JUDGMENT OF THE COURT (Fifth Chamber)
14 November 2002 *

In Case C-251/00,

REFERENCE to the Court under Article 234 EC by the Tribunal Tributário de Primeira Instância de Lisboa (Portugal) for a preliminary ruling in the proceedings pending before that court between

Ilumitrónica — Iluminação e Electrónica Ld[a]

and

Chefe da Divisão de Procedimentos Aduaneiros e Fiscais/Direcção das Alfândegas de Lisboa,

third party:

Ministério Público,

* Language of the case: Portuguese.

on the interpretation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) and on the validity of a Commission decision,

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, A. La Pergola, P. Jann (Rapporteur) and S. von Bahr, Judges,

Advocate General: J. Mischo,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Portuguese Government, by L. Fernandes, acting as Agent,

— the French Government, by G. de Bergues and C. Vasak, acting as Agents,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Commission of the European Communities, by A. Caeiros and R. Tricot, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ilumitrónica — Iluminação e Electrónica Ld[a], represented by J. Teixeira Alves, advogado, and the Commission, represented by A. Caeiros and R. Tricot, at the hearing on 8 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 24 January 2002,

gives the following

Judgment

1 By order of 13 March 2000, received at the Court on 26 June 2000, the Tribunal Tributário de Primeira Instância de Lisboa referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the CCC') and on the validity of a Commission decision.

2 Those questions were raised in proceedings between Ilumitrónica — Iluminação e Electrónica Ld[a] ('Ilumitrónica'), a company governed by Portuguese law, and the Chefe da Divisão de Procedimentos Aduaneiros e Fiscais/Direcção das Alfândegas de Lisboa concerning the post-clearance recovery of customs duties in respect of the importation, in 1992, of a consignment of television sets from Turkey.

The legal framework

The EEC-Turkey Association Agreement and the Additional Protocol

3 This case arose in the context of the Agreement establishing an association between the European Economic Community and Turkey ('the Association Agreement') signed at Ankara on 12 September 1963 by the Republic of Turkey, of the one part, and the Member States of the EEC and the Community, of the other part ('the Contracting Parties'). The Association Agreement was approved on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (*Journal Officiel* 1964, p. 3685; English version published in OJ 1973 C 113, p. 1) and entered into force on 1 December 1964.

4 The aim of the Association Agreement, as set out in Article 2, is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties. It comprises a preparatory stage, a transitional stage and a final stage.

5 Under Article 7 of the Association Agreement, the Contracting Parties are to take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from the agreement and are to refrain from any measures liable to jeopardise the attainment of the objectives of the agreement.

6 Articles 22 and 23 of the Association Agreement provide for the establishment of an Association Council consisting of members of the Governments of the Member States and members of the Council and of the Commission on the one hand and members of the Turkish Government on the other, which, acting unanimously, has the power to take decisions in order to attain the objectives of the agreement.

7 Under Article 25(1) of the Association Agreement:

'[t]he Contracting Parties may submit to the Council of Association any dispute relating to the application or interpretation of this Agreement which concerns the Community, a Member State of the Community, or Turkey'.

8 To lay down the conditions, arrangements and timetables for implementing the transitional stage provided for by the Association Agreement, the Contracting Parties signed at Brussels on 23 November 1970 an Additional Protocol which is annexed to the agreement and was approved by Council Regulation No 2760/72 (EEC) of 19 December 1972 (OJ 1973 C 113, p. 18). The provisions of that Protocol continued to apply until 31 December 1995, when the final stage provided for by the Association Agreement entered into force in accordance with Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (OJ 1996 L 35, p. 1).

9 Under Article 3(1) of the Additional Protocol, the provisions of the latter relating to the elimination of customs duties and quantitative restrictions (hereinafter 'preferential treatment') 'likewise apply to goods obtained or produced in the Community or in Turkey, in the manufacture of which were used products coming from third countries and not in free circulation either in the Community or in Turkey'. However, the same provision states that such goods may be given preferential treatment only if the exporting State charges a compensatory levy.

10 By Decision No 2/72 of 29 December 1972, the Association Council fixed the percentage of common customs tariff duties to be used in calculating the compensatory levy for goods obtained in Turkey at 100.

11 By Decision No 3/72 of the same date, the Association Council established the rules relating to the procedure for the collection of the compensatory levy.

