

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

17 December 2003 *

In Case T-146/01,

DLD Trading Co., established in Brno (Czech Republic), represented by J. Hintermayr, G. Minichmayr, P. Burgstaller and M. Krüger, lawyers,

applicant,

v

Council of the European Union, represented by M.-C. Giorgi, A.-M. Colaert and J.-P. Hix, acting as Agents,

defendant,

* Language of the case: German.

supported by

Republic of Austria, represented by C. Pesendorfer, W. Okresek and H. Dossi, acting as Agents, with an address for service in Luxembourg,

by

Commission of the European Communities, represented by J. Schieferer, acting as Agent, with an address for service in Luxembourg,

and by

Republic of Finland, represented by T. Pynnä and A. Guimaraes-Purokoski, acting as Agents, with an address for service in Luxembourg,

interveners,

APPLICATION for compensation for damage claimed to have been suffered by reason of the unlawfulness of, first, Council Regulation (EC) No 2744/98 of 14 December 1998 amending Regulation (EC) No 355/94 and extending the temporary derogation applicable to Austria (OJ 1998 L 345, p. 9) and, second, Council Directive 69/169/EEC of 28 May 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ, English Special Edition 1969 (I), p. 232), as amended,

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

composed of: B. Vesterdorf, President, P. Lindh and H. Legal, Judges,
Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on
18 March 2003,

gives the following

Judgment

Legal context

- 1 Importation into the Community of goods from non-member countries gives rise to the levying of, first, customs duty under the Common Customs Tariff and, second, value added tax (VAT) and excise duty.
- 2 However, provided that they are of a non-commercial nature, imports for private purposes of goods contained in the personal luggage of travellers are, subject to certain provisos, exempted from customs duty by Article 45 of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (OJ 1983 L 105, p. 1).
- 3 Measures liberalising the tax system applicable to imports in the course of passenger travel were also introduced by Council Directive 69/169/EEC of 28 May 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ, English Special Edition 1969 (I), p. 232).

4 Those customs and fiscal allowances/exemptions are expressed in terms of value or quantity, depending on the type of goods. The value of the products for which an exemption is expressed in terms of quantity is not taken into account when determining whether or not a traveller's imports reach the ceiling of the allowance granted in terms of value.

5 The allowances and exemptions granted to travellers by Regulation No 918/83 and Directive 69/169 were abolished from 1 January 1993 for intra-Community movement of goods. On the other hand, they remain applicable to travel between the Community and non-member countries.

Customs allowances, expressed in terms of value, applicable to imports by travellers of products other than tobacco products, alcoholic products, perfume and eau de toilette

6 For products other than tobacco products, alcoholic products, perfume and eau de toilette, Article 47 of Regulation No 918/83, as amended by Council Regulation (EC) No 355/94 of 14 February 1994 (OJ 1994 L 46, p. 5), increased the amount of the import duty relief expressed in terms of value, which until then had been set at ECU 45 per traveller, to ECU 175, with effect from 1 April 1994.

7 Article 151(2) of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 9) provides that, at the duly substantiated request of one of the new Member States, the Council, acting unanimously on a proposal from the Commission, 'may [take] before 1 January 1995', the date on which the act of accession entered into force, measures consisting of temporary derogations from acts of the institutions adopted, as was the case with Regulation No 355/94, between 1 January 1994 and the date of signature of the act of accession.

- 8 Following such a request submitted by the Republic of Austria on 5 September 1994, the Council adopted Regulation (EC) No 3316/94 of 22 December 1994 amending Regulation No 355/94 by introducing a temporary derogation applicable to Austria with regard to reliefs from customs duties (OJ 1994 L 350, p. 12).
- 9 Article 2 of Regulation No 355/94, as amended by Regulation No 3316/94, postponed until 1 January 1998 the obligation on the Republic of Austria to apply the Community allowance of ECU 175 to imports of goods by travellers entering its territory, in particular, by a land frontier linking it to non-member countries other than member countries of the European Free Trade Association (EFTA).
- 10 That provision also laid down that the Republic of Austria ‘[would] apply an allowance of not less than ECU 75... from the entry into force of the... Treaty of Accession’.
- 11 The derogation was granted on account of the appreciable economic difficulties which increasing the allowance to ECU 175 would have been likely to cause for the Republic of Austria, given the difference between prices charged in that country and in the eastern European countries with which it shares a border.
- 12 After its resulting amendment by the Austrian National Assembly, Paragraph 97a of the Austrian Law implementing customs law (BGBl. 1995 I, p. 6672) read as follows:

‘From the entry into force of the Treaty of Accession until 31 December 1997, an allowance of ECU 75 shall apply to goods imported by travellers entering the

territory to which this Law applies by a land frontier linking that territory to countries other than the Member States and EFTA countries.’

- 13 By letter of 23 July 1997, the Republic of Austria requested the Council to extend the derogation, maintaining that the difficulties which had been the reason for adopting that measure remained and had even increased.
- 14 On 31 December 1997, before the Council came to a decision on that request, the derogation permitting the Republic of Austria to apply a customs allowance of ECU 75 expired. The Republic of Austria none the less did not increase the amount of the allowance to the Community level of ECU 175. Soon after 1997 came to an end, the Austrian National Assembly adopted an amended version of Paragraph 97a of the Law implementing customs law (BGBl. 1998 I, p. 441).
- 15 The new version of that provision stated:

‘The Federal Minister for Finance is empowered to reduce to ECU 75 the allowance applicable to goods imported by travellers entering the territory to which this Law applies by a land frontier linking that territory to countries other than the Member States and EFTA countries.’

- 16 By Regulation (EC) No 2744/98 of 14 December 1998 amending Regulation No 355/94 (OJ 1998 L 345, p. 9), the Council extended the temporary derogation granted to the Republic of Austria. Regulation No 2744/98 entered into force on 19 December 1998, the day of its publication in the *Official Journal of the European Communities*. The regulation provided, however, that it was applicable from 1 January 1998.

- 17 Thus, Article 2 of Regulation No 355/94, as amended by Regulation No 2744/98, extended, from 1 January 1998 to 1 January 2003, the derogation relieving the Republic of Austria from the requirement to apply the Community allowance of ECU 175.
- 18 Under that provision, the Republic of Austria was to grant, in respect of imports of the products covered, an allowance of not less than ECU 75 until 31 December 1998, then of not less than ECU 100 from 1 January 1999, and was to increase that amount gradually with a view to applying the amount of ECU 175 in force in the Community to those imports by 1 January 2003 at the latest.

Fiscal exemptions, expressed in terms of quantity, applicable to imports by travellers of tobacco products, alcoholic beverages, perfume and eau de toilette

- 19 The system of fiscal exemptions, expressed in terms of quantity, relating to international travel is laid down by Articles 4 and 5 of Directive 69/169, as amended. They provide:

‘Article 4

1. Without prejudice to national provisions applicable to travellers whose residence is outside Europe, each Member State shall set the following

quantitative limits for exemptions from turnover tax and excise duty of the goods listed below:

Travel between third countries and the Community

(a) Tobacco products:

— cigarettes 200

or

— cigarillos (cigars of a maximum weight of 3 grammes each) 100

or

— cigars 50

or

— smoking tobacco 250 g

(b) Alcohol and alcoholic beverages:

— distilled beverages and spirits of an alcoholic strength exceeding 22% volume; undenatured ethyl alcohol of 80% vol and over a total of 1 litre

or

- distilled beverages and spirits,
and aperitifs with a wine or alcohol
base, tafia, saké or similar beverages a total of 2 litres

or

- of an alcoholic strength not exceeding
22% vol; sparkling wines, fortified wines

and

- still wines a total of 2 litres

...

Article 5

...

8. Member States may reduce the quantities of the goods referred to in Article 4(1)(a) and (d) for travellers coming from a third country who enter a Member State.'

