JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
18 January 2000 *

In Case T-290/97,

Mehibas Dordtselaan BV, a company incorporated under Netherlands law, established in Rotterdam, the Netherlands, represented by Pierre Bos, Jasper Helder and Marco Slotboom, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Hendrik van Lier, of its Legal Service, acting as Agent, assisted by Jules Stuyck, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision C (97) 2331 of 22 July 1997 refusing the application submitted by the Kingdom of the Netherlands for repayment to the applicant of agricultural levies,

* Language of the case: Dutch.

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

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 4 May 1999,

gives the following

Judgment

Legislation

1 Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986 (OJ 1986 L 286, p. 1), provides:

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

2 Article 905(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1) provides:

'The case sent to the Commission shall include all the facts necessary for a full examination of the case presented.

As soon as it receives the case the Commission shall inform the Member State concerned accordingly.

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.'

3 Article 907 of Regulation No 2454/93 provides:

'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 six 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 six 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.'

4 Article 909 of the regulation states:

'If the Commission fails to take a decision within the time-limit set in Article 907, or fails to notify a decision to the Member State in question within the time-limit set in Article 908, the decision-making customs authority shall grant the application.'

Facts

5 The applicant, Mehibas Dordtselaan BV (formerly known as Expeditie- en Controlebedrijf Codirex BV), is a customs agent at the Port of Rotterdam.

6 Between February 1981 and June 1983, it made 98 customs declarations relating to the import by Ruva BV ('Ruva') of poultrymeat. The declarations were made

on the basis of invoices submitted by Ruva and gave rise to agricultural levies. The goods concerned were put into free circulation in the Community.

7 In 1984, the Netherlands tax authorities discovered that the invoices submitted by Ruva were fraudulent. The value of the imported goods was actually higher and greater agricultural levies were therefore payable.

8 Accordingly, the applicant paid in October 1986, at the request of the Netherlands customs authorities, supplementary agricultural levies in the amount of NLG 677 476 ('the contested levies').

9 On 29 October 1990 the applicant applied to the Netherlands authorities for repayment of the contested levies. The authorities sent the application to the Commission under cover of a letter of 29 April 1994, received on 16 May 1994, for a decision on whether repayment was justified under Article 13 of Regulation No 1430/79.

10 By a decision of 14 November 1994, the Commission found the application for repayment not justified.

11 By an application lodged at the Registry of the Court on 26 January 1995 the applicant brought an action for annulment of that decision (Case T-89/95).

12 On 31 May 1996 the Commission revoked the decision in the light of the Court's judgment in Case T-346/94 *France-Aviation* v *Commission* [1995] ECR II-2841.

13 The Commission informed the Netherlands authorities of the revocation by letter of 4 June 1996 and stated that as a result of that judgment all requests for repayment of import duties must include a statement by the person concerned that he has read the case transmitted by the national authorities and, if appropriate, has nothing to add ('statement for the file'). Observing that the application for repayment of 29 April 1994 was 'neither valid nor admissible' because it did not include such a statement, the Commission requested the Netherlands authorities to submit one signed by the applicant.

14 On 17 October 1996 the applicant withdrew its action in Case T-89/95, which was removed from the Court's register by order of 17 December 1996.

15 By letter of 10 December 1996 the Netherlands customs authorities informed the applicant that, in the light of the judgment in *France-Aviation*, the Commission had revoked its decision of 14 November 1994 and that as a result of that judgment applications for repayment were to be accompanied by a statement for the file. They therefore asked the applicant to send them one.

16 By letter of 6 February 1997 the applicant sent the Netherlands authorities the statement requested together with its comments on the repercussions which the judgment in *France-Aviation* was, in its view, likely to have on its application for repayment. It also requested the authorities to include the application and reply lodged by it in Case T-89/95 with the new case to be sent to the Commission.

17 By letter of 17 February 1997 the Netherlands authorities submitted a fresh application for repayment to the Commission including those various documents.

18 By Decision C (97) 2331 of 22 July 1997 addressed to the Kingdom of the Netherlands ('the contested decision'), the Commission found that that application for repayment was not justified. It considered that the fact that invoices proved to be inaccurate was a trade risk to be assumed by any person making a customs declaration and which could not itself be regarded as a special circumstance. The Commission also stated that the fact that national laws lay down different time-limits for post-clearance recovery where there are acts that could lead to criminal court proceedings could not give rise to a special situation for the purposes of Article 13 of Regulation No 1430/79.

