OPINION OF ADVOCATE GENERAL JACOBS

delivered on 11 March 1999 *

The question and its background

1. The question raised in this case is whether customs authorities are under any obligation to inform a customs agent acting, in good faith, as principal in an external transit procedure that they suspect or are investigating a possible fraud in the context of that procedure, thus enabling him to take action to avoid incurring a customs debt in respect of goods fraudulently removed from customs supervision, and, if there is such an obligation, what consequences may ensue, in particular as regards collection of customs duties, from a failure to comply with it.

2. External transit is a customs procedure under which non-Community goods are moved between two points within the customs territory of the Community with a view to their re-exportation to another non-member country. During transit, no customs duty, value added tax or excise duty is payable on the goods. The 'principal', often a freight forwarder or customs agent, is the person responsible for the proper conduct of the procedure and liable for any duties arising as a result of any offence or irregularity committed in connection with it.

3. The facts of the case, as set out in the national court's order for reference and the annexes thereto, are as follows.

4. Between 29 July and 8 September 1993, De Haan Beheer BV ('De Haan'), a customs agent acting as transit principal, drew up T1 documents — declarations for the purpose of an external transit procedure, giving details of the consignment and evidencing completion of the various stages of the procedure — for seven consignments of non-Community cigarettes, on which no duty had been paid, to be exported to various non-member countries, the customs office of destination within the Community being given in each case as Antwerp. In fact, the cigarettes never reached Antwerp but were fraudulently removed from customs supervision in the Netherlands. A customs official in Antwerp fraudulently stamped the T1 forms so that it appeared that the goods had been duly received at the customs office of destination. (The involvement of that official, though stated as a fact by the national court, appears to be disputed by the Commission. There is no dispute, however, that T1 forms were fraudulently stamped.) The fraud was car-

* Original language: English.

ried out by a number of persons, one of them an employee of De Haan, but without De Haan's knowledge or suspicion of any wrongdoing.

5. All of those fraudulent operations were, however, under surveillance and investigation by officials of the Fiscale Inlichtingen- en Opsporingsdienst (Tax Inquiry and Investigation Department, 'FIOD'). As a result of a FIOD report drawn up on 21 June 1993, an investigation was initiated. On 25 June 1993, an examining magistrate authorised the FIOD to tap a number of telephones, and tapping continued until 14 September 1993. On or around 26 July 1993, that tapping yielded information concerning a number of fraudulent shipments of cigarettes, the first of which was to take place on 29 July. The investigation continued until around 9 September 1993, when a further report was drawn up proposing that certain premises be searched. Search warrants were issued on 14 September 1993 and over 5 000 000 cigarettes on which no duty had been paid were discovered. Suspects were interrogated, further quantities of cigarettes were recovered and on 5 November 1993 a report summarising the results of the investigation was drawn up by the FIOD.

6. According to that report, vouchers attached to sheet 5 of the T1 forms were fraudulently stamped and returned to De Haan. The order for reference states, however, that, on the basis of the fraudulent stamps, the first two T1 documents were initially regarded by the customs office of departure as having been discharged, that is to say, completed in a manner attesting to the satisfactory conclusion of the transit procedure, whereas the copies of the remaining five were never returned to that office and De Haan was notified that they had not been discharged. It further appears from the FIOD report that De Haan's employee implicated in the fraud had, by the time the report was drawn up, been interrogated and had given information of the fraud, and that a Mr De Haan of the company had been interviewed as a witness.

7. On 13 July 1994, De Haan was given notice to pay customs duty of NLG 2 463 318 on the consignments of cigarettes, for which it was held responsible. It lodged an objection to that notice with the customs authorities and, on 5 September 1995, the Inspector of Customs and Excise at Rotterdam reduced the amount payable by NLG 888 287.40, on the ground that the retail value of the cigarettes had been overassessed. In accordance with that decision De Haan was thus still liable for customs duty of NLG 1 575 030.60. On 10 October 1995, it appealed against the Inspector's decision to the Tariefcommissie (Administrative Court for Customs and Excise), which is, according to the Netherlands Government, the court of first and last instance in matters relating to import duties and which has made the present reference for a preliminary ruling.

8. An aspect of the case which is not mentioned in the order for reference but

has been pointed out by De Haan, the Netherlands Government and the Commission is that, in addition to lodging an objection with the customs authorities, leading to the Inspector's decision and the subsequent appeal to the Tariefcommissie, De Haan also applied to the customs authorities, on 31 May 1995, in a separate procedure under Article 239 of the Community Customs Code ('the Customs Code'), [1] for remission of the import duty in question. On 3 June 1997, the Directorate of Customs at Rotterdam, considering that it could not take a decision on the basis of Article 899 of Regulation No 2454/93, [2] requested the Commission to take a decision in accordance with Articles 905 to 909 of that regulation. The Commission's decision, dated 18 February 1998, found that remission of the import duty was not justified. That decision has been challenged before the Court of Justice by the Netherlands Government in Case C-157/98 and before the Court of First Instance by De Haan in Case T-150/98, the procedure in both of those cases having been suspended (in Case C-157/98 at the request of the Netherlands Government) pending judgment in the present proceedings.