- 20 On the basis of that last provision, Paragraph 3a of the Verordnung des Bundesministers für Finanzen, mit der die Verbrauchsteuerbefreiungsverordnung geändert wird (Order of the Austrian Federal Minister for Finance amending the Order concerning Exemption from Excise Duty; BGBl. 1997 II, p. 733) reduced, with effect from 1 July 1997, the fiscal exemption expressed in terms of quantity in the following terms:

‘The exemption from excise duty applicable to tobacco products imported in the personal luggage of travellers who are resident in the territory to which this order applies and enter that territory by a land frontier with countries other than Member States of the European Union and EFTA members is limited to:

1. 25 cigarettes; or
2. 5 cigars; or
3. 10 cigarillos (cigars of a maximum weight of 3 grammes each); or
4. 25 grammes of smoking tobacco; or
5. an assortment of those products not exceeding 25 grammes.

...’

Background

- 21 The applicant operates two duty-free sales outlets in Hevlin and Hate in the Czech Republic, close to the Austrian border. It sells the following goods there:

tobacco products, alcoholic beverages, perfume, eau de toilette, cosmetic products, food, electronic entertainment products, textiles, additives, toys and everyday articles. Its customers are in practice almost exclusively travellers importing those products in their luggage into Austria for personal use.

- 22 The applicant maintains that it made major investments, including the opening of its shop in Hevlin in December 1996, in anticipation of the increase, from ECU 75 to ECU 175, on 31 December 1997 of the customs allowance applicable to travellers' imports into Austria of the products covered.
- 23 However, the postponement of that increase and the reduction by the Republic of Austria of the quantities of tobacco products capable of being imported exempt from VAT and excise duty are said by the applicant to have caught it unawares and caused it considerable damage in the form of loss of income.

Reference to the Court of Justice for a preliminary ruling

- 24 On 23 January 2001, the applicant brought an action before the Landesgericht für Zivilrechtssachen, Wien (Regional Civil Court, Vienna, Austria) seeking EUR 726 728.34 in damages from the Republic of Austria.
- 25 By order of 5 November 2001, that court asked the Court of Justice to give a preliminary ruling under Article 234 EC, in particular on whether Austrian

legislation was contrary to Community legislation in that it imposed a value limit on the customs allowance and certain restrictions on the quantities of tobacco products capable of being imported exempt from turnover tax and excise duty by the travellers concerned (*DLD Trading Company Import-Export*, entered at the Registry of the Court of Justice under case number C-447/01).

- 26 By order of 21 March 2002, the Court declared the reference for a preliminary ruling to be inadmissible on the ground that the information set out in the order for reference did not enable it to provide a useful interpretation of Community law having regard to the factual and legal situation in the proceedings before the national court.

Procedure before the Court of First Instance

- 27 The applicant brought the present action by application lodged at the Court Registry on 2 July 2001.
- 28 By orders of the President of the First Chamber of 9 and 17 January 2002, the Commission, and then the Republic of Austria and the Republic of Finland, were granted leave to intervene in support of the form of order sought by the Council.
- 29 The Republic of Austria and the Commission lodged their statements in intervention on 28 February 2002 and 5 March 2002 respectively.

- 30 After one of the Judges of the First Chamber was prevented from acting, on 9 January 2003 the President of the Court of First Instance designated Judge Lindh, pursuant to Article 32(3) of the Rules of Procedure of the Court of First Instance, to complete the Chamber hearing the case.
- 31 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure.
- 32 The applicant, the Council and the Commission presented oral argument and replied to the Court's questions at the hearing on 18 March 2003.

Forms of order sought

- 33 The applicant claims that the Court should:
- order the defendant to pay the applicant EUR 726 728.34 in damages;
 - declare Regulation No 2744/98 and Article 5(8) of Directive 69/169, as amended, to be contrary to Community law;
 - order the defendant to pay the costs.

34 The Council, supported by the Republic of Austria and the Commission, contends that the Court should:

- declare the action inadmissible;

- in the alternative, dismiss it as unfounded;

- order the applicant to pay the costs.

Admissibility of the action

35 The Council and the Commission submit that the action is inadmissible, putting forward the following two pleas.

Failure of the application to comply with the requirements of Article 44(1)(c) of the Rules of Procedure

36 The Council contends that the applicant has infringed the requirements of Article 44(1)(c) of the Rules of Procedure by failing to annex an audited statement of its losses to its application.