Procedure and forms of order sought

19 Those were the circumstances in which, by an application lodged at the Registry of the Court on 10 November 1997, the applicant brought this action.

20 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry.

21 At the hearing on 4 May 1999 the parties presented oral argument and replied to the questions put by the Court.

22 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

23 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Substance

24 The applicant relies on four pleas in law in support of its action: first, breach of Regulation No 2454/93, misuse of powers, and infringement of the principle of legal certainty; secondly, infringement of the principle of the protection of legitimate expectations; thirdly, breach of Article 13 of Regulation No 1430/79; and fourthly, infringement of the obligation to provide reasons.

First plea: breach of Regulation No 2454/93, misuse of powers and infringement of the principle of legal certainty

Arguments of the parties

25 The applicant observes that when it made its first application for repayment, Regulation No 2454/93 did not require a statement for the file to be submitted. Relying on the judgment in Case C-430/92 *Netherlands* v *Commission* [1994] ECR I-5197, paragraph 19, it argues that, as the application was complete, the six-month period provided for in Article 907 of the regulation began to run on the day on which the Commission received the application, 16 May 1994. It must be concluded from the Commission's revocation, on 31 May 1996, of its decision of 14 November 1994 that it failed to take a decision on the first application for repayment within the prescribed time-limit and that the Netherlands authorities were therefore bound, pursuant to Article 909 of Regulation No 2454/93, to repay the contested levies. The applicant pointed out at the hearing that since the Commission's decision of 14 November 1994 was adopted two days before the six-month period expired it had only two days after its revocation of 31 May 1996 to reach a decision on the application for repayment, and had thus placed itself in a position where it was impossible for it to take a new decision.

26 Next, the applicant claims that the Commission was not entitled to require it to submit a second application for repayment containing a statement for the file. It advances three arguments in support of that claim.

27 First of all, *France-Aviation* gives rise to no such requirement. For the Commission to adhere to the principle of *audi alteram partem* laid down in that case in customs duties repayment procedures, it would have been sufficient for it to request the Netherlands authorities, pursuant to Article 905(2) of Regulation No 2454/93, to hear the applicant.

28 Secondly, it argues that the Commission was not entitled to impose a new condition for applications for repayment of import duties unless it did so clearly and precisely (Case 169/80 *Gondrand Frères* [1981] ECR 1931, paragraph 17, and Joined Cases T-18/89 and T-24/89 *Tagaras* v *Court of Justice* [1991] ECR II-53, paragraph 40), that is to say by amending Regulation No 2454/93. Indeed, Commission Regulation (EC) No 12/97 of 18 December 1996 amending Regulation No 2454/93 (OJ 1997 L 9, p. 1) subsequently did so. However, the applicant points out that since that regulation only entered into force on 20 January 1997, it could not apply to this case.

29 Thirdly, and in any event, a statement for the file does not satisfy the right to be heard. Such statements relate only to the case transmitted by the national authorities to the Commission and are therefore supplied before the Commission examines the application for repayment. The decision in *France-Aviation* requires (paragraph 36) that the Commission ask the national authorities to hear the applicant if it is considering refusing such an application.

30 The Commission contends, first, that it complied with the six-month time-limit laid down in Article 907 of Regulation No 2454/93. It received the first application for repayment on 16 May 1994 and gave its decision thereon on 14 November 1994. It received the second application for repayment on 25 February 1997 and refused it on 22 July 1997.

31 The Commission goes on to observe that, even if it had failed to take a decision within six months, under Article 909 of Regulation No 2454/93 it would have been for the Netherlands authorities to repay the contested levies. The applicant should therefore have challenged the decision taken by those authorities rather than the contested decision.