9. The Commission's decision — annexed to the Netherlands Government's observations in the present case — is founded, essentially, on the considerations that De Haan was responsible for the proper conduct of the customs procedure; that exposure to possible fraudulent acts is a normal commercial risk; that, even though De Haan itself was not implicated in the fraud, one of its staff, for whom it was responsible, was; that the involvement of a Belgian customs official was not established; and that none of the above facts nor the fact that the FIOD, in order to complete its investigation, had withheld its information from De Haan could constitute special circumstances on the basis of which import duties could be remitted under Article 13(1) of Regulation No 1430/79. [3]

10. In the proceedings with which the present case is concerned, the Tariefcommissie took note of De Haan's argument that, since it was acting in good faith and since the investigators were aware of what was happening, the customs authorities should have informed it of the circumstances, at least after the first consignment had been fraudulently misappropriated, so that it could have taken action — by not making any more T1 declarations — to avert liability for a customs debt in respect of the subsequent six consignments. The Tariefcommissie therefore, on 24 February 1998, stayed proceedings and sought a preliminary ruling by the Court of Justice on the following question:

'Is it to be assumed from rules of written or unwritten Community customs law that, in their relations with those liable to pay customs duty, customs authorities are

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

2 — Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, OJ 1993 L 253, p. 1.

3 — 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 amending Regulation No 1430/79, OJ 1986 L 286, p. 1 (see paragraph 24 below).

under an obligation such as that described in paragraph 6.2 above [that of warning a declarant in the position of the applicant, whose declarations are established as having been made in good faith, within an available period of approximately 10 days, against possible fraud] and, if so, what are the legal consequences, as regards assessment, entry in the accounts and collection of the customs debt, if the authorities fail to comply with that obligation?'

The 'period of approximately 10 days' referred to appears to be that between the detection of the misappropriation of the first consignment, which was sent on 29 July 1993, and the sending of the second consignment on 10 August 1993.

The applicable legislation

11. The Customs Code [4] and its implementing provisions (Regulation No 2454/93, [5] as amended by Regulation No 3665/93 [6]) became applicable on 1 January 1994, essentially codifying and repealing the many customs regulations previously in force. Neither the Code nor the implementing regulation contains any transitional provisions. In the present case, the frauds took place and the customs debt arose in 1993; the notice to pay duty, on the other hand, was not issued until 13 July 1994. Which is the legislation to be examined when answering the national court's question as to the existence of a rule of written Community law — the present Customs Code or the previous regulations?

12. The Tariefcommissie refers in its question simply to 'written... Community customs law', but the papers in the case file refer both to the Customs Code and to the previous legislation. De Haan, the Netherlands Government and the Commission refer principally to the Customs Code in their written observations.

13. In its reply to a written question put by the Court before the hearing, however, the Commission took the view that, since the relevant facts occurred before the Customs Code applied, the provisions applicable are those of the previous legislation — which, however, do not materially differ from those of the Customs Code as far as this case is concerned.

14. That view is supported by the Court's consistent case-law to the effect that procedural rules apply to all proceedings pending at the time when they enter into force whereas substantive rules do not in general apply to situations existing before their entry into force unless there is some clear indication to the contrary. That approach is required by the principles of

4 — Regulation No 2913/92, cited in note 1.

5 — Cited in note 2.

6 — Commission Regulation (EC) No 3665/93 of 21 December 1993 amending Regulation No 2454/93, OJ 1993 L 335, p. 1.

legal certainty and the protection of legitimate expectations. [7]

15. I agree that the substantive rules to be interpreted in the present case are those not of the Customs Code but of the previous legislation. All the purely procedural aspects following from the notice to pay issued in July 1994 must, however, be governed by the Customs Code and its implementing rules. That view is fully consistent with both the case-law and the principle that legislation is not to be applied retroactively unless such application is specifically provided for. It was, moreover, accepted by all the parties who submitted observations at the hearing.

16. The main provisions of the Community customs legislation applicable to the facts of the case in the main proceedings which may be relevant to the answer to be given to the national court's question are, therefore, the following.

17. Title V of Regulation No 2726/90 [8] governs the *external Community transit procedure*. Article 10 provides, *inter alia*:

'1. All goods which are to be carried under the procedure for external Community transit shall be the subject of a T1 declaration...

...

4. The T1 declaration shall be signed by the principal...

...'

18. Under Article 11(1):

'The principal shall be responsible for:

(a) production of the goods intact and the T1 document at the office of destination by the prescribed time-limit and with due observance of the measures adopted by the competent authorities to ensure identification;

7 — See, for example, with specific reference to customs legislation, Joined Cases 212/80 to 217/80 *Amministrazione delle Finanze dello Stato* v *Salumi* [1981] ECR 2735, paragraph 9 of the judgment, followed by the Court of First Instance in Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 55; Case C-97/95 *Pascoal & Filhos* v *Fazenda Pública* [1997] ECR I-4209, paragraph 25; and Joined Cases C-121/91 and C-122/91 *CT Control and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 22, recently followed by the Court of First Instance in its judgment of 9 June 1998 in Joined Cases T-10/97 and T-11/97 *Unifrigo and CPL Imperial 2* v *Commission* [1998] ECR II-2231, paragraphs 18 and 19.

8 — Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit, OJ 1990 L 262, p. 1.

(b) observance of the provisions relating to the Community transit procedure;

(c) payment of duties and any other charges due as a result of an offence or irregularity committed in the course of or in connection with a Community transit operation.'