- 37 The Council maintains that it was thus impossible for it to ascertain the precise subject-matter of the dispute and assess the merits of the action and, consequently, to put its case properly.
- 38 The applicant counters that, in order to establish that it suffered damage and the extent of that damage, it referred to its trading results and turnover for the relevant financial years. It explains that the application seeks, initially, a ruling as to the basis upon which non-contractual liability has been incurred by the Community.
- 39 It is settled case-law that a claim for any unspecified form of damages is not sufficiently concrete and must therefore be regarded as inadmissible (Case T-277/97 *Ismeri Europa v Court of Auditors* [1999] ECR II-1825, paragraph 65; upheld on appeal in Case C-315/99 P *Ismeri Europa v Court of Auditors* [2001] ECR I-5281).
- 40 The application does not contain a reliable assessment of the alleged damage. In that document the applicant merely provided an estimate of the minimum damage.
- 41 However, in its application the applicant specified the matters enabling the nature and extent of the alleged damage to be assessed. In that document it thus assessed the damage to it at 20% of the overall losses suffered by it since 1 January 1997 in respect of sales of the products covered by the Community measures in question.

- 42 Nor could the lack of reliable figures regarding the damage allegedly suffered have had an effect in this instance on the exercise by the Council of its rights as a defendant. The applicant supplemented the relevant figures in its reply and thus did enable the defendant to discuss the nature and the extent of the damage both in the rejoinder and at the hearing (see, to this effect, *Ismeri Europa v Court of Auditors*, cited above, paragraph 67).
- 43 Furthermore, in its rejoinder the Council left open the possibility of the precise amount of the damage being determined after any judgment establishing the principle that the Community is liable and reserved the right to contest only at that subsequent stage the assessment of damage put forward by the applicant.
- 44 The plea of inadmissibility alleging that the application lacks the precision necessary to comply with the requirements of Article 44(1)(c) of the Rules of Procedure must therefore be rejected.

The applicant's lack of standing to seek the annulment of legislative provisions

- 45 In its statement in intervention, the Commission contends that the action is inadmissible inasmuch as it should be understood as seeking the annulment of Regulation No 2744/98 and of Article 5(8) of Directive 69/169, as amended. Since those provisions of general application are not of direct and individual concern to DLD Trading Co., it lacks standing to seek their annulment.

- 46 After reproducing that line of argument in its rejoinder, the Council stated at the hearing that it was abandoning reliance on it.
- 47 In accordance with settled case-law, interveners must, under Article 116(3) of the Rules of Procedure, accept the case as they find it at the time of their intervention and their submissions in an application to intervene are, under the fourth paragraph of Article 40 of the Statute of the Court of Justice, limited to reinforcing the submissions of the main party in support of whom they intervene (Joined Cases T-371/94 and T-394/94 *British Airways and Others v Commission* [1998] ECR II-2405, paragraph 75).
- 48 As an intervener, the Commission is therefore not entitled to plead a ground of inadmissibility not set out in the form of order sought by the defendant (see, to this effect, Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others v Commission* [1999] ECR II-93, paragraph 25).
- 49 It is not disputed that in the course of the proceedings the Council withdrew its plea that the applicant lacks standing to bring the action, which in any event had been raised only belatedly, at the stage of its rejoinder.
- 50 The plea of inadmissibility put forward by the Commission, an intervener, cannot therefore be upheld.
- 51 In any event, contrary to the Commission's submissions, the action brought by DLD Trading Co. cannot be regarded as seeking the annulment, on the basis of the fourth paragraph of Article 230 EC, of the contested Community provisions.

- 52 While DLD Trading Co. asks the Court to declare Regulation No 2744/98 and Article 5(8) of Directive 69/169, as amended, to be contrary to Community law, that is solely for the purpose of establishing the legal basis for a claim for damages submitted under the second paragraph of Article 288 EC and not in order to obtain, separately, the annulment of those provisions pursuant to the fourth paragraph of Article 230 EC.
- 53 In order to be entitled to bring its action for damages and to plead that the legislative provisions which, in its submission, justify the action are unlawful, DLD Trading Co. does not have to fulfil the condition that it be directly and individually concerned by those provisions for the purposes of the fourth paragraph of Article 230 EC.
- 54 The contention that the applicant lacks standing to bring the action must therefore be rejected.
- 55 It follows from the foregoing reasoning that the action is admissible.