32 Furthermore, under Article 176 of the EC Treaty (now Article 233 EC) the Commission was bound to adopt the measures necessary to implement *France-Aviation*, including those relating to repayment procedures which were already under way (Joined Cases 59/80 and 129/80 *Turner* v *Commission* [1981] ECR 1883, paragraph 72, and Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraphs 28 and 30). In this case, the grounds of the judgment in *France-Aviation* (paragraph 39) indicate that a new procedure ought to have been initiated on the basis of a case-file supplemented by the Netherlands authorities and the applicant. That is why the Commission revoked its decision of 14 November 1994, requested the Netherlands authorities to make a new application for repayment including a statement signed by the applicant and took a new decision within six months of receiving the latter application. The Commission contends that the statement required is a way of ensuring that the case contains all the information transmitted by both the customs authorities and the person concerned, and therefore constitutes an appropriate measure to guarantee the latter's right to be heard. The decision in *France-Aviation* does not require the Commission to hear the interested party itself but simply to take its decision on the basis of a complete case-file. Lastly, it points out that it described the requirement of a statement in clear and precise terms in its letter of 4 June 1996 to the Netherlands authorities, and that the Netherlands authorities then fully apprised the applicant thereof in accordance with the procedure provided for by Regulation No 2454/93.

Findings of the Court

33 First of all, the Commission was right in the light of *France-Aviation* to revoke its decision of 14 November 1994 (see the order in Case T-22/96 *Langdon* v *Commission* [1996] ECR II-1009, paragraph 12), and its revocation met the requirements imposed by the principles of legality and proper administration in every respect.

34 In that case, the Court held that a trader who requests repayment of customs duties has the right to be heard during the procedure for the adoption of a decision under Article 13 of Regulation No 1430/79 and that if that right, and thus the principle of *audi alteram partem*, is infringed, the decision must be annulled (see paragraphs 34 to 40). As is clear from the grounds of the Commission's decision of 31 May 1996, it was precisely because, first, the decision was adopted by the same procedure as that found to contravene the principle of *audi alteram partem* in *France-Aviation* and, secondly, because an action for annulment of that decision was pending before the Court that the Commission revoked its decision of 14 November 1994. Furthermore, the applicant argued in the action for annulment that the decision was unlawful on the ground, *inter alia*, that it had been denied the right to be heard.

35 Next, the applicant's arguments raise two main issues: whether the Commission had the power to adopt a new decision on the applicant's request for repayment following the revocation of 31 May 1996, and whether the contested decision was properly adopted.

1. The Commission's power to adopt a new decision following the revocation of 31 May 1996

36 The Commission expressly acknowledged in its decision of 31 May 1996 that its decision of 14 November 1994 was being revoked because it was unlawful (see the order in *Langdon*, paragraph 12). The revocation also had retroactive effect (see Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 61, and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 46). Furthermore, the applicant itself acknowledged that after the Commission's revocation of 31 May 1996 it had no further interest in seeking the annulment of the decision of 14 November 1994, and for that reason withdrew its action in Case T-89/95.

37 That being so, it was for the Commission, in accordance with the requirements imposed by the principle of legality and once it had ensured that the applicant was in a position to exercise its right to be heard, to take a new decision on the application for repayment under the procedure provided for in Regulation No 2454/93.

2. The way in which the contested decision was adopted

38 First of all, as would have been the case had the decision of 14 November 1994 been held by the Community judicature to be unlawful, it was incumbent upon the Commission to reconsider the applicability of Article 13(1) of Regulation No 1430/79 to the circumstances of the case, allowing the applicant to exercise its right to be heard, since the period referred to in Article 907 of Regulation No 2454/93 began to run on the date of the decision revoking the decision of 14 November 1994, 31 May 1996 (Case C-61/98 *De Haan Beheer* [1999] ECR I-5003, paragraph 48).

39 In this case, the contested decision was adopted on 22 July 1997, six months after the revocation of 31 May 1996. However, the Commission had asked the Netherlands authorities to procure the applicant's observations on 4 June 1996; those observations were only communicated to it on 17 February 1997. Under the second paragraph of Article 907 of Regulation No 2454/93, the time which elapsed between those two dates is not to be taken into account when calculating the six-month period referred to in the first sentence of the second paragraph of Article 907. It follows that the Commission adopted the contested decision within the period allowed it by Regulation No 2454/93.

40 However, there were irregularities in the procedure whereby the Commission adopted the contested decision.

41 First of all, although the sole ground given in the decision of 14 November 1994 for refusing the first application for repayment was the absence of a special situation within the meaning of Article 13 of Regulation No 1430/79, it is clear from the case-file, and in particular the letter the Commission sent to the Netherlands customs authorities on 4 June 1996, that at the time it considered the application to be 'neither valid nor admissible' because it did not include a statement for the file. It is common ground that no such statement was required to be submitted at the time when the application was made.