19. Article 49(1) of Regulation No 1214/92 [9] provides:

'1. Where a consignment has not been presented at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure shall notify the principal of this fact as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration.'

20. As regards *incurrence of a customs debt*, Article 2 of Regulation No 2144/87 [10] as amended by Regulation No 4108/88, [11] provides, *inter alia*:

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

...

(d) the non-fulfilment of one of the obligations arising... from the use of the customs procedure under which [goods liable to import duties] are placed, or non-compliance with a condition to which the placing of the goods under that procedure is subject...

...'

9 — Commission Regulation (EEC) No 1214/92 of 21 April 1992 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure, OJ 1992 L 132, p. 1.

10 — Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt, OJ 1987 L 201, p. 15.

11 — Council Regulation (EEC) No 4108/88 of 21 December 1988 amending Regulation No 2144/87, OJ 1988 L 361, p. 2.

Under Article 3 of that regulation:

'The moment when a customs debt on importation is incurred shall be deemed to be:

...

(d) in the cases referred to in Article 2(1)(d),... the moment when the obligation, non-fulfilment of which causes the customs debt to be incurred, ceases to be met...;

...'

21. As regards *entry in the accounts of customs duty*, Article 3(3) of Regulation No 1854/89 [12] provides:

'In the case of a customs debt which arises under conditions other than those referred to in paragraph 1,' — and the situation with which the present case is concerned is not referred to there — 'entry in the accounts of the corresponding amount of duty must occur within two days of the date on which the customs authority is in a position to:

(a) calculate the amount of duty in question, and

(b) determine the person liable for payment of that amount.'

Under Article 6(1) of the same regulation:

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

12 — Council Regulation (EEC) No 1854/89 of 14 June 1989 on the entry in the accounts and terms of payment of the amounts of the import duties or export duties resulting from a customs debt, OJ 1989 L 186, p. 1.

22. With regard to the *recovery* of import duties, Article 2(1) of Regulation No 1697/79 [13] provides:

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

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

23. As regards possible *exemptions from the obligation to pay a customs debt*, two provisions allow for situations in which import duties need not be levied. One concerns cases where duty entered in the accounts may be repaid (or remitted if not yet collected), the other covers situations in which it is possible to waive recovery of duty which should have been collected but has not.

13 — 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 (as amended by Regulation No 1854/89, though the amendment is not relevant here).

24. First, Article 13 of Regulation No 1430/79, as amended by Regulation No 3069/86, [14] provides:

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

The situations in which the first subparagraph may be applied, and the detailed procedural arrangements to be followed for this purpose, shall be determined in accordance with the procedure laid down [for the adoption of implementing provisions]....

...'

(The situations referred to in Sections A to D are those in which duty must be repaid or remitted. Sections A to C cover cases where there is no customs debt or the amount fixed is higher than that lawfully due, where goods are entered in error for free circulation or where they are refused by the importer as defective or non-compliant.

14 — Both cited in note 3.

Section D lists a number of special situations in which, essentially, an error in ordering or delivery, or some other supervening defect, has meant that the goods cannot be used as intended. None of them covers circumstances such as those of the present case.)

25. Second, Article 5(2) of Regulation No 1697/79 [15] provides:

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

The cases in which the first subparagraph can be applied shall be determined in accordance with... implementing provisions...'

26. As regards the *procedure* to be followed in such cases, the implementing provisions for Article 13(1) of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79 were contained, at the time when the consignments in question were misappropriated, in Regulations No 3799/86 [16] and No 2164/91 [17] respectively. The procedural rules in those regulations do not, as I have stated above, apply *ratione temporis* to the period subsequent to the notice for payment served in 1994. They remain, however, substantially the same under, respectively, Articles 905 to 909 and 869 to 876 of Regulation No 2454/93. [18]

27. Regulations No 3799/86 and No 2164/91 do, however, contain a number of what I consider to be substantive provisions concerning cases in which customs authorities are themselves to repay, remit or waive recovery of duty. Article 4 of Regulation No 3799/86 lists a number of 'special situations' for the purposes of Article 13(1) of Regulation No 1430/79. They include cases where the goods are stolen and then recovered, where goods are inadvertently and temporarily withdrawn from a customs procedure, where opening mechanisms on means of transport cannot be operated, where goods are returned to a non-Community supplier or are re-exported, and where their marketing is prohibited by court order. Article 2 of

15 — Cited in note 13.

16 — Commission Regulation (EEC) No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4a, 6a, 11a and 13 of Regulation No 1430/79, OJ 1986 L 352, p. 19.

17 — Commission Regulation (EEC) No 2164/91 of 23 July 1991 laying down provisions for the implementation of Article 5(2) of Regulation No 1697/79, OJ 1991 L 201, p. 16.

18 — Cited in note 2.

Regulation No 2164/91 specifies two situations falling within Article 5(2) of Regulation No 1697/79: where a tariff quota or ceiling has been exhausted without that fact having been published in the *Official Journal of the European Communities* or where the authorities consider that the conditions laid down in Article 5(2) are fulfilled and the amount not collected is less than ECU 2 000.

