JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
9 June 1998 *

In Joined Cases T-10/97 and T-11/97,

Unifrigo Gadus Srl, a company incorporated under Italian law, established at Naples (Italy),

and

CPL Imperial 2 SpA, a company incorporated under Italian law, established at Pescara (Italy),

represented by Giuseppe Celona, of the Milan Bar, with an address for service in Luxembourg at the Chambers of Georges Margue, 20 Rue Philippe II,

applicants,

v

Commission of the European Communities, represented initially by Fernando Castillo de la Torre and Paolo Stancanelli and subsequently by Mr Stancanelli, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Italian.

APPLICATION for annulment of Commission Decision C(96) 2780 def of 8 October 1996 ordering the post-clearance recovery of customs duties and for compensation for the damage allegedly suffered by the applicants,

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

composed of: V. Tiili, President, C. P. Briët and A. Potocki, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 3 March 1998,

gives the following

Judgment

Facts giving rise to the dispute and procedure

1 The applicants are companies trading in fishery products.

2 In 1990 and 1991 they imported consignments of cod from Norway. Those imports were carried out pursuant to EUR.1 certificates confirming that the products were of Norwegian origin. They therefore benefited from the preferential tariff arrangements applicable to products of that type, within the context of the Community tariff quotas provided for by Council Regulation (EEC) No 3692/89 of 4 December 1989 opening and providing for the administration of Community tariff quotas for cod and fish of the species *Boreogadus saida*, dried, salted or in brine, originating in Norway (1990) (OJ 1989 L 362, p. 3) and by Council Regulation (EEC) No 3523/90 of 4 December 1990 opening and providing for the administration of Community tariff quotas for certain agricultural and fishery products originating in certain EFTA countries (OJ 1990 L 343, p. 4).

3 During the course of 1993 the Norwegian customs authorities volunteered to the Italian authorities the information that, according to findings made by them, the exporter was unable to prove that the products were of Norwegian origin.

4 On 4 August and 23 November 1993 the Verona Customs Office notified CPL Imperial 2 SpA ('CPL Imperial 2') and Unifrigo Gadus Srl ('Unifrigo Gadus') respectively of its decision to effect a post-clearance recovery of the customs duties.

5 By letter of 3 December 1993, sent through the intermediary of the customs agent representing it, CPL Imperial 2 maintained that it had acted in good faith and requested the Italian authorities not to effect the post-clearance recovery of the customs duties. It explained that the non-payment of the duties resulted from an error on the part of the competent authorities which could not reasonably have been detected by an operator acting in good faith. It also requested the Italian authorities to refer the matter to the Commission. Unifrigo Gadus states that it took similar steps.

6 On 30 January 1996 the applicants confirmed to the Italian authorities, through the intermediary of their representative, that they had taken cognizance of the file which those authorities were preparing to send to the Commission and that they had no comments to make in that regard.

7 By letter of 6 February 1996, received on 12 April 1996, the Italian authorities sent to the Commission the file relating to the request made by the applicants and by a third undertaking which is not a party to the present litigation. They requested the Commission to determine whether, in the present case, there was any justification for the non-recovery of the import duties, totalling LIT 148 890 000, in accordance with 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 (OJ 1979 L 197, p. 1, hereinafter 'Regulation No 1697/79').

8 That request was examined under the procedure described in Article 871 et seq. of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1, hereinafter 'Regulation No 2454/93').

9 The Commission consulted experts representing the Member States in the course of the meeting of the Customs Code Committee held on 3 June 1996. On 8 October 1996 it adopted Decision C(96) 2780 def ('the Decision'), Article 1 of which is in the following terms: 'the import duties, amounting to LIT 148 890 000, in respect of which Italy submitted its request dated 2 February 1996 must be recovered'.

10 Following the adoption of the Decision, the applicants each received from the customs authorities a letter dated 22 November 1996 enclosing a copy of the Decision and demanding payment of the customs duties, amounting to LIT 31 200 000 in the case of Unifrigo Gadus and LIT 95 010 000 in the case of CPL Imperial 2, together with default interest. The sum claimed from CPL Imperial 2 included the amount of customs duties corresponding to customs slip 7338 F.