42 Regulation No 12/97 added a provision to Article 905 of Regulation No 2454/93 requiring that cases sent to the Commission include such a statement, but did not come into force until 20 January 1997 and the new provision could not be applied to the applicant's first request for repayment.

43 It follows that by retroactively imposing a new condition of admissibility on the applicant's first request for repayment of duties the Commission not only exceeded the powers conferred on it by Regulation No 2454/93, but also failed to have regard to the principle of legal certainty.

44 Secondly, the statement now required by the Commission only partly meets the requirements imposed by the principles laid down in *France-Aviation*. It merely enables a trader applying for repayment — and who has not necessarily been involved in the preparation of the case sent to the Commission by the competent national authorities — to satisfy himself that the case is complete and where appropriate to add anything he deems useful. Whilst that effectively enables the person concerned to exercise his right to be heard during the first stage of the administrative procedure, which takes place at national level, it in no way guarantees his rights of defence during the second stage of the procedure, which

takes place before the Commission once the national authorities have communicated the case to it. The statement is made at a stage when the Commission has not yet had an opportunity to consider the position of the person concerned, let alone come to a provisional view on his application for repayment.

45 It follows from *France-Aviation* that the right to be heard in a procedure such as that in point here must be guaranteed at both stages. Thus, at paragraph 36 of the judgment in that case, the Court found that where the Commission is considering refusing an application for repayment on the ground that the trader has been guilty of obvious negligence whereas the competent national authorities had proposed that his application be granted on the ground that he could not be regarded as guilty of any negligence at all, it is under a duty to ensure that the person is heard by the national authorities. The Court has confirmed its position in subsequent judgments in cases where the applicant for repayment was merely alleged to have failed to act with due care (Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 85, and Case T-50/96 *Primex Produkte Import-Export and Others* v *Commission* [1998] ECR II-3773, paragraph 68).

46 It is true that Regulation No 2454/93 only provides for contact between the person concerned and the national authorities on the one hand, and between the national authorities and the Commission on the other (*France-Aviation* paragraph 30, and *Primex Produkte Import-Export and Others*, paragraph 58). Under the current legislation, therefore, the Commission need only deal with the Member State concerned. However, it is settled case-law that observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (see Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraph 44, Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 39, and Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21). In view of the margin of assessment enjoyed by the Commission in adopting a decision pursuant to the general equitable provision contained in Article 13 of Regulation No 1430/79, it is all the more important that respect for

the right to be heard be guaranteed in procedures for the remission or repayment of import duties (*France-Aviation*, paragraph 34, *Eyckeler & Malt*, paragraph 77, and *Primex Produkte Import-Export*, paragraph 60).

47 The procedure followed by the Commission in adopting the contested decision was therefore tainted by irregularities. However, those irregularities cannot result in the annulment of the contested decision unless it is established that without them the procedure might have had a different outcome (see to that effect Joined Cases 209/78 to 215/78 and 218/78 *Landewyck* v *Commission* [1980] ECR 3125, paragraph 47, Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 48, and Case T-266/94 *Skibsvaerftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 243).

48 First, the fact that in this case the Commission considered the applicant's first request for repayment of duties to be 'neither valid nor admissible' was irrelevant. As the Court has found above, the Commission had six months in any event under Article 907 of Regulation No 2454/93 to take a new decision, a period which began to run on the date of the revocation, 31 May 1996, and was extended by the time allowed to enable the applicant to exercise its right to be heard.

49 Secondly, the applicant was not only given the opportunity to ensure that the case sent to the Commission was complete and to add anything it wished but also to make known its views, since when it made the second application it was already aware of the Commission's provisional position, set out in the decision of 14 November 1994. Indeed, the applicant acknowledged at the hearing that it had been given the opportunity to explain its views in full and that its right to be heard had been observed.

50 That being so, it has not been established that without the irregularities which occurred in this case the procedure might have resulted in a different decision. The first plea must accordingly be dismissed.

Second plea: infringement of the principle of the protection of legitimate expectations

Arguments of the parties

51 The applicant argues that the contested decision breaches the principle of the protection of legitimate expectations in so far as the Commission gave it good reason to expect repayment of the contested levies. It advances three arguments in support of this second plea.

52 First of all, it was not until 31 May 1996 that the Commission challenged the admissibility of the initial application for repayment, received on 16 May 1994, on the ground that it did not include a statement for the file. In its view, that delay implied that it was entitled to consider that its application had been validly submitted.