12 Also on 29 December 1972, the Association Council adopted Decision No 5/72 on methods of administrative cooperation for implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement (OJ 1973 L 59, p. 74). Under Article 1 of that decision, the presentation of a certificate issued at the request of the exporter by the customs authorities of the Republic of Turkey or of a Member State is necessary in order to obtain preferential treatment. For goods transported directly from Turkey to a Member State of the Community this is the A.TR.1 movement of goods certificate (hereinafter 'the A.TR.1 certificate').

The Community rules on the incurrence of customs debt, the repayment or remission of customs duties and the waiver of post-clearance recovery

The system prior to the CCC

— The incurrence of customs debt

13 Article 2(1) of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt (OJ 1987 L 201, p. 15) states that:

'A customs debt on importation shall be incurred by:

(a) the placing of goods liable to import duties in free circulation...'

14 Article 2(1) of Council Regulation (EEC) No 1031/88 of 18 April 1988 determining the persons liable for payment of a customs debt (OJ 1988 L 102, p. 5) provides that:

'[w]here a customs debt has been incurred pursuant to Article 2(1)(a)... of Regulation (EEC) No 2144/87, the person liable for payment of such debt shall be the person in whose name the declaration or any other act with the same legal effects was made'.

— The remission of customs duties

15 The first subparagraph of 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; hereinafter 'Regulation No 1430/79'), provides that 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. Article 13(2) stipulates that repayment or remission must be the subject of an application submitted to the appropriate customs office within 12 months from the date on which those duties were entered in the accounts by the competent authority.

— The waiver of post-clearance recovery of customs duties

16 Article 2(1) 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) states:

'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'.

17 The first subparagraph of Article 5(2) of Regulation No 1697/79 defines the conditions to which waiver of post-clearance recovery of customs duties is subject. It provides:

'The competent authorities may refrain from taking action for the post-clearance recovery of import 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 CCC

18 Regulations Nos 1697/79 and 1430/79 were repealed by Article 251 of the CCC which, pursuant to the first and second paragraphs of Article 253, entered into force on 22 October 1992 and has applied since 1 January 1994.

19 Article 201 of the CCC is worded as follows:

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

(a) the release for free circulation of goods liable to import duties,

or

(b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

2. ...

3. The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.

Where a customs declaration in respect of one of the procedures referred to in paragraph 1 is drawn up on the basis of information which leads to all or part of the duties legally owed not being collected, the persons who provided the information required to draw up the declaration and who knew, or who ought reasonably to have known, that such information was false may also be considered debtors in accordance with the national provisions in force.'

20 The remission of customs duties is governed by Articles 235 to 242 of the CCC. Under Article 239(2) thereof, any remission of customs duties must be the subject of an application submitted to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.

21 Waiver of post-clearance recovery is governed by Article 220 of the CCC, paragraph 2(b) of which reproduces in almost identical terms Article 5(2) of Regulation No 1697/79.

The dispute in the main proceedings and the questions referred

22 According to the order for reference, 'the facts conditionally established for the purposes of the present reference for a preliminary ruling' are as follows.

23 By document dated 20 July 1992, Ilumitrónica declared to the Portuguese customs authorities the importation of a consignment of colour television sets from Turkey. The goods were accompanied by an A.TR.1 certificate, on the basis of which they were granted preferential treatment, in accordance with the Association Agreement and the Additional Protocol, as ratified by the Portuguese Republic by Decree No 3/92 of 21 January 1992 (*Diário da República* I, series A, No 17, of 21 January 1992, p. 340).

24 On 19 July 1995 the defendant in the main proceedings notified Ilumitrónica that it required payment of customs duties relating to the importation totalling PTE 7 534 264.

25 That collection order was issued on the basis of a finding by the Commission, forwarded to the Portuguese customs authorities, according to which the goods did not fulfil the conditions for the preferential treatment provided for by the Association Agreement and Additional Protocol. Having received complaints from Community producers, the Commission had initiated an investigation as a

result of which its staff concluded that the colour television sets manufactured in Turkey incorporated components originating in non-Member States which had neither been released into free circulation nor subjected to a compensatory levy upon exportation to the Community.

26 Being uncertain as to how to interpret the relevant provisions of Community law, the Tribunal Tributário de Primeira Instância de Lisboa decided to stay proceedings and to refer the following five questions to the Court for a preliminary ruling:

'1. Is it permissible to require payment of the customs debt by importers who, acting in good faith and with due care, prepared and presented their declarations over a number of years, unaware of an irregularity which was known to both the Turkish and the Community authorities?