28. Where it is not possible for the competent authority of a Member State to determine, on that basis, whether the conditions laid down in those articles are met, it is to submit the case to the Commission, which is to decide on the matter after consulting a group of experts composed of representatives of all Member States. [19]

29. Finally, Articles 243 to 246 of the Customs Code provide for an appeal procedure, to be implemented by the Member States. Under Article 243:

'1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.

...

2. The right of appeal may be exercised:

(a) initially, before the customs authorities designated for that purpose by the Member States;

(b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.'

No equivalent procedure was specifically provided for in the previous Community customs legislation, although such procedures were available under national law. It appears that the right specified in Article 243 of the Customs Code is embodied in the Netherlands in the Algemene Wet Bestuursrecht and the Algemene Wet inzake Rijksbelastingen.

The relationship between the two sets of proceedings

30. De Haan has initiated two parallel sets of proceedings with a view to gaining exemption from the claim for import duty, both commenced following receipt of the notice to pay in July 1994, and thus, as I have said above, governed procedurally by the Customs Code and its implementing

19 — Articles 871 to 876 and 905 to 909 of Regulation No 2454/93.

provisions. One is an appeal against the notice to pay, made first to the customs authorities themselves and subsequently to the Tariefcommissie, as provided for in Article 243 of the Customs Code, which has led to the present request for a preliminary ruling. The second took the form of an application to the customs authorities under Article 239(2) of the Customs Code for remission of the duty pursuant to Article 239(1), which substantially reenacted Article 13(1) of Regulation No 1430/79. That application was forwarded to the Commission by the Netherlands Government in accordance with Article 905(1) of Regulation No 2454/93 and led to the Commission's decision of 18 February 1998 that the circumstances did not amount to a special situation within the meaning of Article 13(1) of Regulation No 1430/79, which has been challenged in Cases C-157/98 and T-150/98.

31. There has been some discussion before the Court as to whether the customs authorities' failure to inform De Haan of their suspicions could constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79. However, it seems to me that this question falls outside the scope of the present case and is to be dealt with in the context of Cases C-157/98 and T-150/98.

32. In the context of both Article 5(2) of Regulation No 1697/79 and Article 13(1) of Regulation No 1430/79, where the customs authorities are unable or unwilling to take a decision favourable to the putative customs debtor, either the case is to be submitted to the Commission for it to take a decision — which may then be challenged before the Court of Justice or the Court of First Instance as the case may be — or (although this amounts merely to a confirmation in Community law of a presumably pre-existing right under national law) there is a general right of appeal under which a decision of the customs authorities may be reviewed by the national authorities and courts — and thus, where the case comes before a national court, the possibility of a request for a preliminary ruling by the Court of Justice.

33. It is clear that such a right of appeal to the national courts is a right to judicial review of a decision taken by the customs authorities. Where those authorities have taken the decision to submit a case to the Commission under Article 13(1) of Regulation No 1430/79 — as has been done here — that is the only decision which can be examined by the national courts, since the Commission's decision can be reviewed only by the Community judicature. Here, there is no suggestion that the Tariefcommissie has been asked to review the Netherlands customs authorities' decision to submit the case to the Commission.

34. I therefore take the view that in the main proceedings the Tariefcommissie is not entitled to rule on the existence or otherwise of a 'special situation' within the meaning of Article 13(1) of Regulation

No 1430/79 and that the Court should reserve its consideration of that question for its judgment in Case C-157/98. In any event, the Tariefcommissie, in its order for reference, makes no mention of Article 13(1) of Regulation No 1430/79 or of its equivalent in the Customs Code but only of Article 220(2)(b) of that Code, the re-enactment of Article 5(2) of Regulation No 1697/79. Nor does Article 13(1) or its equivalent appear to have been referred to by De Haan in its written pleadings before the Tariefcommissie, appended to the order for reference. In the present case, that provision seems to have been raised only in the observations submitted to this Court, principally by the Netherlands and United Kingdom Governments. Accordingly, I shall not address the 'special situation' directly.

Analysis of the question

35. The Tariefcommissie has specifically posed its question in a form which may be restated, essentially, as 'Are customs authorities under an obligation to inform a transit principal of a suspected fraud in which he is not implicated but as a result of which he may incur a customs debt and, if so, what is the consequence of their not doing so?' The observations submitted to the Court have also addressed the slightly different question 'May a transit principal be exempted from paying duty where customs authorities do not inform him of a suspected fraud in which he is not implicated but as a result of which he may incur a customs debt?'

36. It is clearly for the national court to determine the form of question which it is most appropriate to answer in order to settle the dispute before it. In the present case, De Haan has indicated that the manner in which the question has been posed bears a relation to a national rule concerning the collection of taxes. However, it seems to me that what the national court really wishes to know is whether, under Community law, there are any circumstances, deriving from the customs authorities' failure to inform De Haan, in which De Haan may be exempted from having to pay the customs duties in question, and I feel that — subject to my proviso concerning Article 13(1) of Regulation No 1430/79 — the question may legitimately be examined in that slightly wider context.

37. If we look at the actual provisions of the applicable legislation, it is clear — and indeed undisputed — that a customs debt arose, under Articles 2(1)(d) and 3(d) of Regulation No 2144/87,[20] at the moment when each consignment of cigarettes ceased to comply with the conditions to which it

20 — See paragraph 20 above.

was subject under the external transit procedure, either when it was actually misappropriated or at the latest when the period within which it was to be produced at the office of destination expired without such production having taken place. It is also clear that under Article 11(1)(c) of Regulation No 2726/90 [21] De Haan, as principal, was responsible for payment of that debt. In such circumstances, Article 2(1) of Regulation No 1697/79 [22] required the competent authorities to recover the debt.