53 Secondly, it was entitled to assume from the fact that the decision of 14 November 1994 was revoked that the Commission had not reached a decision on the first application for repayment within the period prescribed by Regulation No 2454/93 and so to expect that the Netherlands authorities would repay the contested levies.

54 Thirdly, it applied for annulment of the decision of 14 November 1994 in Case T-89/95 on the ground that it had not been duly authenticated. On 4 September 1995, the member of the Commission's staff responsible for the case told the applicant's adviser during a telephone conversation that that decision was indeed tainted by a procedural defect and that in the circumstances the Commission was willing to come to an arrangement. The applicant therefore considers that it was justified in believing that it had obtained satisfaction and that the Commission would grant its application for repayment.

55 The Commission contends that the applicant could not have legitimately believed that its first application for repayment was well founded and would therefore be granted.

56 It emphasises the fact that it revoked its decision of 14 November 1994 within a reasonable time, after becoming aware of the decision in *France-Aviation* and realising that the procedure which led to the adoption of that decision was not compatible with Community law.

57 The Commission also points out that it was bound, in the light of *France-Aviation*, to decide the applicant's request for repayment afresh, making certain that the applicant was able to exercise its right to be heard.

58 Finally, the Commission acknowledges that its representative indicated in the context of Case T-89/95 that the decision of 14 November 1994 was not duly

authenticated. However, it denies that its representative stated that it was willing to come to an arrangement on that ground. On 13 October 1995 the Commission's representative had a second telephone conversation with the applicant's adviser during which he intimated that whether or not the decision was revoked depended on the outcome of Case C-286/95 P which was pending before the Court, being an appeal against the judgment of the Court of First Instance in Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901 and relating to the same procedural defect. The Commission says it ultimately revoked the decision for a different reason, concerning the requirements imposed by the principle of *audi alteram partem* laid down in *France-Aviation*.

Findings of the Court

59 The right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the Community authorities have caused him to entertain legitimate expectations (Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products* v *Commission* [1987] ECR 1155, paragraph 44, Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 26, Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 74, and *Exporteurs in Levende Varkens and Others*, paragraph 148). However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration (Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 72, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 68).

60 The arguments advanced by the applicant in no way show that the Commission gave the applicant any precise assurance that it would obtain reimbursement of the contested levies.

61 First, even if the applicant's belief that its first application for repayment was admissible was well founded (see paragraphs 41 and 42 above), it was not entitled to infer that repayment was justified. As the Court has observed at paragraphs 36 and 37 above, after revoking the decision of 14 November 1994 the Commission was bound to reopen the administrative procedure, and, having given the applicant an opportunity to exercise its right to be heard, decide the matter afresh.

62 Secondly, the applicant was not entitled to assume that, because the decision of 14 November 1994 was revoked, the Commission failed to take a decision within the six-month time-limit. As the Court has pointed out at paragraphs 38 and 39 above, after its revocation of 31 May 1996 and once the applicant had been given an opportunity to exercise its right to be heard, the Commission had to adopt a new decision on the applicant's request for repayment, and the period referred to in Article 907 of Regulation No 2454/93 began to run on the date of the decision to revoke, 31 May 1996.

63 Finally, the Court finds that it has not been established that, in the context of Case T-89/95, the Commission provided the applicant with a precise assurance that its request for repayment would be granted as part of an arrangement. It must also be noted that even if the decision of 14 November 1994 had been annulled by the Court due to an irregularity in its authentification, the Commission could have adopted a new decision on the application once it had remedied the procedural defect (see to that effect Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 98).

64 It follows that the plea of breach of the principle of the protection of legitimate expectations must be rejected.

Third plea: breach of Article 13 of Regulation No 1430/79

Arguments of the parties

65 The applicant argues that the Commission's finding that repayment of the contested levies was not justified under Article 13 of Regulation No 1430/79 constituted an infringement of that provision, since both the conditions for it to apply were met in this case.

66 Relying on paragraph 34 of *France-Aviation*, the Commission contends that Article 13 of Regulation No 1430/79 accords it a wide discretion, with the result that only manifest errors of assessment may be dealt with by the Community judicature. However, it made no error in this case. Even where the conditions for the provision to apply are met, there is no automatic right to repayment.