11 It was in those circumstances that, by applications lodged at the Registry of the Court of First Instance on 17 January 1997, the applicants brought the present proceedings.

12 By order of the President of the Third Chamber of 9 February 1998, Cases T-10/97 and T-11/97 were joined pursuant to Article 50 of the Rules of Procedure for the purposes of the oral procedure and the judgment.

13 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. The applicants were requested, in the context of measures of organisation of procedure, to produce certain documents, which they did by letter of 23 January 1998.

14 The parties presented oral argument and their replies to the Court's questions at the hearing on 3 March 1998.

Forms of order sought by the parties

15 The applicants claim that the Court should:

— declare the applications admissible;

— annul the Decision;

— in the alternative, declare that the Decision does not affect the applicants' right to waiver of the post-clearance duties in question;

— in the further alternative, order the Commission to reimburse to the applicants the full amount which they are required to pay in respect of post-clearance duties, penalties and ancillary charges;

— in any event, annul the Decision as regards the payment of interest;

— order the defendant to pay the costs.

16 In Case T-11/97, the applicant, CPL Imperial 2, claims that the Court should:

— in the alternative, annul the Decision in so far as it orders the post-clearance recovery of the amount of customs duties corresponding to customs slip 7338 F.

17 The Commission contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs.

The application for annulment of the Decision

18 It should be noted, as a preliminary point, 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, the judgment of the Court of Justice in Joined Cases C-121/91 and C-122/91 *CT Control and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 22).

19 In those circumstances, it follows — and the parties do not deny this — that the rules applicable to the procedure before the Commission are those laid down by Regulation No 2454/93 and that the substantive rules applicable to the facts of the case are those resulting from Article 5(2) of Regulation No 1697/79.

20 The applicants have advanced, in essence, five pleas in law in support of their claim for annulment.

The first plea, alleging lack of competence on the part of the Commission

Arguments of the parties

21 The applicants observe that, according to Article 873 of Regulation No 2454/93, the Commission has absolute power to decide whether it is appropriate to take into account the post-clearance recovery of duties, *inter alia* where the national customs authorities consider that the conditions laid down in Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) or, previously, in Article 5(2) of Regulation No 1697/79 are fulfilled. They maintain that such a provision is contrary to the principles formulated by the case-law of the Court of Justice, according to which the importer is entitled, where the conditions laid down by Article 220(2)(b) are fulfilled, to waiver of post-clearance recovery. Consequently, the Commission was not empowered to adopt the Decision.

22 The Commission maintains, first, that that plea is inadmissible, since Regulation No 2454/93 is not of direct and individual concern to the applicants as legal persons.

23 Next, it submits that, contrary to the applicants' assertions, it is precluded by Article 871 et seq. of Regulation No 2454/93 from circumventing the right of a person liable to pay customs duties not to have to pay those duties where the criteria are fulfilled in that regard.

Findings of the Court

24 The allegation that the plea is inadmissible is founded upon the premiss that the applicants are seeking annulment of provisions of Regulation No 2454/93 pursuant to Article 173 of the Treaty. However, that is not the case. As the applicants con-

firmed in their reply, their plea must instead be construed as an application for an interpretation of those provisions in accordance with the principles of Community law.

25 In those circumstances, the allegation that the plea is inadmissible must be rejected.

26 As regards the substance of the plea, it is common ground that, where the conditions laid down in Article 5(2) of Regulation No 1697/79 are fulfilled, the person liable is entitled to waiver of recovery (see, in particular, the judgments of the Court of Justice in Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 12, Case C-292/91 *Weis* v *Hauptzollamt Würzburg* [1993] ECR I-2219, paragraph 15, and Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 84).

