5 of the T1 document must be returned through administrative channels from the office of destination direct to the office of departure, with the possible intervention of the centralising offices appointed by the Member States. As the Commission explained in response to the measures of organisation of procedure ordered by the Court, transmission is effected inter alia by means of envelopes duly identified by the customs authorities of the country of destination; such identification is assured by the use of special stamps, impresses by franking machines or specific methods of franking, communicated to the Commission and familiar to the other competent national authorities.

138 Community customs rules do not therefore allow the office of destination to entrust to third parties, in particular to private operators involved in the transit operation,

the task of transmitting copy 5 of the T1 document to the office of departure. In fact, regard being had to the undeniably essential role played by the T1 transit document in the proper functioning of the system of external Community transit (judgment in *British American Tobacco*, cited above, paragraph 52), and to the importance of copy 5 of that document in regard to the determination of whether any customs debt arises or in disclosing to the office of departure any irregularities committed on transportation of the goods, that copy must be transmitted between customs authorities without the intervention of economic operators. If traders become involved in the return of the copy it is not possible to ensure the authenticity of the documents at issue and the information contained therein, which increases the risks of fraud.

139 In reply to the questions put by the Court, the applicant conceded that the procedure followed did not correspond to its previous practice. Nor was that method of returning the document that which had been decided between the applicant and Mr C, the intermediary, that is to say the use of franked envelopes bearing the address of the customs clearance office of Coevorden which were to be handed by the driver of the lorry to the authorities of the office of destination in order to be used by them for the postal transmission of copy 5 to the clearing office. The following statements by Mr FB, which are reproduced in the FIOD report (paragraph 8.3, pp. 40 and 41), serve particularly well to illustrate the irregular nature of the procedure used:

'[Copy 5] was handed to me by [C, the intermediary,] or indirectly by [B, superior of FB] .... My initial reaction on each occasion was one of fear. ... I let my astonishment be known on an internal level and complained to [B] ... I agreed nothing further with [B] concerning the subsequent return to the clearing office. ... When [C, the intermediary] returned one day with a stamped [copy 5], I felt my hair stand on end. At the least I was both stupefied and furious that he had not kept to what had been agreed. I informed [B] and [C, the intermediary], thereof ... .'

140 It is also important to note that the applicant was aware of the method of return used from before departure of the second consignment of cigarettes, that relating to the operation of 25 February 1994. Yet, although that method of returning the document was contrary not only to the customs rules but also to what had been decided with Mr C, the intermediary, the applicant accepted the use of that method for the 10 subsequent operations by participating in its implementation.

141 None the less, the applicant maintains that that procedure for return had been expressly accepted by the Netherlands authorities. It claims in particular that when it began to receive copy 5 from Mr C, the intermediary, it contacted the customs several times by telephone and obtained their agreement. It also states that it sent them the copy 5 forms and they were accepted. However, although there were in fact certain contacts between the applicant and the Netherlands authorities, it is none the less not clear from the file that the Netherlands authorities expressly accepted the method of return employed. Conversely, it is beyond dispute that the Netherlands authorities regarded the intervention of private operators in the return as not permitted. Thus, the FIOD report (point 3.2.3, p. 18) contains the following statements by a customs official from the Groningen area: 'I was never informed of the fact that the fifth copies were sent to the customs clearance department at Coevorden by the [applicant]. We would never have given our agreement to that method of clearance ... . I did not prohibit the other method of returning the fifth copy (direct despatch by the German customs to the Coevorden clearance department). Conversely, I would have prohibited or would prohibit any other method of returning the fifth copy to the clearance department by [the applicant]. It must therefore be considered in the circumstances of the case that the applicant was not entitled merely to rely on an absence of reaction by the Netherlands authorities for a certain period to the method of returning copy 5 in order to assert that that method was lawful.

142 Finally, the applicant's alternative argument concerning the complexity of the applicable rules cannot be upheld. As has already been pointed out, it is unambiguously plain from Article 356 of the implementing regulation that it is the office of destination which has to return copy 5 of the T1 document to the office of departure without the intervention of any third party.