— Whether there is a special situation

67 The applicant relies on two factors which should have led the Commission to conclude that there was a special situation within the meaning of Article 13 of Regulation No 1430/79.

68 First of all, under Netherlands law as it applied at the material time, the repayment of import duties was subject to a limitation period of three years while the recovery of agricultural duties was subject to a limitation period of 30 years. Under Community customs law, by contrast, the limitation period is three years in both cases (Article 2 of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties, OJ 1979 L 197, p. 1). If the period had been three years in this case, it could no longer have been required to pay the contested levies. The applicant also observes that under Netherlands law, in contrast to Community customs law, the agent and principal were jointly and severally liable for the recovery of import duties, whereas only the principal could incur liability for agricultural levies. At the hearing, the applicant stated that the Netherlands authorities could not have recovered the contested levies from Ruva anyway since Ruva had in the meantime become insolvent and gone into liquidation; nor could the applicant have taken action against Ruva, for the same reason. The consequences of Ruva being wound up ultimately fall to be borne by the Community.

69 Secondly, Article 5(2) of Regulation No 1697/79 sets out the conditions in which the national authorities may waive the right to post-clearance recovery of unpaid import or export duties. According to the case-law, those conditions are fulfilled where 'an economic agent produces in good faith information which, although incorrect or incomplete, is the only information which he can reasonably possess or obtain, and therefore include in the customs declaration' (Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 29).

70 Furthermore, in Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 46, the Court held that the conditions for Article 13 of Regulation No 1430/79 to apply were to be assessed in the light of the conditions laid down in Article 5(2) of Regulation No 1697/79. It concludes that the Commission is

bound to grant a request for repayment under Article 13 of Regulation No 1430/79 where the applicant relies on circumstances analogous to those considered relevant for the purposes of Article 5(2) of Regulation No 1697/79.

71 Such circumstances pertained in this case. The Netherlands authorities have consistently acknowledged that the applicant relied in good faith in its customs declarations on information regarding Ruva's imports. The information in its declarations was in any case the only information it could possess or obtain. Thus, in order to make its declarations, it submitted Ruva's invoices to certain official bodies which at no point called into question the accuracy of the amounts stated therein. In addition, the Netherlands authorities only discovered Ruva's fraudulent conduct following a thorough investigation using means not available to the applicant. Also, since it did not have access to Ruva's books, it would have been physically impossible for the applicant to verify the amounts stated in Ruva's invoices.

72 The Commission challenges the applicant's claim that the Community customs legislation provides for the same treatment in respect of import duties and agricultural levies. Whereas Article 2 of Regulation No 1697/79 draws no distinction between the two types of duty, Article 3, by contrast, provides that where it is by virtue of an act that could give rise to criminal proceedings that the competent authorities were unable to determine the exact amount of duties, action for recovery of unpaid duties is to be taken in accordance with the provisions in force in this respect in the Member States. In addition, the Court has held that the provisions of Article 3 of Regulation No 1697/79 are to be interpreted in accordance with national law (Case C-273/90 *Meico-Fell* [1991] ECR I-5569, paragraph 12). The fact that there are discrepancies between the rules is to be expected and so does not amount to a special situation for the purposes of Article 13 of Regulation No 1430/79.

73 The Commission further argues that the fraudulent nature of Ruva's invoices could not amount to a special situation justifying repayment of the contested levies. According to the case-law, an importer who has acted in good faith is liable for customs duties on the importation of goods in respect of which the exporter has breached customs regulations (Case C-97/95 *Pascoal & Filhos* [1997] ECR I-4209, paragraphs 55 to 61). It is for the importer to bear the risk of an action for recovery and to adopt the necessary measures in its contractual relations to ensure that it is equipped to deal with that risk (Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 114, and *Pascoal & Filhos*, paragraph 60). If that were not the case, there would be an incentive for the importer not to verify the exporter's good faith or the information provided to the authorities of the State of export by the exporter, which would give rise to abuse (*Pascoal & Filhos*, paragraph 57).

— No deception or manifest negligence

74 The applicant argues that it cannot be accused of deception in this case since it was in no way involved in falsifying Ruva's invoices. Similarly, it did not commit any manifest act of negligence since it was not in a position to detect the fraud in those invoices (see *Eyckeler & Malt*, paragraphs 141 and 142). By failing to take into account those factors in the contested decision, the Commission breached Article 13 of Regulation No 1430/79.