2. Since the Turkish authorities were aware of the inaccuracy of the content of the ATR certificates, which they authenticated, is there no possibility of making the Turkish State liable for payment of the customs debt?

3. Since the Commission suspected or was aware of the conduct of the Turkish authorities, referred to in question 2 above, was the Commission under a duty to warn Community traders?

4. Is breach of that possible duty such as to exonerate from liability the (customs) declarants who during all those years acted in good faith in respect of the contents of their declarations?

5. Is the decision of the Commission and of the Portuguese customs authorities, acting on the advice of the former, to take action for post-clearance recovery of the import duties valid without first initiating the procedure provided for by Articles 22 and 25 of the EEC-Turkey Association Agreement (signed in Brussels on 23 November 1970)?'

The questions referred for a preliminary ruling

Preliminary observations

27 In so far as the court making the reference defines the purpose of its questions as being the interpretation of Article 201(3) of the CCC, it should be noted that that article is a new provision and cannot be applied to an importation effected prior to its entry into force (Case C-97/95 *Pascoal & Filhos* [1997] ECR I-4209, paragraph 25).

28 That is the case with the importation at issue in the main proceedings, which was declared on 20 July 1992, whereas, pursuant to the second paragraph of Article 253, the CCC has applied only since 1 January 1994.

29 More generally, it should be noted that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (see, in particular, Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commis-*

sion [1993] ECR I-3873, paragraph 22, and Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 13).

30 With regard to the dispute in the main proceedings, reference must therefore be made, on the one hand, to the substantive rules contained in the legislation in force prior to the application of the CCC and, on the other hand, to the procedural rules contained in the CCC.

The first question

31 By its first question, the court making the reference seeks in essence to ascertain whether it is permissible to require a trader who acts in good faith and with due care to pay customs duties which have become payable as the result of an irregularity of which he was unaware but which was known both to the Community authorities and to the authorities of the exporting country.

32 Article 2(1) of Regulation No 1031/88 provides that the person liable for a customs debt is the declarant or, as the case may be, the person on whose behalf the declaration was made.

33 The circumstance that the declarant acted in good faith and with care, unaware of an irregularity which prevented the collection of duties which he should have paid if that irregularity had not been committed, has no bearing on his capacity as the person liable, which results exclusively from the legal effects associated with the formality of declaration.

34 However, the Community rules contain two categories of specific exceptions to the payment of customs debt.

35 The first is the remission of duties, referred to in the first subparagraph of Article 13(1) of Regulation No 1430/79. However, both paragraph (2) of that provision and Article 239(2) of the CCC provide that an application to that effect must be submitted to the competent customs authorities. It is not clear from the order for reference that such an application was submitted by Ilumitrónica. Consequently, in so far as the first question referred for a preliminary ruling concerns the remission of duties, there is no need to answer it.

36 The second category of exceptions to the payment of import or export duties is laid down in Article 5(2) of Regulation No 1697/79.

37 That provision makes waiver of post-clearance recovery by the national authorities subject to three cumulative conditions. Provided that those three conditions are fulfilled, the person liable is entitled to waiver of post-clearance recovery (see, in particular, Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 12; Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 84, and Case C-15/99 *Sommer* [2000] ECR I-8989, paragraph 35).

38 First, non-collection of the duties must have been due to an error made by the competent authorities themselves. Second, the error they made must be such that the person competent, acting in good faith, could not reasonably have been able to detect it in spite of the professional experience and exercise of due care required of him. Finally, he must have complied with all the provisions laid down by the legislation in force so far as his customs declaration is concerned (see, in particular, *Hewlett Packard France*, paragraph 13, *Faroe Seafood*, paragraph 83, and Case C-370/96 *Covita* [1998] ECR I-7711, paragraphs 25 to 28).

39 The fulfilment of those conditions must be assessed in the light of the purpose of Article 5(2) of Regulation No 1697/79, which is to protect the legitimate expectation of the person liable that all the information and criteria on which the decision whether or not to proceed with recovery of customs duties is based are correct (see, in particular, Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 19, and *Faroe Seafood*, paragraph 87).

Definition of 'competent authorities' and 'error'

40 The Court has already held that, since no precise and exhaustive definition of 'competent authorities' is provided in Regulation No 1697/79 or in Commission Regulation (EEC) No 2164/91 of 23 July 1991 laying down provisions for the implementation of Article 5(2) of Council Regulation (EEC) No 1697/79 (OJ 1991 L 201, p. 16), not only the authorities competent for taking action for recovery but any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and which may thus cause the person liable to entertain legitimate expectations must be regarded as a 'competent authority' within the meaning of Article 5(2) of that regulation. The Court has made it clear that this applies in particular to the customs authorities of the exporting Member State which deal with the customs declaration (*Faroe Seafood*, paragraph 88).