27 Furthermore, Article 871 of Regulation No 2454/93 provides: 'In cases other than those referred to in Article 869, where the customs authorities either consider that the conditions laid down in Article 220(2)(b) of the Code are fulfilled or are in doubt as to the precise scope of the criteria of that provision with regard to a particular case, those authorities shall submit the case to the Commission, so that a decision may be taken in accordance with the procedure laid down in Articles 872 to 876.' Article 873 of that regulation states: 'the Commission shall decide whether the circumstances under consideration are or are not such that the duties in question need not be entered in the accounts'.

28 Articles 871 and 873 of Regulation No 2454/93 thus confer on the Commission a decision-making power, in particular where the competent authorities consider that the criteria for waiving post-clearance recovery of customs duties are fulfilled.

29 That decision-making power is designed to ensure the uniform application of Community law (see, as regards the provision applying before the entry into force of Article 871 of Regulation No 2454/93, the judgments of the Court of Justice in Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535, paragraph 13, *Mecanarte*, cited above, paragraph 33, and *Faroe Seafood and Others*, cited above, paragraph 80).

30 The machinery for referring cases to the Commission would be rendered pointless if the Commission were required to adhere to the views expressed by the customs authorities in the request submitted to it by them.

31 None the less, that decision-making power in no way permits the Commission to disregard the right of the person liable to waiver of the post-clearance recovery of customs duties where, having completed its examination of the matter, it concludes that the criteria entitling the undertaking to the benefit of that waiver of recovery are fulfilled.

32 The first plea must therefore be rejected.

The second plea in law, alleging infringement of Articles 871 to 874 of Regulation No 2454/93

Arguments of the parties

33 In the first part of this plea, the applicants point out that Article 871 of Regulation No 2454/93 provides that the Commission may, and therefore must, request additional information '[s]hould it be found that the information supplied by the

Member State is not sufficient to enable a decision to be taken on the case concerned in full knowledge of the facts'.

34 It was not open to the Commission, therefore, to rely solely on the statement of the Norwegian authorities calling in question the validity of the certificates of origin, when that finding had been contested by the Supreme Court of Norway, the Høyesterett, in a judgment of 2 April 1993, long before the Decision was adopted. By refraining from carrying out a supplementary examination, the Commission did not decide the matter in full knowledge of the facts.

35 In the second part of their plea, the applicants maintain that, having regard to the strict time-limits prescribed by Articles 871 to 874 of Regulation No 2454/93, there existed no grounds for ordering the post-clearance recovery of the duties. In the present case, the imports took place in 1990 and 1991 and the applicants requested the Italian national authorities to refer the matter to the Commission in December 1993; however, the Decision was not adopted until 8 October 1996 and was not sent to the applicants until 22 November 1996.

36 The Commission's response to this is that it acted in accordance with the rules laid down in Articles 871 to 874 of Regulation No 2454/93 (see, in particular, the judgments of the Court of Justice in Case C-12/92 *Huygen and Others* [1993] ECR I-6381 and in *Faroe Seafood and Others*, cited above, paragraphs 16 and 63, and the judgment of the Court of First Instance in Case T-346/94 *France-Aviation* v *Commission* [1995] ECR II-2841, paragraphs 30 to 36).

Findings of the Court

37 With regard to the first part of this plea, it should be noted that, under the first paragraph of Article 871 of Regulation No 2454/93, '[t]he case submitted to the

Commission shall contain all the information required for a full examination'. The third paragraph of that article provides: 'Should it be found that the information supplied by the Member State is not sufficient to enable a decision to be taken on the case concerned in full knowledge of the facts, the Commission may request that additional information be supplied.'

38 In the present case, the Norwegian authorities informed their Italian counterparts that the exporter was unable to prove that the products were of Norwegian origin. Where a subsequent verification does not confirm the origin of the goods as stated in the EUR.1 certificate, it must be concluded that the goods are of unknown origin and that the EUR.1 certificate and the preferential tariff were thus wrongly granted. In principle, therefore, the customs authorities of the importing Member State must carry out post-clearance recovery of the customs duties which were not levied on importation (*Huygen and Others*, cited above, paragraph 17, and *Faroe Seafood and Others*, cited above, paragraph 16).