38. Those rules, taken together, form a coherent system requiring recovery of the customs debt which arose in the present case. The only exceptions to that requirement are provided for in Article 13(1) of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79. Since specific exceptions have been laid down by the legislature, it is not appropriate for the Court to add to those exceptions, although it should obviously indicate, where required, the general principles of Community law which must apply to their interpretation.

39. When considering such exceptions, I think it useful to bear in mind the nature of De Haan's responsibility.

40. Article 11(1)(c) of Regulation No 2726/90 provides that the principal in a transit procedure is responsible for payment of any duty payable as a result of any offence or irregularity committed in the context of that procedure. There is no suggestion in that wording of any limitation of that liability to cases where the principal is himself at fault.

41. Moreover, in the present case De Haan was a customs agent acting in that capacity. The profession of customs agent is not one which is regulated at Community level, although at the relevant time Regulation No 3632/85 [23] laid down provisions stipulating that it must be possible for a customs declaration to be made by one person on behalf of another, but essentially leaving the regulation of the profession of providing such services to the Member States. In a number of Member States the profession is

21 — See paragraph 18 above.

22 — See paragraph 22 above.

23 — Council Regulation (EEC) No 3632/85 of 12 December 1985 defining the conditions under which a person may be permitted to make a customs declaration, OJ 1985 L 350, p. 1.

subject to stringent rules which specifically impose strict liability for customs debts.[24] The Court has, moreover, held[25] that a customs agent, 'by the very nature of his functions, renders himself liable both for the payment of import duty and for the validity of the documents which he presents to the customs authorities'. That liability is not, however, totally unlimited. Limits may include cases where customs authorities have issued binding tariff information[26] or certain cases of *force majeure*.[27] Even so, there does not appear to be any specific limitation of that liability, applicable to the circumstances of the present case, other than the possible relevance of Articles 13(1) of Regulation No 1430/79 or 5(2) of Regulation No 1697/79.

42. Since a customs agent must thus be regarded as having in principle strict liability for any customs duties payable in respect of transit operations for which he is responsible as principal, it is clear that any exception to that rule can only be a wholly explicit one, such as is contained in either of those two provisions.

43. With that in mind, let us turn to the various possibilities that have been mooted, in the written and oral observations before the Court, as allowing for an exception to the basic rule, in particular on the basis of a duty to inform on the part of the customs authorities.

44. The existence of a 'special situation' giving rise to the repayment or remission of duties within the meaning of Article 13(1) of Regulation No 1430/79 is, as I have said, a matter to be dealt with in the context of Case C-157/98.

45. The basic provision to be examined here, therefore, is Article 5(2) of Regulation No 1697/79. Under it, customs authorities may refrain from effecting post-clearance recovery of duties which were not collected as a result of an error made by the competent authorities themselves, in a situation where the person liable could not reasonably have detected that error, had acted in good faith and had complied

24 — In the Netherlands, the profession of customs agent (*douane-expediteur*) is regulated by Articles 30 to 34 of the Douanewet. Under Article 31, they have an exclusive right of indirect representation as referred to in Article 5 of the Customs Code. In accordance with Articles 32 and 32a, the agent is responsible for duties himself, but has a preferential claim against his principal to recover them.

25 — Joined Cases 98/83 and 230/83 *Van Gend & Loos* v *Commission* [1984] ECR 3763, paragraph 16 of the judgment.

26 — See Article 12 of the Customs Code.

27 — See, for example, Articles 206 ('no customs debt on importation shall be deemed to be incurred... where the person concerned proves that the non-fulfilment of the obligations which arise from... the use of the customs procedure under which the goods have been placed, results from the total destruction or irretrievable loss of the said goods as a result of the actual nature of the goods or unforeseeable circumstances or *force majeure*, or as a consequence of authorisation by the customs authorities') and 233 ('a customs debt shall be extinguished... (c) where... the goods, before their release, are... destroyed or irretrievably lost as a result of their actual nature or of unforeseeable circumstances or *force majeure*') of the Customs Code.

with all the provisions governing the customs declaration.

46. The crucial question is: was there an error on the part of the competent authorities?

47. The national court's question is directed specifically at the hypothesis that the customs authorities' failure to inform De Haan of their suspicions and investigations may in some way lead to De Haan's exoneration from liability for the customs duty. In that context, I find it hard to consider that such conduct — which seems to have been deliberate — can constitute an 'error' for the purposes of Article 5(2) of Regulation No 1697/79. The notion of error for those purposes has been held by the Court to include not only errors of calculation or copying (which are specifically cited, along with the use of inaccurate or incomplete information, as examples in the preamble to Regulation No 1697/79) but also misinterpretation or misapplication of the relevant rules of law.[28] Whilst the instances of error cited in the regulation and the case-law clearly do not constitute an exhaustive list, I consider it would be stretching the concept too far to extend it to cases of deliberate action taken by the customs authorities in knowledge of the facts (although I would not rule out the possibility that such conduct might constitute a 'special situation' within the meaning of Article 13(1) of Regulation No 1430/79). Indeed, the wording of Article 5(2) suggests that what is meant is an erroneous failure to collect duty, following upon an error made by the authorities.