Substance of the action

Arguments of the parties

- 56 The applicant alleges, first, that the provisions of Community law concerning the amount of the customs allowances and fiscal exemptions infringe various fundamental rights and general principles of law and, second, that those provisions were at the root of the reduction in its business activity that caused loss.

- 57 First, DLD Trading Co. contends that Regulation No 2744/98 fails to comply with the principles of the protection of legitimate expectations and of non-retroactivity in that it entered into force on 19 December 1998 and extended retroactively from 1 January 1998 the derogation enabling the Republic of Austria to limit to ECU 75 the amount of the customs allowance applicable to passenger travel.
- 58 The Council thereby gave its backing to the practice, which has no legal basis whatsoever and is manifestly contrary to Community law, unilaterally followed by the Austrian fiscal authorities from 1 January 1998 to 19 December 1998.
- 59 Article 5(8) of Directive 69/169, as amended, offends against the principle of proportionality in that it allows the Member States to limit, without conditions or restrictions, the quantities of products which travellers may import exempt from turnover tax and excise duty.
- 60 Since the contested provisions infringe general principles of Community law and certain fundamental rights protected by the Community legal order, they are vitiated by a sufficiently serious breach of superior rules of law.
- 61 The Council counters that the adoption of a common customs tariff does not prevent it from derogating therefrom where economic circumstances so require, as Article 27(d) EC moreover indicates.

- 62 The retroactive application of Regulation No 2744/98 was justified by the objective pursued by the regulation and was not such as to deceive the applicant's legitimate expectations. A circumspect and alert trader could not have been surprised by the extension of the Community derogation in question.
- 63 Furthermore, any derogation granted to Member States by a directive must be implemented within the limits marked out by the Treaty and, in particular, the limit resulting from application of the principle of proportionality.
- 64 The Council adds that, far from having seriously infringed a rule of law intended to confer rights on individuals, it duly weighed up the various public and private interests involved. The Council further points out that the allowance granted to travellers is not intended to confer rights on traders established, like the applicant, in a non-member country but only on the travellers themselves.
- 65 DLD Trading Co. contends, second, that the unlawful provisions complained of have caused it serious damage which the Council, to which the conduct giving rise to the damage is attributable, should make good under the second paragraph of Article 288 EC.
- 66 The retroactive limitation of the customs allowance expressed in terms of value, which under Regulation No 2744/98 was reduced from ECU 175 to ECU 75 on 1 January 1998, and then the increase in that allowance to just ECU 100 from 1 January 1999 significantly restricted the generally applicable amount of the allowance, ECU 175, to which the applicant's customers should have been entitled. DLD Trading Co. thus suffered considerable commercial damage from 1 January 1998.

- 67 Furthermore, the limitation, through Article 5(8) of Directive 69/169, as amended, on the maximum quantities of tobacco products capable of being imported exempt from turnover tax and excise duty also caused the applicant substantial damage from 1 July 1997.
- 68 The Council counters by stating that the applicant has not proved that it actually suffered damage since it has failed to produce documents with probative force. In the alternative, the Council rejects the assessment of damage put forward by the applicant.
- 69 DLD Trading Co. further contends in essence that the allowance of ECU 75 is laid down by way of derogation by a directly applicable Community regulation, which, in so far as it does not allow the Republic of Austria to set a different amount, is directly at the root of the damage.
- 70 The Council responds that the contested Community provisions give a certain latitude to the Austrian authorities, who were able to choose to set the allowance at a higher level. Because of the possibilities of adjustment open to those authorities, there is no direct causal link in the present case between the conduct of which the Council is accused and the alleged damage.

Findings of the Court

Causal link between the conduct of which the Council is accused and the alleged damage

- 71 It is settled case-law that, in order for the Community to incur non-contractual liability, the applicant seeking damages must prove the unlawfulness of the

alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the alleged damage (Case 26/81 *Oleifici Mediterranei v EEC* [1982] ECR 3057, paragraph 16, and Case C-257/90 *Italsolar v Commission* [1993] ECR I-9, paragraph 33).