39 After the Norwegian authorities had informed the Italian authorities of the fact that the exporter was unable to prove the Norwegian origin of the products in question, neither the Italian authorities nor the applicants contested that conclusion.

40 In particular, although the applicants claimed to have acted in good faith, they did not challenge, in the exchange of correspondence with the Italian authorities, the information received from the Norwegian authorities. Indeed, the applicants' representative confirmed by letter of 30 January 1996 that he had nothing to add to the file sent to the Commission by the Italian authorities.

41 In those circumstances, the Commission was entitled to conclude that the file submitted to it was complete and that there was no need for it to seek additional information.

42 For the sake of completeness, it should be noted that the only item of information which did not appear in the file sent to the Commission, and on which the applicants rely, is that relating to the judgment of the Høyesterett of 2 April 1993. It seems that that judgment concerned criminal proceedings against two persons for forgery of health certificates relating to fishery products exported to various countries. As the Commission has observed, the Høyesterett ruled only on that issue, and did not establish that the products in question were of Norwegian origin.

43 As regards the second part of the plea, it should be noted that the second paragraph of Article 871 of Regulation No 2454/93 provides that '[a]s soon as it receives the case [submitted by the customs authorities of a Member State] the Commission shall inform the Member State concerned accordingly'. The first paragraph of Article 872 of that regulation provides: 'Within 15 days of receipt of the case referred to in the first paragraph of Article 871, the Commission shall forward a copy thereof to the Member States.' The first sentence of the second paragraph of Article 873 states, in turn, that the decision 'must be taken within six months of the date on which the case referred to in the first paragraph of Article 871 is received by the Commission'. Lastly, according to the first paragraph of Article 874, '[t]he Member State concerned shall be notified of the decision referred to in Article 873 as soon as possible and in any event within 30 days of the expiry of the period specified in that Article'.

44 In the present case, the applicants have adduced no evidence to show that those provisions were disregarded. Thus, neither the period which elapsed between the date of the imports and the date of adoption of the Decision by the Commission nor the period between the date on which the undertakings requested their national authorities to refer the matter to the Commission and the date on which those authorities actually did so is covered by the aforementioned provisions. Consequently, they cannot affect the question whether the Commission complied with the time-limits laid down by those provisions.

45 In the light of all the foregoing, the second plea must be rejected.

The third and fourth pleas in law, alleging infringement of Article 5(2) of Regulation No 1697/79 and breach of the general principle of the protection of legitimate expectations

Arguments of the parties

46 The applicants maintain that post-clearance recovery of customs duties may be effected only where the importer should have realised that he had benefited from some error or inattention on the part of the customs authorities (judgments of the Court of Justice in Case 283/82 *Schoellershammer* v *Commission* [1983] ECR 4219, paragraph 7, Case 160/84 *Oryzomyli Kavallas and Others* v *Commission* [1986] ECR 1633, paragraph 21, and Case C-250/91 *Hewlett Packard France* v *Directeur Général des Douanes* [1993] ECR I-1819, paragraphs 45 and 46).

47 Thus, where, as in the present case, the importing undertaking had no cause to suspect that the exporting undertaking had forged the certificates of origin, no post-clearance recovery can take place (*Deutsche Fernsprecher*, cited above, paragraph 17, and *Hewlett Packard France*, cited above, paragraph 28; see also the judgment of the Court of Justice in Case C-446/93 *SEIM* v *Subdirector-Geral das Alfândegas* [1996] ECR I-73, paragraphs 40 to 48).

48 Furthermore, the Commission wrongly considered in the Decision that the possible invalidity of EUR.1 certificates formed part of the commercial risk.

49 The applicants conclude that, since they were not in a position to detect the error committed, the ordering of post-clearance recovery of the customs duties is contrary to the principle of the protection of legitimate expectations. They point out in that regard that, according to case-law, Article 5(2) of Regulation No 1697/79 expresses a general principle of fairness.

50 The Commission maintains that one of the three cumulative conditions laid down in Article 5(2) of Regulation No 1697/79, as interpreted by case-law, namely that non-collection must have been due to an error made by the competent authorities themselves, is not fulfilled in the present case (see, in particular, the judgments in *Mecanarte* and *Faroe Seafood and Others*, cited above).