48. The failure to inform De Haan of the suspected fraud thus cannot constitute an error within the meaning of Article 5(2) of Regulation No 1697/79. However, the national court's question refers to a possible obligation to inform — within a certain period — in general terms, and not with reference to any specific provision. I must therefore also consider the other possibilities which have been put forward.

49. A number of suggestions have been made as to specific time-limits laid down by Community law within which the customs authorities could have been under an obligation to inform De Haan of its liability for a customs debt. De Haan argues that under Articles 3(3) and 6(1) of Regulation No 1854/89,[29] read together, duty must be entered in the accounts within two days of the date on which the customs authorities are able to calculate its amount and determine the person liable for payment, and

28 — See, for example, Case C-348/89 *Mecanarte-Metalúrgica da Lagoa* v *Alfândega do Porto* [1991] ECR I-3277, paragraph 20.

29 — See paragraph 21 above.

that amount must be communicated to the person liable as soon as entry has taken place. Since the authorities were in a position to calculate the amount of duty for which De Haan was liable in respect of the first consignment as soon as they knew of the fraudulent misappropriation, they should have notified it within two days.

50. I do not think De Haan can derive any benefit from that reasoning. As was pointed out at the hearing, the Court recently held, in *Covita*,[30] that 'failure to observe the time-limits laid down in Articles 3 and 5 of... Regulation... No 1854/89... does not nullify the right of competent customs authorities to proceed with the post-clearance recovery of customs duties, provided that it is carried out within the time-limit [of three years within which post-clearance recovery must be effected] laid down in Article 2(1) of Regulation No 1697/79'.[31] In the grounds of its judgment, it stated that '[t]he sole purpose of [those] time-limits... is to ensure rapid and uniform application by the competent administrative authorities of the technical procedures for the entry in the accounts of amounts of import or export duties. Failure by the customs authorities to observe those time-limits may give rise to the payment of interest in respect of delay by the Member State concerned to the Communities, in the context of making available own resources...'.[32]

51. Further light is cast on that ruling by the Opinion of Advocate General Fennelly in that case, in which he stated:[33] 'It is clear that the time-limits in these provisions relate to the entry in accounts and not to the recovery of the sums in question and were laid down for accounting purposes rather than in order to create rights for individual traders. This, I think, is demonstrated conclusively by the existence of a distinct time-limit of three years for post-clearance recovery in Article 2(1) of [Regulation No 1697/79] and, in particular, by the fact that provision is made for this time-limit to run either from the date of entry of the customs debt in the accounts or, where this is not done, from the date that the customs debt was incurred. Article 2(1) provides the only limitation period for the post-clearance recovery of customs debts.'

52. De Haan has cited the second recital in the preamble to Regulation No 1854/89 — 'the rules on entry in the accounts and terms of payment of customs debt are of particular importance for... ensuring the optimum degree of equal treatment of traders in the collection of import and export duties' — in support of its view that persons liable for payment do derive rights

30 — Case C-370/96 *Covita* v *Greek State*, judgment of 26 November 1998.

31 — Operative part of the judgment, paragraph 3.

32 — Paragraph 36.

33 — At paragraph 37.

from Articles 3(3) and 6(1). However, if that recital is read in the context of the preamble as a whole, it is quite clear that the aim of the regulation is to harmonise the procedures governing entry in the accounts and terms of payment throughout the Community. To the extent that traders may claim any right on the basis of the second recital, it is a right not to be subjected to different treatment as a result of different rules in different Member States rather than a right to be exempted from payment where a (particularly short) time-limit has been overrun.

53. I take the view, therefore, that, in line with the Court's judgment in *Covita*, whilst Article 3(3) of Regulation No 1854/89 does require the customs authorities to make entries in the accounts within a period of two days, that requirement concerns the relationship between the Member States and the Community, and failure to comply with the time-limit does not in itself give rise to any consequences as regards liability for or recovery of the customs debt.

54. However, it seems to me that Article 6(1) of that regulation [34] — a provision which has not previously been examined by the Court — does confer a right on the person liable for payment to be informed of the amount of duty *as soon as it has been entered into the accounts* — although the term 'as soon as' is qualified by the phrase 'in accordance with the appropriate procedures'.

55. We do not have any information on this point — and I feel sure that De Haan would have provided that information had it been relevant — but if the amount of the customs duty was in fact promptly entered in the accounts but not then promptly communicated to De Haan within the period normally taken for such communications, then I consider that the customs authorities did indeed fail to comply with an obligation towards De Haan.

56. However, that obligation could not arise until entry in the accounts was actually effected and if it did arise — a matter which can only be established by the national court — I still do not think that failure to comply with it can free De Haan from liability for the duty. Although the Court did not look at Article 6(1) of

34 — See paragraph 21 above.

Regulation No 1854/89 in its judgment in *Covita*, it would be illogical to consider that the finding as regards the paramountcy of the time-limit in Article 2(1) of Regulation No 1697/79 did not apply here too. The effect of a failure to notify promptly in accordance with Article 6(1) of Regulation No 1854/89 is, I think, in the context of that regulation, merely that the period within which the duty must be paid in accordance with Article 8(a) thereof does not start to run.