41 As the Advocate General observed in paragraph 41 of his Opinion, it follows from that definition of 'competent authorities' that in the context of the main proceedings it must be regarded as applying both to the Turkish customs authorities which issued the A.TR.1 certificate on the basis of which the importation at issue in those proceedings took place and to Turkey's central customs authorities.

42 The Court has also held that it follows from the wording of Article 5(2) of Regulation No 1697/79 itself that the legitimate expectations of the person liable

attract the protection provided for in that article only if it was the competent authorities 'themselves' which created the basis for those expectations. Thus, only errors attributable to acts of those authorities confer entitlement to the waiver of post-clearance recovery of customs duties (*Mecanarte*, paragraph 23, and *Faroe Seafood*, paragraph 91).

43 As the Court has pointed out, that condition cannot be regarded as fulfilled where the competent authorities have been misled — in particular as to the origin of the goods — by incorrect declarations on the part of the exporter whose validity they do not have to check or assess. In those circumstances, it is the person liable who must bear the risks arising from a commercial document which is found to be false when subsequently checked (*Mecanarte*, paragraph 24, and *Faroe Seafood*, paragraph 92).

44 However, the Court expressly said that that did not apply where the exporter has declared that the goods originate in the exporting country in reliance on the actual knowledge by that country's competent authorities of all the facts necessary for applying the customs rules in question, and where, notwithstanding such knowledge, those authorities have raised no objection concerning the statements made in the exporter's declarations, thereby basing their certification of the origin of the goods on a misinterpretation of the relevant customs rules. In such a case, it must be considered to be the result of an error made by the competent authorities themselves in initially applying the relevant rules that no duty was charged when the goods were imported (*Faroe Seafood*, paragraph 95).

45 It follows that, contrary to what the Commission argues, it is not sufficient to rely on an incorrect declaration by the exporter in order to exclude any possibility of an error attributable to the competent authorities. The conduct of the latter must, where appropriate, be assessed, taking into consideration the general context in which the relevant customs provisions were implemented.

46 Whilst it is in principle for the national court to establish whether or not an error has been made by the competent authorities, in this case the Court has all the information needed to make that assessment.

47 To that end, the conduct of the Turkish customs authorities must be assessed taking into consideration the general context of the implementation of the Association Agreement and the Additional Protocol.

48 In that connection, a number of circumstances referred to in the observations submitted to the Court are relevant.

49 Thus, the French Government, without being contradicted by the Commission on this point, maintained that the Turkish Government had implemented a policy of encouraging exports ('Export Incentive Scheme'), which provided for exemption from import duties for components from third countries on condition that they were used in the manufacture of products which were then exported to the Community or third countries.

50 The French Government also argued that it was only on 16 June 1992 that the Turkish Government adopted Decree No 92/3177 (*Official Gazette of the Republic of Turkey* No 21277 of 7 July 1992) providing for the collection of the compensatory levy which had been established by Article 3 of the Additional Protocol and the rate of which had been fixed by Decision No 2/72 of the Association Council. The French Government pointed out that the method of calculating the levy, as laid down by the abovementioned decree, was not that indicated by the decision, since the levy was collected only if the value of the components originating in third countries exceeded 56% of the free-on-board (fob) price of the finished products.

51 The French Government added that it was only on 12 January 1994, that is, after the importation at issue in the main proceedings had been carried out, that the Turkish Government adopted Decree No 94/5168 (*Official Gazette of the Republic of Turkey* No 21832 of 28 January 1994) providing for the collection of a compensatory levy, fixed at the level required by Decision No 2/72 of the Association Council, on goods in the manufacture of which were used products coming from third countries and not in free circulation either in Turkey or in the Community.

52 Those considerations demonstrate that the Turkish authorities must have been aware, on the one hand, of trade involving the duty-free importation of components originating in third countries for incorporation in goods intended for export to the Community and, on the other hand, of the impossibility of issuing A.TR.1 certificates in respect of such goods if no compensatory levy was collected.