143 In light of the foregoing it must be concluded that the applicant, as an experienced operator in Community transit, ought not to have agreed to become actively involved in the returning of the copy 5 documents at issue. It must also be noted that the method of returning copy 5 employed in this case not only was based on an infringement of the formal rules governing the Community transit procedure but also assisted in the commission of fraud. In fact the circumvention of administrative channels and in particular the non-transmission to the German centralising office made it impossible for the German authorities to verify the registration numbers entered by the corrupt customs official on the T1 documents at issue which, it should be recalled, actually corresponded to numbers used in order to register other goods and other customs documents. In all likelihood it would have been possible for the German authorities to detect that duplicity but it was not possible for the Netherlands authorities responsible for clearance to do so.

144 Accordingly it must be concluded that the Commission did not err in having regard to the applicant's involvement in the irregular return of the copy 5 forms of the T1 documents when assessing whether there was obvious negligence on the applicant's part.

5. Inadequacy of information concerning the buyers

— Arguments of the parties

145 The applicant points out that for eight years it had enjoyed satisfactory business relations with Mr C, the intermediary, and nothing had led it to be suspicious of the buyers on whose behalf he acted. The requirement imposed by the Commission as to the obtaining of information on the buyers from the intermediary ignores the realities of international trade since the intermediary has no interest in the two parties to the transaction entering into a direct relationship. Furthermore, such verification is very rare under the external Community transit procedure, being applied for example in cases where the declarant is acting on the instructions of the addressee. Nor was there any reason in this case to verify the solvency of the buyers since payment was made in cash.

146 The Commission maintains that the applicant should, particularly in its dual capacity as seller of the goods and declarant, have sought to ascertain whether the buyers whose identities were known to it actually existed and that it should have taken a minimum number of precautions to avoid serving as a cover for a fictitious sale which was liable to give rise to fraudulent action in the context of the Community transit procedure.

— Findings of the Court

147 The applicant did not attempt to obtain accurate information about the alleged buyers of the goods to which the customs transactions in question related. However, in light of the circumstances of the case, in particular the prior existence of long-standing commercial relations between the applicant and Mr C, the intermediary, who claimed that he was representing those buyers, and in light of the specific features of international trade, particularly the difficulty of rapidly obtaining detailed information about undertakings in other countries, the Court finds that that fact alone cannot justify a finding of obvious negligence on the part of the applicant.

6. No causal link between the special circumstances and the negligence of which the applicant is accused

— Arguments of the parties

148 The applicant claims that it is clear from the second indent of Article 239(1) of the Customs Code that the remission of duties can be refused only if the special situation in question is a consequence of the applicant's negligence. In this case, however, there is no causal relationship between this situation, that is to say the fraudulent act by the German customs official, and the four factors on the basis of which the Commission assessed the alleged obvious negligence. That fraud was not the consequence of the fact that the registration numbers were not given or of the failure to verify the identity of the buyers. Furthermore, the change in the office of destination and the unusual method of returning copy 5 of the T1 documents simply aroused suspicion on the part of the customs authorities and increased the likelihood of the fraud being discovered.

149 The Commission argues that an application for remission may be rejected where the applicant is guilty of obvious negligence irrespective of whether there is a connection with the particular circumstance on which it is relying. The Commission considers in any event that there is a causal link in this case between the special circumstance and the applicant's obvious negligence in that the negligence played a part in the commission of the fraud and rendered its discovery more difficult.

— Findings of the Court

150 Under Article 239 of the Customs Code import duties may be repaid or remitted in situations arising out of circumstances involving no deception or obvious negligence on the part of the person concerned. Moreover Article 905 of the implementing regulation provides that the application for remission must be accompanied by evidence which might constitute a special situation resulting from circumstances involving neither any deception nor obvious negligence on the part of the person concerned. Contrary to the Commission's argument, it is plain from the very wording of those provisions that there must be a connection between the negligence of which the operator is accused and the special situation established. In the absence of such a connection it would be unfair to refuse the application for remission or repayment. However, and contrary to the applicant's assertions, it is not necessary for the special situation to be the direct and immediate consequence of negligence on the part of the party concerned. In that connection it is sufficient for the negligence to have contributed to or facilitated the removal of goods from customs supervision.