51 Furthermore, in circumstances such as those of the present case, the person liable cannot entertain a legitimate expectation (see, in particular, the judgments of the Court of Justice in Joined Cases 98/83 and 230/83 *Van Gend & Loos and Expeditiebedrijf Wim Bosman* v *Commission* [1984] ECR 3763 and in *Mecanarte* and *Faroe Seafood and Others*, cited above).

52 The Commission concludes that the person liable must bear the commercial risk arising from the issue by the exporter of an incorrect declaration of origin (judgments of the Court of Justice in Case 827/79 *Amministrazione delle Finanze* v *Acampora* [1980] ECR 3731, paragraph 8, and in *SEIM*, cited above, paragraph 45); it is the responsibility of that person to guard against that risk (*Faroe Seafood and Others*, cited above, paragraph 114).

Findings of the Court

53 Article 5(2) of Regulation No 1697/79 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.'

54 It is settled case-law that the conditions laid down in that article are cumulative (see, in particular, the judgments in *Mecanarte*, paragraph 12, and *Faroe Seafood and Others*, paragraph 83).

55 The first of those conditions is that an error must have been made by the competent authorities themselves.

56 It is common ground that the Norwegian customs authorities are competent authorities within the meaning of Article 5(2) of Regulation No 1697/79 (*Mecanarte*, paragraph 22, and *Faroe Seafood and Others*, paragraph 88).

57 In the present case, the parties are agreed that the error giving rise to the litigation was committed by the exporter, who declared that the products were of Norwegian origin but was subsequently unable to prove that declaration.

58 It follows from the very wording of Article 5(2) of Regulation No 1697/79 that the legitimate expectations of the person liable warrant 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 the competent authorities confer entitlement to the waiver of post-clearance recovery of customs duties (*Mecanarte*, paragraph 23, and *Faroe Seafood and Others*, paragraph 91).

59 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 (*Mecanarte*, paragraph 24, and *Faroe Seafood and Others*, paragraph 92).

60 Moreover, the person liable cannot entertain a legitimate expectation with regard to the validity of certificates by virtue of the fact that they were initially accepted by the customs authorities of a Member State, since the role of those authorities in regard to the initial acceptance of declarations in no way prevents subsequent checks from being carried out (*Faroe Seafood and Others*, paragraph 93).

61 It follows that neither the fact that the competent Norwegian authorities certified in the EUR.1 certificates that the goods originated there nor the fact that the Italian authorities initially accepted that the origin of the goods was as declared on those certificates is sufficient to constitute an error on the part of the competent authorities within the meaning of Article 5(2) of Regulation No 1697/79 (*Faroe Seafood and Others*, paragraph 94).

62 Admittedly, the possibility of verifying the EUR.1 certificate following importation, without the importer being given prior warning, may cause him difficulties where, in good faith, he has imported goods benefiting from preferential tariffs in reliance on certificates which are incorrect or were falsified without his knowledge. It must, however, be pointed out, first, that the European Community cannot be made to bear the adverse consequences of the wrongful acts of suppliers of importers, second, that the importer may seek compensation from the perpetrator of the fraud, and, finally, that, in calculating the benefits from trade in goods likely to obtain tariff preferences, a prudent trader aware of the rules must assess the risks inherent in the market which he is considering and accept them as normal trade risks (judgment of the Court of Justice in Case C-97/95 *Pascoal & Filhos* v *Fazenda Pública* [1997] ECR I-4209, paragraph 59).

63 It is the responsibility of traders to make the necessary arrangements in their contractual relations in order to guard against the risks of an action for post-clearance recovery (*Faroe Seafood and Others*, paragraph 114, and *Pascoal & Filhos*, cited above, paragraph 60).

64 It follows from all of the foregoing that the Commission rightly concluded that, in the present case, there had not been any error on the part of the competent authorities themselves within the meaning of Article 5(2) of Regulation No 1697/79 and that the applicants could not rely on the principle of the protection of legitimate expectations.