75 The Commission contends that the fact that there was no deception or manifest negligence on the part of the applicant is not sufficient to justify repayment of the contested levies. It was incumbent upon the applicant to show in addition that there was a special situation within the meaning of Article 13 of Regulation No 1430/79.

Findings of the Court

76 It is settled case-law, first, that Article 13 of Regulation No 1430/79 constitutes a general equitable provision designed to cover situations other than those which arise most often in practice and for which special provision could be made when the regulation was adopted (Case 283/82 *Papierfabrik Schoellershammer* [1983] ECR 4219, paragraph 7, Case 58/86 *Coopérative Agricole d'Approvisionnement des Avirons* [1987] ECR 1525, paragraph 22, Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 41, and *Eyckeler & Malt*, paragraph 132).

77 Article 13 is intended to apply, *inter alia*, where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which he would not normally have incurred (*Coopérative Agricole d'Approvisionnement des Avirons*, paragraph 22, and *Eyckeler & Malt*, paragraph 132).

78 In applying Article 13 of Regulation No 1430/79, the Commission enjoys a discretionary power (*France-Aviation*, paragraph 34) which it must exercise by balancing the Community interest in ensuring that customs rules are respected against the interest of the importer acting in good faith not to incur loss beyond the normal commercial risk (*Eyckeler & Malt*, paragraph 133).

— Whether there is a special situation

79 As regards the first factor relied on by the applicant, Article 3 of Regulation No 1697/79 expressly provides that 'when the competent authorities find that it

is following an act that could give rise to criminal court proceedings that the competent authorities were unable to determine the exact amount of the import duties or export duties legally due on the goods in question... the competent authorities shall take action for recovery in accordance with the provisions in force in this respect in the Member States'. Since it is expressly provided that in the situation referred to in Article 3 customs duties are only recoverable as provided for under national law, there may well be discrepancies between national law and the Community customs legislation applicable in other situations.

80 The fact that there are such discrepancies is an objective factor which applies to an indeterminate number of economic operators and does not therefore constitute a special situation for the purposes of Article 13 (*Coopérative Agricole d'Approvisionnement des Avirons*, paragraph 22).

81 The applicant's argument that it would not have been possible to recover the contested levies from Ruva because the company had become insolvent in the meantime cannot be accepted. Article 13 of Regulation No 1430/79 is manifestly not intended to protect customs agents against the consequences of their clients going into liquidation (see to that effect Joined Cases 98/83 and 230/83 *Van Gend & Loos* v *Commission* [1984] ECR 3763, paragraph 16).

82 The second argument relied on by the applicant, namely that the fact that the invoices submitted to it by Ruva were fraudulent amounted to a special situation for the purposes of Article 13, must also be rejected. In taking the view that that was, by the very nature of a customs agent's work, a trade risk accepted by him, the Commission did not make a manifest error of assessment.

83 It is settled case-law that submitting documents subsequently found to be falsified or inaccurate does not in itself constitute a special situation justifying the remission or repayment of import duties, even where such documents were presented in good faith (*Eyckeler & Malt*, paragraph 162). A customs agent, by the very nature of his work, assumes liability for the payment of import duties and for the validity of the documents which he presents to the customs authorities (*Van Gend & Loos*, paragraph 16), and any loss caused by wrongful conduct on the part of his clients cannot be borne by the Community. For that reason, it has been held that the fact that certificates of origin which were subsequently found not to be valid were delivered by the customs authorities of the countries mentioned on them does not amount to a special situation. It is one of the trade risks assumed by customs agents.

84 The applicant confines itself here to arguing that it submitted fraudulent documents to the customs authorities in good faith. It does not plead any factor suggesting that the fraud in question went beyond the normal commercial risk to be assumed by it.

85 Finally, as regards the parallel drawn by the applicant between Article 13 of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79, although the Court has held that they pursue the same aim, namely to limit the post-clearance payment of import or export duties to cases where such payment is justified and is compatible with a fundamental principle such as the protection of legitimate expectations, it did not consider that the two provisions could be equated. It simply considered that the question whether the error by the competent authorities was capable of being detected within the meaning of Article 5(2) of Regulation No 1697/79 was linked to the existence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79, and that the conditions laid down by the latter provision must therefore be assessed in the light of those laid down in Article 5(2) (*Ecykeler & Malt*, paragraphs 136 and 137).