151 In the present case the special situation is constituted by the fact that the applicant was the victim of a fraud made possible by the involvement of an agent of the national customs services. Accordingly, it is necessary for the various respects in which the applicant is criticised for obvious negligence to have contributed to or facilitated the commission of that fraud.

152 It has already been held (see paragraphs 118, 120, 130 and 143) that three matters alleged to constitute obvious negligence on the applicant's part, that is to say the failure to state the registration numbers on the copy 5 forms of the T1 documents, the false mention of Schirnding as the office of destination and the irregular method of returning the copy 5 forms of the T1 documents facilitated the commission of the fraud and thus the removal of the goods from customs supervision, in particular by rendering it difficult for the national customs authorities to supervise the proper conduct of the operations at issue.

153 Accordingly, the plea alleging that there is no causal link must be rejected.

7. Conclusion on the second plea

154 It is settled case-law that the Commission enjoys a margin of discretion when adopting a decision under the general rule as to fairness provided for by the Community customs rules (judgments in Case T-346/94 *France Aviation* v *Commission* [1995] ECR II-2841, paragraph 34; *Primex Produkte Import-Export and Others* v *Commission*, cited above, paragraph 60; *Mehibas Dordtselaan* v *Commission*, cited above, paragraphs 46 and 78, and *Aslantrans* v *Commission*, cited above, paragraph 55). It must also be pointed out that the repayment or remission of import duties, which can be granted only in certain circumstances and in situations which are specifically provided for, is an exception to the normal rules applicable to imports and exports and, consequently, the provisions under which such repayment or remission may be granted must be interpreted strictly (*Söhl & Söhlke*, cited above, paragraph 52, and *Aslantrans* v *Commission*, cited above, paragraph 55). In particular, since the absence of obvious negligence is a condition sine qua non for claiming repayment or remission of import duties, it follows that that concept must be interpreted in such a way that the number of cases of repayment or remission remains limited (*Söhl & Söhlke*, cited above, paragraph 52).

155 In this case the applicant was the principal under the external Community transit procedure for the customs operations in question. Consequently, the applicant, qua principal, had assumed specific responsibility in relation to those operations.

156 However, the applicant knowingly infringed its obligations under the Community transit procedure on several occasions. First of all, by failing to indicate the registration numbers of the transport vehicles, it failed to comply with the obligation under Annex 37 to the implementing regulation. Secondly, by providing false information on the office of destination in the customs declarations, it acted in breach of its obligations under Article 199 of the implementing regulation and Annex 37 to that regulation. Thirdly and lastly, by participating in an irregular method for returning the copy 5 forms of the T1 documents, it assisted in the non-observance of Article 356 of the implementing regulation. Nor, moreover, were the infringed provisions particularly complex or difficult to interpret. Moreover, the applicant was a very experienced economic operator in that sector. Those infringements not only constitute breaches of the formal requirements of the Community transit procedure but they also assisted in the commission of the fraud and the removal of the goods from customs supervision, in particular by making it difficult for the national customs authorities to supervise the proper conduct of the operations. Finally, it should be emphasised that, in regard to customs operations concerning cigarettes, which are at-risk goods, the applicant was required to show particular diligence.

157 It follows from all the foregoing that the Commission did not manifestly err in its assessment when it formed the view that, in light of all the circumstances of the case, the applicant had shown obvious negligence within the meaning of Article 239 of the Customs Code and Article 905 of the implementing regulation.

158 Accordingly, this plea must be rejected.

Third plea: infringement of the principle of proportionality

Arguments of the parties

159 The applicant maintains that Article 239 of the Customs Code must be interpreted and applied in conformity with the principle of proportionality. However, in view of the amount of duties claimed and the size of its commercial activities, rejection of the application for remission would result in major loss and, in order not to infringe the principle of proportionality, the alleged negligence established by the Commission would have had to be particularly serious. In the final analysis, the Commission accorded disproportionately severe treatment to the applicant whose alleged negligence is strictly 'secondary' to the fraudulent conduct of a German customs officer.

160 The Commission observes that the principle of proportionality must apply in the present case to the interpretation of the provisions governing the remission of the customs debt and not to the question as to the validity of the debt itself. It observes that the Court established that it is not disproportionate for an operator to be made bankrupt by the fact that he must settle a customs debt (judgment in Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 116). Finally the Commission took account of the principle of proportionality in the contested decision but the serious allegations against the applicant did not allow the duties to be remitted.