65 In view of the cumulative nature of the conditions laid down by Article 5(2) of Regulation No 1697/79, the Commission was not obliged to consider the other conditions governing the application of that provision, since the first of those conditions was not fulfilled in any event. Accordingly, it is not necessary to examine the applicants' arguments concerning those other conditions.

66 The third and fourth pleas must therefore be rejected.

The fifth plea in law, alleging breach of the obligation to provide a statement of reasons

Arguments of the parties

67 The applicants complain that the Commission merely asserted in the Decision that the EUR.1 certificates 'were invalid', without substantiating that assertion.

68 Had the Commission carried out a more thorough examination, which was all the more justified since the applicants took no part in the procedure, it would have found that the judgment given against the Norwegian exporter by the lower courts of that State, ruling that the certificate of origin was a forgery prepared by that exporter, had been set aside by judgment of the Høyesterett of 2 April 1993, which specifically concerned the origin of the products.

69 According to the applicants, the Commission is incorrect in its assertion that the invalidity of the certificates of origin has not been contested, since the applicants have produced the judgment of the Høyesterett in the form of an annex to their applications in the present case.

70 The Commission considers that the Decision accords with the requirements of Article 190 of the Treaty.

Findings of the Court

71 It is settled case-law that the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the authority which adopted the measure in question, in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Community judicature to exercise its power of review (see, in particular, the judgment of the Court of Justice in Case C-323/88 *Sermes* [1990] ECR I-3027, paragraph 38).

72 In the present case, the Commission states in the preamble to the Decision, first, that the EUR.1 certificates are invalid, second, that that invalidity forms part of the commercial risk, third, that the initial acceptance of those certificates by the customs authorities could not have given rise to any legitimate expectations on the part of the importers and, fourth, that no error was made by the competent authorities themselves within the meaning of Article 5(2) of Regulation No 1697/79.

73 The Decision therefore sets out in a clear and unequivocal fashion the reasoning followed by the Commission.

74 In those circumstances, the plea must be rejected.

The alternative application for a declaration that the Decision is ineffective

75 The applicants claim that, in the event that the Court does not order annulment of the Decision, it should declare that the Decision does not affect their right to waiver of the post-clearance recovery of the customs duties.

76 According to Article 174 of the Treaty, if an action for annulment brought under Article 173 of the Treaty is well founded, the Court is to declare the act concerned to be void. Consequently, an alternative application such as that made by the applicants does not fall within the competence of the Court and is therefore inadmissible.

The alternative application for annulment of the Decision in so far as the amount of the duties demanded includes slip 7338 F

Arguments of the parties

77 In Case T-11/97 the applicant observes that it is apparent from the letter of 22 November 1996 from the Verona customs authorities informing it of the amount of customs duties to be recovered that that total includes the amount relating to customs slip 7338 F of 27 September 1990, which does not concern products the origin of which had been contested.

78 It submits that the Decision should therefore be annulled in so far as it concerns that amount, which totals LIT 12 614 070.

79 The applicant points out that the amount of the customs debt is expressly indicated in Article 1 of the Decision.

80 The Commission contends that that plea is inadmissible. It points out that the matter was referred to it by the Italian authorities, at the applicant's request, solely for the purpose of determining whether the criteria for the application of Article 5(2) of Regulation No 1697/79 were fulfilled. Consequently, it made no decision regarding either the question whether the debt was due or the amount of the customs debt in issue. It is not open to the applicant, therefore, to contest the Decision by relying on arguments seeking to show that the decisions of the competent national authorities demanding payment of the duties at issue were unlawful. It follows that such decisions may be contested only before the national courts (judgments of the Court of Justice in Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani* v *Commission* [1987] ECR 1303, paragraphs 9 to 13, and in *CT Control and JCT Benelux*, cited above, paragraphs 42 to 46).

Findings of the Court

81 The decision-making power conferred on the Commission by Articles 871 and 873 of Regulation No 2454/93 relates only to the question whether, in a given factual situation, the conditions for the application of Article 5(2) of Regulation No 1697/79 are fulfilled.