57. It is true that De Haan's contention — and the hypothesis on which the national court seeks a ruling — is that the customs authorities were under an obligation failure to comply with which barred them from collecting not only each customs debt not promptly notified but also subsequent debts which would have been averted had notification been effected. However, I can see nothing in Regulation No 1854/89 to suggest that any obligation which it lays down might relate not merely to transactions already effected but to subsequent situations which have not yet arisen. It is clearly confined to entry in the accounts and terms of payment with regard to customs debts which have already arisen.

58. Regulation No 1854/89 therefore does not in my view lay down any obligation to inform failure to comply with which is capable of freeing De Haan from its liability for duty.

59. The Netherlands Government refers to certain other provisions which might place an obligation to inform on the customs authorities, but concludes that they do not. The obligation under Article 11 of the Customs Code, for example, concerns only information relating to an import or export operation actually envisaged and requested by the person concerned.

60. It also considers Article 379(1) of Regulation No 2454/93. This is a re-enactment of Article 49(1) of Regulation No 1214/92,[35] applicable at the material time, under which, when goods subject to an external transit procedure have not been presented and the precise circumstances are unknown, the office of departure is to notify the principal 'as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration'. The Netherlands Government takes the view that such an obligation is different from and much narrower than that envisaged by

35 — See paragraph 19 above.

the Tariefcommissie to warn a customs agent of a possible fraud by his customers.

61. I would agree that this is a different kind of obligation. It is clearly designed for cases where goods have 'gone missing' and the customs authorities have no evidence of what has happened to them. The aim [36] is to give the principal an opportunity to provide a satisfactory explanation before he is required to pay the duty, and it is in that regard only that it may confer any right on him. Moreover, the inclusion of the words 'and in any case before the end of the 11th month...' tends to dilute the urgency of the stipulation 'as soon as possible', so that the relevance of this obligation to the case in point is attenuated, if not completely negated. Finally, that provision applies only where the place where the offence was committed cannot be established — which is apparently not the case here.

62. Those appear to be the only provisions of the Community customs legislation applicable at the time of the sending of the consignments in question on the basis of which the customs authorities might have been under an obligation to inform De Haan. I consider, for the reasons I have given, that they imposed no obligation such that a failure to comply with it could free De Haan from liability for the duty.

63. De Haan has argued, however, that the customs authorities have transgressed unwritten rules of Community law in their conduct towards it, thereby barring them from collecting the duty. I have expressed the view [37] that it is inappropriate to add further grounds for exception to those already laid down by the legislature, but I think it worthwhile to examine at this point the precise relationship between the specific legislative provisions and the rules of equity or proportionality invoked.

64. At the hearing, De Haan invoked a general principle to the effect, if I understood correctly, that the application of the law should not be allowed to give rise to unfairness — that the scope of that application is, so to speak, circumscribed by the

36 — As is made clear in Article 49(2):
'The notification referred to in paragraph 1 shall indicate, in particular, the time-limit by which proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed must be furnished to the office of departure to the satisfaction of the customs authorities.
That time-limit shall be three months from the date of the notification referred to in paragraph 1. If the said proof has not been produced by the end of that period, the competent Member State shall take steps to recover the duties and other charges involved. In cases where that Member State is not the one in which the office of departure is located, the latter shall immediately inform the said Member State.'

37 — See paragraph 38 above.

dividing line between what is fair and equitable and what is unfair or inequitable.

65. Whilst that goal is undoubtedly a just one, I am not convinced that there is any overriding principle of Community law to the effect that no result which may be described as unfair may ever be allowed to come about. [38] Often, the application of the law to a particular case may appear harsh, or unjust, but it is only so in the interest of a wider justice. What is fair for the individual must be balanced against what is fair for the community (and the Community) at large. Cases of strict liability — which are very much in point here — provide a particularly clear example. If strict liability has been imposed on transit principals, it is so that they, having been entrusted with the conduct of transit procedures, will take every step necessary to ensure that the Community is not deprived of resources to which it is entitled. Since customs agents or freight forwarders make, it has been claimed, 90% of all declarations for Community transit, [39] it is clearly of the utmost importance for that system that such professionals observe the most scrupulous standards.

66. There is, it is true, case-law to the effect that national rules of equity may be applied to waive the collection of Community levies where Community law, including its general principles, does not contain common rules in that respect, provided that those national rules are reconciled with the requirement of uniform application of Community law so as to avoid unequal treatment of economic operators and do not have the effect of making it virtually impossible to implement Community legislation. [40]

67. In the present case, I take the view that the Community rules concerning the collection of customs duties are sufficiently complete to preclude the application of national rules of equity in that regard; [41] the only reference to national rules is that 'Where the amount of duty due has not been paid within the prescribed period... the customs authorities shall avail themselves of all options open to them under the legislation in force, including enforcement, to secure payment of that amount.' [42] Exceptions of an equitable nature are, moreover, already provided for at the Community level in Articles 13(1) of Regulation No 1430/79 and 5(2) of Regulation No 1697/79. Even if that were not so, it is not implausible, in view of the prevalence of customs fraud involving cigarettes of which the Court has been informed, that systematic application of the rule of equity invoked would lead to a significant

38 — See, for example, Case C-174/89 *Hoche* v *BALM* [1990] ECR I-2681, paragraph 31 of the judgment ('there is no such thing as a general principle of objective unfairness under Community law'), and the case-law cited there.