86 The Commission did not therefore make a manifest error of assessment in deciding that the factors referred to by the applicant did not constitute a special situation for the purposes of Article 13 of Regulation No 1430/79.

— No deception or obvious negligence

87 It is clear from the wording of Article 13 of Regulation No 1430/79 that its application is dependent on the concurrent fulfilment of two conditions, the existence of a special situation and the absence of obvious negligence or deception, so that 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).

88 In the contested decision, the Commission found that the request for repayment was not justified because the applicant had not demonstrated that there was a special situation within the meaning of Article 13. For that reason the Commission was under no duty to consider the second condition, relating to absence of deception and obvious negligence on the part of the applicant.

89 It follows that the third plea, namely breach of Article 13 of Regulation No 1430/79, is unfounded.

Fourth plea: breach of the duty to provide reasons

Arguments of the parties

90 The applicant argues that the contested decision is tainted by two defects in the statement of reasons. First of all, the statement of reasons fails to indicate why the Commission considered that the first request for repayment was not validly submitted and that it was entitled to adopt a new decision on that request. The contested decision merely stated that that request 'did not satisfy the requisite conditions'. The applicant only realised that the 'conditions' were a reference to the statement for the file when it read the letter sent by the Commission to the Netherlands authorities on 4 June 1996. If the authorities had not sent the applicant a copy of that letter, it would not have been able to defend its interests in these proceedings. Secondly, the contested decision failed to state why the fact that Netherlands law imposes different limitation periods for the recovery of import duties and agricultural levies does not amount to a special situation under Article 13 of Regulation No 1430/79. Since the Community courts have not yet considered the question of discriminatory time-limits for recovery, the Commission should have given more explanation of its findings in that respect.

91 The Commission contends that the statement of reasons in the contested decision is adequate. First of all, it clearly states that the decision of 14 November 1994 was revoked in the light of the decision in *France-Aviation* on the ground that the procedure leading to its adoption did not allow the applicant to exercise its right to be heard. Secondly, since the Commission has no power to amend or comment on the time-limits for post-clearance recovery determined by the Member States where there are facts that could give rise to criminal proceedings, it was sufficient for the contested decision to state that there were different time-limits and that those differences did not amount to a special situation such as to justify repayment of the contested levies.

Findings of the Court

92 According to settled case-law, the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must disclose clearly and unambiguously the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to acquaint themselves with the reasons for the measure and the Community judicature to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law. The question whether the statement of reasons meets those requirements must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 31, and Case T-195/97 *Kia Motors and Broekman Motorships* v *Commission* [1998] ECR II-2907, paragraph 34).

93 The first objection raised by the applicant is wholly unfounded. As the applicant itself acknowledges, it knew of the letter of 4 June 1996 in which the Commission informed the Netherlands customs authorities that, in order to guarantee the person concerned the right to be heard, an application for repayment or remission must be accompanied by a declaration signed by that person stating that he has read the case and has nothing to add. In that letter, the Commission also stated that the first request for repayment was 'neither valid nor admissible' because it did not include such a statement. The same explanation was given to the applicant by the Netherlands customs authorities in their letter of 30 December 1996. The applicant must accordingly have understood that the 'requisite conditions' mentioned in the contested decision referred to the statement. Furthermore, the Court finds that both those two letters and the contested decision clearly state that the decision of 14 November 1994 was revoked in the light of the decision in *France-Aviation* on the ground that the applicant's right to be heard had not been safeguarded during the administrative procedure, and at a time when that decision was the subject of an action for annulment.

94 Similarly, the contested decision also expressly states that where there are acts that could give rise to criminal proceedings, the post-clearance recovery of duties is to be made within the time-limits prescribed by national law, so that there may be discrepancies, and that that does not amount to a special situation for the purposes of Article 13 of Regulation No 1430/79. It is sufficiently clear from that explanation that the Commission regards the fact that there are different national rules in this area to be a legal reality which is generally and objectively applicable to the operators concerned and that there is therefore nothing special about the applicant's situation.

95 It follows that the plea of breach of the duty to provide reasons is unfounded.

96 The action must therefore be dismissed.

Costs

97 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful in its submissions, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to pay all the costs.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 18 January 2000.

H. Jung R. García-Valdecasas

Registrar President