82 Consequently, the Commission does not determine the amount of the debt payment of which is to be demanded. In actual fact, the reference to customs slip 7338 F first appeared in the letter sent by the Italian authorities to the undertaking on 22 November 1996, that is to say, following the adoption of the Decision.

83 Article 1 of the Decision is admittedly worded as follows: 'The import duties amounting to LIT 148 890 000, payment of which was demanded by Italy on 2 February 1996, must be recovered.' However, the sum referred to corresponds not to a figure calculated by the Commission but merely to the total amount mentioned by the Italian authorities in their demand, to which express reference is made in Article 1 of the operative part of the Decision.

84 In those circumstances, this head of claim must be rejected, since it cannot affect the lawfulness of the Decision and in fact falls within the competence of the national court which is called upon to review the legality of the Italian administrative act ordering post-clearance recovery of the duties.

The alternative plea seeking annulment of the Decision as regards the payment of interest

Arguments of the parties

85 The applicants observe that the sum demanded from them by the customs authorities in the letter of 22 November 1996 also includes interest and may be increased by the addition of default interest.

86 Article 7 of Regulation No 1697/79, which is applicable to the facts of the present case, prohibits the charging of default interest on sums recovered post-clearance where the non-collection of the customs duties due is attributable to an error made by the competent authorities.

87 The Commission contends that, for the reasons given previously (see paragraph 80 above), the plea is inadmissible. It observes that, in any event, since the non-collection of the customs duties is not attributable to an error made by the competent authorities, the criterion for the application of Article 7 is not fulfilled.

Findings of the Court

88 For the same reasons as those stated above, this head of claim must be rejected (see paragraphs 81 to 84 above).

The claim for compensation

Arguments of the parties

89 The applicants deny that the claim for compensation is inadmissible, as alleged by the Commission (judgment of the Court of First Instance in Case T-485/93 *Dreyfus* v *Commission* [1996] ECR II-1101, paragraph 73).

90 They submit, as regards the substance of the claim, that the Commission was at fault in its investigation of the matter, since, first, it did not act with the diligence required by Regulation No 2454/93 and, second, it did not seek additional

information as it was required to do (judgment of the Court of Justice in Case C-368/92 *Chiffre* [1994] ECR I-605, paragraphs 19 and 30).

91 The damage suffered as a result of that fault corresponds to the amount of customs duties which the applicants will ultimately have to pay to the Italian authorities.

92 The Commission submits, as its principal argument, that, according to case-law, an application for compensation which is in fact designed to nullify the effects of the decision annulment of which is also sought, as in the present case, must be declared inadmissible (judgment of the Court of Justice in Case 175/84 *Krohn* v *Commission* [1986] ECR 753).

93 It submits in the alternative that the application is unfounded, since it cannot be said to have committed any fault in the present case.

Findings of the Court

94 According to case-law, the inadmissibility of an application for annulment based on Article 173 of the Treaty may exceptionally render inadmissible an action for compensation brought under Article 215 of the Treaty where the application for compensation seeks in fact the withdrawal of an individual decision which has become definitive (see, in particular, *Krohn* v *Commission*, cited above, paragraph 33).

95 In the present case, the Commission is not claiming that the application for annulment is inadmissible, but merely that it is unfounded. The case-law relied on by the Commission is therefore inapplicable in the present case.

96 As to the substance, it must be observed that the faults alleged by the applicants correspond to the first and second parts of the second plea advanced in support of the claim for annulment.

97 Since the Court's assessment of those two parts has not disclosed any error of law or of fact on the part of the Commission, the applicants are wrong to claim that it has committed any such fault.

98 In those circumstances, the application for compensation for the damage allegedly suffered must be rejected.

99 It follows that the action must be dismissed in its entirety.

Costs

100 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs as applied for by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the applications;

2. Orders the applicants to pay the costs.

Tiili Briët Potocki

Delivered in open court in Luxembourg on 9 June 1998.

H. Jung V. Tiili

Registrar President