53 In those circumstances, it must be held that by not raising, as a matter of routine practice, any objections to the statements contained in the declaration relating to the import at issue in the main proceedings, the authorities which issued the A.TR.1 certificate based their certification of the origin of the goods on a misinterpretation of the relevant customs rules, thereby making an error themselves in the initial application of the rules in question.

Whether the error was detectable

54 The Court has consistently held that whether the error was detectable must be determined having regard to the nature of the error, the professional experience of the traders concerned and the degree of care which they exercised (see, in particular, *Hewlett Packard France*, paragraph 22, *Faroe Seafood*, paragraph 99, and *Sommer*, paragraph 37).

55 Whilst it is in principle for the national court to make that assessment, in this case the Court has all the information needed for that purpose. A number of circumstances permit the inference that the error made by the Turkish authorities was not, in some cases, detectable, even to an experienced professional trader such as Ilumitrónica.

56 As regards first the nature of the error, the Court has held that it is necessary to determine it in the light, in particular, of the complexity of the rules concerned (*Hewlett Packard France*, paragraph 23, and *Faroe Seafood*, paragraph 100) and of the period of time during which the authorities persisted in their error (Case C-38/95 *Foods Import* [1996] ECR I-6543, paragraph 30).

57 The importer's knowledge of the rules concerned implied, in the main proceedings, at least a knowledge of Article 3 of the Additional Protocol, providing for the collection of a compensatory levy on goods in the manufacture of which were used products coming from third countries and not in free circulation either in the Community or in Turkey, as well as of Decisions Nos 2/72 and 3/72 of the Association Council, fixing the rate and rules relating to the procedure for collecting that compensatory levy. As the Advocate General observed in paragraph 63 of his Opinion, those rules may objectively be described as complex.

58 The period during which the possible error on the part of the Turkish authorities continued extended from 1 January 1973, the date of entry into force of Decision No 2/72 of the Association Council, until the entry into force of Decree No 94/5168 of 12 January 1994, that is, for over 20 years.

59 As regards, secondly, the degree of care to be exercised by an experienced trader, the French Government stated, without being contradicted by the Commission,

that Decisions Nos 2/72 and 3/72 of the Association Council, fixing the rate of the compensatory levy applicable pursuant to Article 3 of the Additional Protocol and therefore enabling the Turkish authorities to take the required enforcement measures, were not published in the *Official Journal of the European Communities*.

60 Ilumitrónica's claim that it was unaware of the breach by the Turkish authorities of their obligations must therefore be held to be proven in the light of that omission and, in general, of the conduct of the Commission itself. Under Article 155 of the EC Treaty (now Article 211 EC), the latter had the task of ensuring the proper implementation of the Association Agreement and had, in particular under Article 7 thereof, all the information needed to do so. However, in the observations which the Commission submitted in this case, whilst acknowledging the absence, from 1973 to 1994, of any provisions in Turkish legislation which would have enabled the Additional Protocol to be applied correctly, it merely mentions the sending of a fact-finding mission to Turkey in 1993, thus taking, as the Advocate General observed in paragraph 67 of his Opinion, nearly 20 years to discover that Turkey was not complying with the Additional Protocol.

The degree of care exercised by the declarant

61 This condition implies that the declarant is obliged to supply the customs authorities with all the necessary information as required by the Community rules, and any national provisions which supplement or transpose them, in relation to the customs treatment requested for the goods in question (see, in particular, *Hewlett Packard France*, paragraph 29).

62 It is clear from the order for reference and from the wording of the first question that the national court regards this condition as fulfilled.

63 In the light of the foregoing considerations, the answer to the first question is that Article 5(2) of Regulation No 1697/79 must be interpreted as meaning that:

— in order to determine whether there is an 'error made by the competent authorities themselves', account must be taken both of the conduct of the customs authorities which issued the certificate permitting the application of preferential treatment and of that of the central customs authorities;

— the routine issuing by the authorities of the exporting country of certificates permitting the application of preferential treatment under association rules constitutes evidence of such an error when those authorities must have been aware, on the one hand, of the existence in the exporting country of a policy of encouraging exports, involving the duty-free importation of components originating in third countries for incorporation in goods intended for export to the Community and, on the other hand, of the absence in the exporting country of provisions enabling collection of the compensatory levy to which the application of preferential treatment to exports to the Community of goods thus obtained was subject;

— the fact that some of the relevant provisions of the association rules were not published in the *Official Journal of the European Communities* and the circumstance that those provisions were not implemented, or were implemented incorrectly, in the exporting country over a period of more than 20 years constitute evidence that such an error could not reasonably have been detected by the person liable.