- 72 Moreover, the causal link required by the second paragraph of Article 288 EC entails the existence of a direct link of cause and effect between the unlawfulness of the conduct of the institution concerned and the damage alleged, that is to say the damage must be a direct consequence of the conduct complained of (see Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier frères and Others v Council* [1979] ECR 3091, paragraph 21, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 51, Case T-175/94 *International Procurement Services v Commission* [1996] ECR II-729, paragraph 55, and Case T-7/96 *Perillo v Commission* [1997] ECR II-1061, paragraph 41).
- 73 The applicant has the burden of proving a direct link of that kind (Case T-168/94 *Blackspur and Others v Council and Commission* [1995] ECR II-2627, paragraph 40).
- 74 Since the three conditions for the incurring of non-contractual liability by the Community are cumulative, failure to meet one of them is sufficient for an action for damages to be dismissed (Case C-257/98 P *Lucaccioni v Commission* [1999] ECR I-5251, paragraph 14, and Case T-220/96 *EVO v Council and Commission* [2002] ECR II-2265, paragraph 39).

— The damage said to result from the limitation of the customs allowance, expressed in terms of value, applicable to imports by travellers of products other than tobacco products, alcoholic products, perfume and eau de toilette

75 It is apparent from the exposition of the legal context in paragraphs 6 to 20 above that the Republic of Austria was initially authorised by Article 2 of Regulation No 355/94, as amended by Regulation No 3316/94, not to grant in respect of the goods in question the Community customs allowance of ECU 175 until 1 January 1998 but to apply to them by way of derogation, between 1 January 1995, the date upon which the Treaty of Accession entered into force, and 31 December 1997, an allowance set at ECU 75.

76 Subsequently, Article 2 of Regulation No 355/94, as amended by Regulation No 2744/98, extended, with retroactive effect from 1 January 1998 and until 1 January 2003, the authorisation granted to the Republic of Austria to derogate from application of the Community customs allowance of ECU 175, by imposing upon it only an allowance of an amount no lower than ECU 75 until 31 December 1998 and no lower than ECU 100 from 1 January 1999, to be increased gradually to reach ECU 175 by 1 January 2003 at the latest.

77 It follows that, in adopting Regulation No 2744/98 which the applicant criticises, the Council simply required the Austrian authorities to comply with a minimum amount for the customs allowance below the generally applicable Community minimum. In so doing, the Council did not impose any obligation on the Member State concerned to make use of the derogation made available to it.

- 78 It thus remained lawful for the national authorities to adopt in domestic legislation at any time the level of the Community allowance of ECU 175, without waiting for the periods laid down by Article 2 of Regulation No 355/94, as amended by Regulation No 2744/98, to expire before bringing application of the derogation to an end.
- 79 Regulation No 2744/98 therefore constituted in that respect a mere power, free of any obligation, for the national authorities to apply minimum allowance amounts below the amounts imposed by Community law.
- 80 That regulation cannot therefore be regarded as being directly at the root of the alleged damage, by reason of the national authorities' setting of allowances of an amount which the Community legislation did not require them to adopt.
- 81 In this connection, the applicant cannot infer from the direct applicability of Community regulations that those authorities had no discretion when applying the provisions at issue.
- 82 The fact that a Community regulation is directly applicable does not in any way prevent its provisions from empowering Member States to adopt the implementing measures — whether legislative, regulatory, administrative or financial — necessary for its actual implementation (Case 230/78 *Eridania* [1979] ECR 2749, paragraph 34) or the Member States from having a discretion for that purpose (Case 31/78 *Bussone* [1978] ECR 2429, paragraph 10).