Findings of the Court

161 It is important to note that the amount of the customs debt imposed on the applicant reflects the financial significance of the goods which formed the subject-matter of the Community transit operations at issue, in particular the amount of duties and taxes imposed on those goods, namely cigarettes. The fact that the amount claimed by way of import duties is considerable comes within the category of business risks to which the economic operator is exposed (see, to that effect, the judgment in *Faroe Seafood and Others*, paragraph 115). Accordingly the extent of the debt whose remission is sought is not in itself a factor capable of influencing the assessment of the conditions to which such remission is subject. It must therefore be concluded that the Commission has not infringed the principle of proportionality by not taking into consideration in the present case, in its examination of the application at issue, the extent of the financial loss that a decision to reject the application for remission would entail for the applicant.

162 In regard to the applicant's argument that the obvious negligence alleged against it by the Commission is strictly 'secondary' to the fraud on the part of the German customs official, it is sufficient to note that that fraud was taken into account by the Commission as it was a factor underpinning the finding in the present case that there was a special situation. Yet in the context of the assessment of the second condition conferring entitlement to remission, that is to say the absence of obvious negligence, the Commission rightly took into consideration the conduct and omissions attributable to the applicant which, as has been held, assisted in the commission of the fraud and made its discovery more difficult. Nor, accordingly, did the Commission infringe the principle of proportionality in its scrutiny of the applicant's conduct.

163 Accordingly, this plea must be rejected.

Fourth plea: non-existence of the customs debt

Arguments of the parties

164 At the hearing the applicant raised a new plea, alleging the occurrence of a new fact. It claimed that, as is apparent from the judgment of the Vrchní Soud of Prague of 30 November 2004, cited above, the goods forming the subject-matter of the customs operations at issue have left the Community customs territory. Accordingly, those goods have not been removed from customs supervision and are not therefore subject to import duties. Accordingly, the customs debt imposed on the applicant by the Netherlands authorities in respect of which the application for remission forms the subject-matter of the contested decision is non-existent. That fact is such as to justify remission of the customs debt. Application of the procedure provided for in Article 239 of the Customs Code presupposes a pre-existing customs debt.

Findings of the Court

165 It is settled case-law that the provisions of Article 239 of the Customs Code and Article 905 of the implementing regulation have the sole objective of making it

possible, where certain specific conditions are satisfied and in the absence of obvious negligence or deception, to exempt economic operators from the payment of the duties for which they are liable; their objective is not to enable the very principle of whether the customs debt has arisen to be called in question (judgments in Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani* v *Commission* [1987] ECR 1303, paragraph 11, and Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 43; judgment in *Hyper* v *Commission*, paragraph 98). In fact, determination of the existence and of the exact amount of the debt is a matter for the national authorities. However, the applications submitted to the Commission under the abovementioned provisions do not concern the question whether the provisions of substantive customs law have been correctly applied by the national customs authorities. The Court recalls that the decisions adopted by those authorities may be contested before the national courts, those courts being able to bring a matter before the Court under Article 234 EC (judgments in Case T-195/97 *Kia Motors and Broekman Motorships* v *Commission* [1998] ECR II-2907, paragraph 36, and *Hyper* v *Commission*, paragraph 98).

166 In light of the foregoing this plea must be declared inadmissible.

167 The Court considers that the investigation of the case, together with the documents and the replies provided by the parties in response to the measures of organisation of procedure, have afforded sufficient elucidation and it is not necessary for other measures of enquiry to be ordered, in particular the examination of witnesses, as proposed by the applicant.

168 In light of all the foregoing the application must be rejected in its entirety.

Costs

169 Under Article 87(2) of the Rules of Procedure of the Court of First Instance the unsuccessful party is to be ordered to pay the costs if they have been applied for by the successful party. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission in accordance with its application in that regard.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. **Orders the applicant to bear its own costs and to pay those of the Commission.**

Cooke García-Valdecasas Trstenjak

Delivered in open court in Luxembourg on 13 September 2005.

H. Jung J.D. Cooke

Registrar President

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