39 — CLECAT (European Liaison Committee of Freight Forwarders), in Annex I to the Commission's 'Interim Report on Transit' — a working document issued in October 1996.

40 — See, for example, Case C-290/91 *Peter* v *Hauptzollamt Regensburg* [1993] ECR I-2981, paragraph 8 of the judgment.

41 — See Articles 222 to 232 of the Customs Code, previously Articles 8 to 18 of Regulation No 1854/89, cited in note 12.

42 — Article 232 of the Customs Code.

decrease in the amount of customs duty collected since customs agents, no longer under the same burden of strict liability, might be tempted to lower their level of vigilance in combating fraud, thereby impairing the objectives of the system of Community customs duties. [43]

68. Whilst I sympathise with De Haan in its plight, which may well have arisen through no fault of its own, I do not consider that it can invoke an independent Community or national principle of equity here.

69. This is not to say that its appeals to fairness may go unheeded. On the contrary, they may be dealt with very adequately on the basis of the principle of proportionality, to which all the parties which have submitted observations to the Court have quite rightly made reference.

70. However, that principle is to be applied here in the context of the customs legislation in which it is inherent rather than independently, at a higher level. In particular, it may be relevant to the question of the existence of a 'special situation' within the meaning of Article 13(1) of Regulation No 1430/79. In this, I agree with the approach taken by the United Kingdom Government at the hearing. That provision contains an inbuilt and sufficient 'gateway' to the application of the principle of proportionality, and there is no reason for this Court or the national court to extend that application to what might be viewed as the validity of the debt itself rather than the interpretation of the provisions allowing for exemptions from the requirement to pay it. It is worth bearing in mind in this regard that the debt which De Haan is seeking to have set aside is the normal customs debt in respect of the goods and not a penalty imposed on it as a result of the fraud. Had the latter been the case, it might well have been relevant to consider whether the penalty was in itself not disproportionate.

71. In my Opinion in *Peter*, [44] I suggested that the situations in which repayment or remission was to be made under Regulation No 1430/79 constituted a series of 'equity clauses'. The Court has very recently taken the same view in its judgment in the *Trans-Ex-Import* case, [45] describing Article 905 of Regulation No 2454/93 — the provision now laying down the requirement that a case of doubt must be submitted to the Commission for a decision on whether a 'special situation' exists — as containing a 'general equity clause'. To the extent, then, that equity or the principle of proportionality are to be taken into account in assessing De Haan's situation in the broad perspective, it is in the context of Arti-

43 — Cf. the judgment in *Peter*, cited in note 40, paragraphs 11 and 14.

44 — Cited in note 40; see paragraph 16 of my Opinion.

45 — Case C-86/97 *Woltmann, trading as 'Trans-Ex-Import'* v *Hauptzollamt Potsdam* [1999] ECR I-1041, paragraph 18.

cle 13(1) of Regulation No 1430/79 that they will come into play.

72. As I have said, I do not consider it appropriate to examine here whether the conditions in that article are met in De Haan's case, but there is one point I wish to make, which also answers another argument raised by De Haan.

73. In its written observations, De Haan relies on the interdependence between Articles 13(1) of Regulation No 1430/79 and 5(2) of Regulation No 1697/79 to support its claim that the criteria applied to the former are also valid for the latter.

74. It is true that in *Covita*[46] the Court, confirming its previous case-law, stated that 'Article 13 of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79 pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified' and that 'the question whether the error was detectable, within the meaning of Article 5(2) of Regulation No 1697/79, is linked to the existence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79'.[47]

75. It seems to me, however, that the parallel drawn is only between the aims of the two provisions and between the concepts of 'detectable error' and 'obvious negligence or deception'. There does not appear to be any ground for assuming that the specific case of an 'error made by the competent authorities' is to be governed by the criteria applicable to a 'special situation' under Article 13(1) of Regulation No 1430/79. Article 4 of Regulation No 3799/86[48] gives a non-exhaustive list of such special situations; they include theft, the impossibility of operating opening mechanisms on the means of transport, the return of goods for elimination of defects and court orders prohibiting the sale of imported goods. Whilst an error on the part of the customs authorities may conceivably constitute a special situation, the latter is clearly a much broader concept. It is unfortunately necessary, however, to reserve examination of that concept for the action brought by the Netherlands against the Commission.

46 — Cited in note 30.

47 — Paragraphs 30 and 32 of the judgment, respectively.

48 — Cited in note 16.

Conclusion

76. I therefore conclude that the Court should give the following answer to the Tariefcommissie in the present case:

Where customs authorities have reason to believe that a fraud will be committed in the context of an external transit procedure, there is no rule of Community law requiring them to warn any person that he may become liable for customs duties as a result of the fraud, whether that person is acting in good faith or not. In particular, a decision to refrain from doing so in order to ensure the identification and conviction of the perpetrators of the fraud, whilst it may be an element to be taken into account in applying the equitable rule embodied in Article 13(1) of Regulation No 1430/79, does not constitute an 'error made by the competent authorities themselves' within the meaning of Article 5(2) of Regulation No 1697/79.