- 83 It should also be examined, so far as is relevant, whether there may otherwise be a causal link between the alleged unlawfulness of Regulation No 2744/98 because of its retroactive effect from 1 January 1998 and the damage which the applicant claims to have suffered from that date until 19 December 1998, when Regulation No 2744/98 entered into force.
- 84 Even if Regulation No 2744/98, which entered into force on 19 December 1998, was unlawful in that it extended retrospectively from 1 January 1998 the derogation granted to the Republic of Austria, it cannot in any event be considered to be directly at the root of the damage allegedly suffered by the applicant in respect of the period between that date and 19 December 1998.
- 85 It was the Austrian authorities who, without having first been empowered to do so by the Council, unilaterally decided, by Article 97a of the Law implementing customs law, as amended, which is set out in paragraph 15 above, to ‘reduce’ to ECU 75 the allowance applicable to the goods at issue, from 1 January 1998.
- 86 On that date the derogation granted to the Austrian authorities until 31 December 1997 by Article 2 of Regulation No 355/94, as amended by Regulation No 3316/94, had expired and the Community allowance set at ECU 175 should normally have begun to apply.
- 87 An allowance limited to ECU 75 was therefore granted, in respect of imports into Austria by the travellers in question between 1 January 1998 and 19 December 1998, pursuant only to provisions adopted by the Austrian authorities without prior Community authorisation.

- 88 Accordingly, if the provision of Regulation No 2744/98 designed to regularise a posteriori the situation of the Republic of Austria from the point of view of Community law, by granting it retroactive authorisation, had not been adopted, that would have had no effect on the materialisation of the damage alleged by the applicant.
- 89 The question of the legality of the retroactive derogation contained in Regulation No 2744/98 is therefore irrelevant when considering the applicant's claim for damages.
- 90 It follows from the foregoing that the damage allegedly suffered by the applicant from 1 January 1998, by reason of the limitation on the amounts of the customs allowance, expressed in terms of value, applicable to imports by travellers, does not result directly from the Community legislation claimed to be unlawful and that the wrongful conduct ascribed to the Council is thus not linked to the alleged damage by a sufficiently close causal link for Community liability to be involved.
- The damage said to result from the limitation on the quantities of tobacco products, alcoholic products, perfume and eau de toilette capable of qualifying for the fiscal exemption applicable to imports by travellers
- 91 Article 5(8) of Directive 69/169, as amended, expressly states merely that the Member States 'may reduce the quantities of the goods' admitted free of duty and tax under Article 4(1)(a) and (d) of the directive.

- 92 As is apparent from paragraph 20 above, it was Paragraph 3a of the Order of the Austrian Federal Minister for Finance concerning exemption from excise duty, as amended, which, pursuant to the power conferred on national authorities by Directive 69/169, as amended, reduced, with effect from 1 July 1997, the quantities of tobacco products admitted duty-free.
- 93 As the applicant itself observes in its application, it was actually those national provisions which substantially reduced the quantities of the goods concerned that could be imported by relevant travellers free of excise duty.
- 94 In those circumstances, the Council's conduct cannot be considered to be directly at the root of the damage allegedly caused to the applicant from 1 July 1997, by reason of the reduction in the quantities of the products concerned admitted free of excise duty.
- 95 It was thus in exercise of a power given to the Republic of Austria by the two contested items of Community legislation, namely Regulation No 2744/98 and Article 5(8) of Directive 69/169, that the Austrian authorities applied customs allowances, expressed in terms of value, of an amount below the Community level of ECU 175 and restricted the quantities of goods admitted duty-free to a fraction of the maximum authorised by the Community legislature.
- 96 A direct causal link between the Council's conduct and the damage alleged by the applicant cannot therefore be found with a view to holding the Community liable.

97 The action for damages must consequently be dismissed, without there being any need to consider whether the applicant has proved wrongful conduct on the part of the Commission or to assess whether the applicant has actually suffered the damage alleged by it and the extent of that damage.

Costs

98 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.

99 Since DLD Trading Co. has been unsuccessful, it must be ordered to bear, in addition to its own costs, those incurred by the Council, in accordance with the latter's application for costs.

100 Pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States and Community institutions which have intervened in proceedings are to bear their own costs.

101 The Commission, the Republic of Austria and the Republic of Finland must therefore be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders the applicant to bear its own costs and those incurred by the Council;**
3. **Orders the Commission, the Republic of Austria and the Republic of Finland to bear their own costs.**

Vesterdorf

Lindh

Legal

Delivered in open court in Luxembourg on 17 December 2003.

H. Jung

B. Vesterdorf

Registrar

President