The second question

64 By its second question, the national court seeks to ascertain whether the conduct of the authorities of the exporting country, as described in the order for reference, is capable of rendering that country liable for payment of the customs debt.

65 As the Court has held at paragraphs 32 and 33 of this judgment, the person liable for a customs debt is the declarant or the person on whose behalf the declaration was made, the person liable being determined exclusively on the basis of the formality of declaration. It follows that the conduct of the authorities of the exporting country cannot affect the determination of the person by whom the customs debt is payable or, therefore, the right of the authorities of the importing country to take action for post-clearance recovery of the duties owed.

66 The question whether the debtor can render a third party liable to compensate for the damage which he considers himself to have sustained on account of the latter's conduct is therefore, in any event, irrelevant to the outcome of the main proceedings and so does not need to be examined.

67 The answer to the second question is therefore that the conduct of the authorities of the exporting country does not affect the determination of the person by whom the customs debt is payable or the right of the authorities of the importing country to take action for post-clearance recovery thereof.

The third and fourth questions

68 By its third and fourth questions, the court making the reference seeks in essence to ascertain whether the Commission is obliged to warn traders when it has suspicions regarding the regularity of the procedure followed by the customs authorities of the exporting country and whether a breach of any such obligation is capable of exempting declarants from liability.

69 In view of the answers given to the first and second questions, there is no need to answer these questions.

The fifth question

70 By its fifth question, the court making the reference queries the validity of both the Commission decision and that of the Portuguese authorities, acting on the Commission's advice, to take action for post-clearance recovery of the customs duties without first initiating the procedure provided for in Articles 22 and 25 of the Association Agreement.

71 In so far as this question refers to a Commission decision, nothing in the order for reference serves to identify the decision. Consequently, the Court is unable to adjudicate on this point.

72 In so far as the question refers to the decision of the Portuguese authorities to initiate the procedure for post-clearance recovery, Article 25 of the Association Agreement, which lays down the conditions governing the submission of disputes to the Association Council, provides that the Contracting Parties may submit to the latter any dispute relating to the application or interpretation of the agreement.

73 It follows from the wording of that provision that it provides for a possibility and not an obligation of submission.

74 It must therefore be held that the authorities of the importing State retain the right to take action for post-clearance recovery on the basis of the results of checks carried out after the import transactions, without being obliged to have recourse to the mechanism for settling disputes provided for by the Association Agreement (see, to that effect, *Pascoal & Filhos*, paragraph 38).

75 The answer to the fifth question is therefore that Articles 22 and 25 of the Association Agreement do not require the national customs authorities of a Member State, acting on the Commission's advice, to have recourse to the procedure provided for by those articles before taking action for post-clearance recovery of import duties.

Costs

76 The costs incurred by the Portuguese, French and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Tribunal Tributário de Primeira Instância de Lisboa by order of 13 March 2000, hereby rules:

1. Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties must be interpreted as meaning that:

— in order to determine whether there is an 'error made by the competent authorities themselves', account must be taken both of the conduct of the customs authorities which issued the certificate permitting the application of preferential treatment and of that of the central customs authorities;

— the routine issuing by the authorities of the exporting country of certificates permitting the application of preferential treatment under association rules constitutes evidence of such an error when those authorities must have been aware, on the one hand, of the existence in the exporting country of a policy of encouraging exports, involving the duty-free importation of components originating in third countries for incorporation in goods intended for export to the Community and, on the other hand, of the absence in the exporting country of provisions enabling collection of the compensatory levy to which the application of

preferential treatment to exports to the Community of goods thus obtained was subject;

— the fact that some of the relevant provisions of the association rules were not published in the *Official Journal of the European Communities* and the circumstance that those provisions were not implemented, or were implemented incorrectly, in the exporting country over a period of more than 20 years constitute evidence that such an error could not reasonably have been detected by the person liable.

2. The conduct of the authorities of the exporting country does not affect the determination of the person by whom the customs debt is payable or the right of the authorities of the importing country to take action for post-clearance recovery thereof.

3. Articles 22 and 25 of the Agreement establishing an association between the European Economic Community and Turkey do not require the national customs authorities of a Member State, acting on the Commission's advice, to have recourse to the procedure provided for by those articles before taking action for post-clearance recovery of import duties.

Wathelet Timmermans La Pergola

Jann von Bahr

Delivered in open court in Luxembourg on 14 November 2002.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber