JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

27 September 2005 *

In Case T-26/03,

GeoLogistics BV, formerly LEP International BV, established in Schiphol Rijk (Netherlands), represented initially by H. de Bie and K. Schellaars, and subsequently by H. De Bie and A. Huizing, lawyers,

applicant,

v

Commission of the European Communities, represented by X. Lewis, acting as Agent, assisted by F. Tuytschaever, lawyer, with an address for service in Luxembourg,

defendant,

supported by

Kingdom of Spain, represented by L. Fraguas Gadea and J.M. Rodríguez Cárcamo, abogados del Estado, with an address for service in Luxembourg,

intervener,

* Language of the case: Dutch.

APPLICATION for annulment of Commission Decision REM 08/00 of 7 October 2002 declaring there to be no grounds for the applicant to be granted remission of import duties, as requested in the application submitted by the Kingdom of the Netherlands,

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

composed of J.D. Cooke, President, R. García-Valdecasas and I. Labucka, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 12 April 2005,

gives the following

Judgment

Legal context

Rules relating to external Community transit

1 Under Articles 37, 91 and 92 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, 'the Customs

Code'), non-Community goods brought into the Community which, instead of being immediately subject to import duties, are dealt with under the external transit procedure, can move, under customs supervision, throughout the Community customs territory until they are produced at the customs office of destination.

2 The person authorised to use the external Community transit procedure is defined in the Customs Code as 'the principal'. As such, that person is responsible for production of the goods intact at the customs office of destination by the prescribed time-limit and with due observance of the procedure (Article 96 of the Customs Code). Those obligations end when the goods and the corresponding documents are produced at the office of destination (Article 92 of the Customs Code).

3 Under Article 94 of the Customs Code, the principal must provide a guarantee in order to ensure payment of any customs debt or other charges which may be incurred in respect of the goods. Article 191 of the Customs Code states, in that connection, that, at the request of the person concerned, the customs authorities are to allow comprehensive security to be provided to cover two or more operations in respect of which a customs debt has been or may be incurred. Under Article 198 of the code, where the customs authorities establish that the security provided does not ensure, or is no longer certain or sufficient to ensure, payment of the customs debt within the prescribed period, they are to require the principal, at his option, to provide additional security or to replace the original security with a new security.

4 Pursuant to Articles 341, 346, 348, 350, 356 and 358 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the Customs Code (OJ 1993 L 253, p. 1), as amended ('the implementing regulation'), the goods concerned must first of all be presented at the customs office of departure accompanied by a T 1 declaration. The office of departure prescribes

the period within which the goods must be presented at the office of destination, enters the necessary particulars on the T 1 declaration, retains its own copy and returns the other copies of the T 1 declaration to the principal. The goods are transported under cover of the T 1 document. Following presentation of the goods, the office of destination records on the copies of the T 1 document it receives the details of controls carried out and sends a copy of that document to the office of departure without delay, normally through a central office.

5 Article 203(1) of the Customs Code provides that a customs debt on importation is incurred through the unlawful removal from customs supervision of goods liable to import duties. Under Article 203(3) the persons responsible for that debt include the person required to fulfil the obligations arising from the use of the customs procedure under which those goods are placed.

6 Article 217 of the Customs Code provides that each and every amount of import duty or export duty resulting from a customs debt is to be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium ('entry in the accounts'). Article 220(1) of the Customs Code provides that where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 of the code, or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered must be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor. That time-limit may be extended in accordance with Article 219. Under Article 221(1) of the Customs Code, as soon as it has been entered in the accounts, the amount of duty must be communicated to the debtor in accordance with appropriate procedures.

7 Article 379(1) of the implementing regulation provides that where a consignment has not been presented at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure is to notify the principal of this fact as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration. Subparagraph (2) provides that the notification must indicate, in particular, the period within which proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed can be furnished to the office of departure. That time-limit is three months from the date of the notification.

Rules relating to repayment or remission of import duties or export duties

8 Article 239 of the Customs Code provides that import duties or export duties may be repaid or remitted in situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

9 Article 239 of the Customs Code has been explained and developed by the implementing regulation, in particular by Articles 899 to 909 thereof. Article 905(1) of the implementing regulation establishes that, where the national customs authority to which an application for repayment or remission has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which that authority belongs is to transmit the case to the Commission.

Facts

The external Community transit operations at issue

10 Between 16 January and 7 August 1995, the applicant, an undertaking established in the Netherlands and formerly called LEP International BV, drew up, in its capacity as a customs agent, 14 external Community transit documents for the transportation of various consignments of meat (in particular, beef, calf sweetbreads and poultry) to Morocco and acted as principal for those operations. Those documents were issued on behalf of a single commissioning principal, the United Kingdom company, Hector International. The following documents are of particular relevance:

— No 5100507 of 16 January 1995;

— No 5100508 of 16 January 1995;

— No 5102442 of 8 March 1995;

— No 5102443 of 8 March 1995;

— No 5104186 of 25 April 1995;

— No 5104187 of 25 April 1995;

— No 5104188 of 25 April 1995;

— No 5105833 of 12 June 1995;

— No 5105896 of 13 June 1995;

— No 2501311 of 17 June 1995;

— No 5106710 of 4 July 1995;

— No 5106874 of 7 July 1995;

— No 5107619 of 28 July 1995;

— No 5107922 of 7 August 1995.

11 Following receipt of notification from the Belgian authorities pointing out irregularities relating to consignments of frozen calf sweetbreads, the Douane informatie Centrum (Customs investigations service 'the CIS') in Rotterdam (Netherlands) opened an investigation, in the course of which it selected a number of declarations for more thorough consideration. On 20 March 1995, the Rotterdam

CIS wrote to the Spanish customs authorities to ask them whether the customs document relating to T 1 declaration No 5100508, completed by the applicant on 16 January 1995, had been submitted for discharge. By fax of 20 March 1995, the Spanish authorities replied that the document did not appear in the records of the customs office in Cadiz (Spain). By fax of 23 March 1995, the Cadiz customs authorities informed the Netherlands authorities that the stamp on the declaration in question was a forgery of the stamp used by the Cadiz customs office and that the signature on the document was not that of any of that office's officers. On 31 March 1995, the Rotterdam CIS pointed this irregularity out to the Haarlem Fiscale Inlichtingen en Opsporingsdienst (Tax Information and Investigation Service) ('the FIOD'). On 18 April 1995, the Haarlem FIOD passed the file over to the Rotterdam FIOD.

12 On 16 May 1995, in relation to a samples control, the Kerkrade customs office (Heerlen, Netherlands) sent the Cadiz customs authorities two requests for post-clearance checking of T 1 documents Nos 5102442 and 5102443, issued by the applicant on 8 March 1995. On 29 June 1995, the Spanish authorities informed the Netherlands authorities that the customs documents had not been presented at the office of the competent authority, that the two stamps were forgeries and that the signatures were not those of any of the officials in the office of the competent authority. On 11 July 1995, the Kerkrade customs office passed that information to the Rotterdam FIOD.

13 On 12 June 1995, the Kerkrade customs office, in the course of a further control, sent the customs authorities in Cadiz two requests for post-clearance checking of customs documents T 1 Nos 5104187 and 5104188, issued by the applicant on 25 April 1995. On 10 July 1995, the Spanish authorities informed the Netherlands authorities that the customs documents had not been presented at the office of the competent authority and that the stamps and the signatures were forged. On 19 July 1995, the Kerkrade customs office passed these findings to the Rotterdam FIOD.

14 On 9 August 1995, the Netherlands tax authorities contacted the applicant about the declarations which had been improperly discharged. On 14 August 1995, the Netherlands authorities raided the applicant's offices and took away the files pertaining to the external Community transit declarations made out for Hector International.

15 The Netherlands customs authorities' investigation revealed that 14 customs declarations issued by the applicant had not been properly discharged, since the goods had been unlawfully removed from customs supervision. The Netherlands customs authorities therefore held, in accordance with Article 203 of the Customs Code, that a customs debt had been incurred by the applicant, in view of its status of principal under the external Community transit procedure in the operations at issue. Between January and April 1996, the Netherlands authorities sent the applicant the corresponding recovery notices for the import duties for which it was liable. Subsequently, the Netherlands tax authorities cancelled the recovery notices corresponding to the applicant's declarations concerning two consignments of meat which had been destroyed by a fire in Spain (T 1 No 5107619 of 28 July and T 1 No 5107922 of 7 August 1995).

Administrative procedure relating to the application for remission of import duties

16 On 21 August 1996, the applicant applied to the Netherlands customs authorities for remission of import duties.

17 On 23 March 2000, the Netherlands authorities applied to the Commission for the applicant to be granted remission of import duties.

18 On 24 May 2000, the Commission sent a first request for additional information to the Netherlands authorities, by which it asked to be informed of the exact amount of the remission requested. By letter of 16 June 2000, the Netherlands authorities stated that the application for remission concerned only the declarations drawn up after 23 March 1995, the date on which the Spanish customs authorities first informed their Netherlands counterparts of the fact that there were irregularities which concerned a declaration made by the applicant. The application for remission related, in particular, to a total amount of NLG 925 706.20, namely EUR 420 067.16.

19 On 4 July 2000, the Commission sent the Netherlands authorities a second request for additional information. That request concerned exchanges of information between the Netherlands and the Spanish authorities and, in particular, the fax of 23 March 1995 sent by the Spanish authorities to the Netherlands customs authorities. The latter replied to the Commission on 28 July 2000.

20 On 24 November 2000, the Commission made a third request for additional information, relating, inter alia, to the way in which the customs authorities' investigation into the improperly discharged declarations had proceeded, to the role played by the applicant in the operations at issue and to the criteria used by the Netherlands authorities in reaching the conclusion that there was no obvious negligence on the part of the applicant. The Netherlands authorities replied by letter of 8 August 2001, to which they attached a record of official proceedings of the Rotterdam FIOD dated 2 September 1996.

21 By letter of 11 October 2001, the Commission informed the applicant that it anticipated refusing the application for remission of import duties: it set out its objections and called on the applicant to comment within one month.

22 By letter of 9 November 2001, the applicant expressed its view on the objections put forward by the Commission. The applicant drew the Commission's attention, in particular, to the fact that the fraud had been made possible by the conduct of one or a number of Spanish customs officers or by failures of the Spanish customs authorities to comply with customs regulations.

23 In the wake of the applicant's allegations, the Commission, on 22 November 2001, sent a further request for additional information to the Netherlands authorities. The fourth request essentially concerned the alleged involvement of Spanish customs officers in the fraud. The Commission also asked for fuller information on the factors which had prompted the Netherlands authorities to find that there was no negligence on the applicant's part. By letter of 2 August 2002, the Netherlands authorities replied to the Commission's fourth request for additional information.

24 On 7 October 2002, the Commission adopted Decision REM 08/00 stating that there were no grounds in the present case for a remission of import duties ('the contested decision').

25 In the contested decision, the Commission found, first, there to be no special situation within the meaning of Article 239 of the Customs Code. Second, the Commission stated that this was a case of obvious negligence on the applicant's part, in particular because the applicant, although it was an experienced trader deemed to be familiar with customs regulations and with the commercial risks inherent in its business, had not taken all the steps necessary to guard against those risks, by, for example, monitoring the persons involved and taking out the appropriate insurance.

26 By letter of 10 December 2002, the Netherlands authorities informed the applicant that the application for remission of duties had been refused.

Procedure and forms of order sought

27 The applicant brought the present action by application lodged at the Court registry on 28 January 2003. By letter of 31 January 2003, it completed its application and ensured that it was in order.

28 On 30 April 2003, the Kingdom of Spain applied for leave to intervene in support of the form of order sought by the Commission. By order of 5 June 2003, the President of the Fifth Chamber of the Court of First Instance granted the Kingdom of Spain leave to intervene. The Kingdom of Spain lodged a statement in intervention on 23 July 2003.

29 Upon hearing the report of the Judge Rapporteur, the Court (First Chamber) decided to open the oral procedure. In the context of measures of organisation of procedure, the Court asked the Commission to produce certain documents. The Commission complied with that request within the prescribed period.

30 The parties presented oral argument and answered questions put to them by the Court at the hearing on 12 April 2005.

31 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

32 The Commission and the Kingdom of Spain, which intervened in support of the Commission, contend that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Law

33 In support of its application the applicant puts forward a single plea in law alleging errors of assessment and breach of the obligation to state reasons. The plea is divided into two parts. The first part claims that there was a special situation within the meaning of Article 239 of the Customs Code and Article 905 of the implementing regulation. The second part claims that there was no deception or obvious negligence within the meaning of those provisions.

34 As a preliminary point, it must be borne in mind that Article 239 of the Customs Codes provides for the possibility of either full or partial repayment of import or export duties which have been paid or remission of a customs debt. The rule in that provision was explained by Article 905 of the implementing regulation, which constitutes a general fairness clause, intended, in particular, to cover exceptional situations which, in themselves, do not fall within any of the cases provided for in Articles 900 to 904 of the implementing regulation (Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraph 18).

35 It follows from the wording of Article 905 that repayment of import duties is subject to two cumulative conditions, namely, first, the existence of a special situation and, second, the absence of deception or obvious negligence on the part of the operator concerned (Case T-282/01 *Aslantrans* v *Commission* [2004] ECR II-693, paragraph 53).

First part of the plea: existence of a special situation

Introduction

— Arguments of the parties

36 The applicant submits that the Commission was wrong to conclude that there was no special situation in this instance. In particular, the following circumstances constitute a special situation; first, the omissions and negligence of the Netherlands authorities in uncovering the fraud and their delay in informing the applicant of irregularities concerning the customs documents issued by it, of which they were nevertheless aware at an early stage; second, the possible involvement of a Spanish customs official in the fraud and the failure of the Spanish customs authorities to comply with the Community customs regulations; and, third, the Commission's breaches of its own obligations in customs matters.

37 The Commission submits that there is no special situation within the meaning of the customs legislation. The fact that one of the two cumulative conditions laid down by Article 239 of the Customs Code was not met was sufficient to provide a reason for the refusal of the application for remission of import duties.

38 The Kingdom of Spain submits that this case entails no special situation such as to justify a remission of import duties and observes in particular that there is no evidence nor any arguments which establish that Spanish officials were involved in the fraudulent operations referred to in the contested decision.

— Findings of the Court

39 It must be recalled at the outset that, by virtue of settled case-law, factors which might constitute a special situation within the meaning of Article 905 of the implementing regulation exist, where, in view of the objective of fairness underlying Article 239 of the Customs Code, factors liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business are found to exist (*Trans-Ex-Import*, paragraph 22; Case C-253/99 *Bacardi* [2001] ECR I-6493, paragraph 56, and *Aslantrans* v *Commission*, paragraph 56). The fairness clause provided for by the Community customs legislation is intended to apply where the circumstances characterising the relationship between an economic operator and the administration are such that it would be inequitable to require the trader to bear a loss which he normally would not have incurred (see, by analogy, Case 58/86 *Coopérative agricole d'approvisionnement des Avirons* [1987] ECR 1525, paragraph 22, and Case C-222/01 *British American Tobacco* [2004] ECR I-4684, paragraph 63).

40 In order to determine whether the circumstances of the case constitute a special situation, the Commission must assess all the relevant facts (see by analogy, Case T-346/94 *France-aviation* v *Commission* [1995] ECR II-2841, paragraph 34, and Case T-205/99 *Hyper* v *Commission* [2002] ECR II-3141, paragraph 93). Although the Commission has some discretion in applying a fairness clause, it is required to

exercise that power by genuinely balancing, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the bona fide importer in not suffering loss which goes beyond normal commercial risk (see, by analogy, *Hyper* v *Commission*, paragraph 95).

41 It is in the light of those principles that the Court must consider whether the Commission made a manifest error of assessment in holding, in the contested decision, that the circumstances relied on by the applicant did not constitute a special situation.

The alleged negligence of the Netherlands authorities in detecting the fraud and their delay in informing the applicant of the irregularities concerning the customs documents issued by it

— Arguments of the parties

42 The applicant submits that, although fraud is a normal risk which must be borne by traders, the fact that the national authorities, for the sake of the investigation, deliberately allowed offences and irregularities to be committed, thereby causing the principal to incur a customs debt, placed the principal in an exceptional situation in comparison with other operators engaged in the same business (Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 56).

43 The applicant points out that on 23 March 1995 the Spanish authorities told the Rotterdam CIS that the stamps on one of its T 1 documents were forged. On 31 March 1995, the Rotterdam CIS informed the Haarlem FIOD of that irregularity,

which started an investigation. Therefore, the Netherlands authorities were aware, as early as March 1995, of the existence of a fraud affecting the applicant. Nevertheless it was five months before the Netherlands authorities informed the applicant of the fraud. In that connection, it cannot but be the case that the Netherlands authorities made a deliberate decision to inform it of the situation only at a later stage. Since the customs authorities and the Rotterdam CIS were both part of the Netherlands tax authorities, the latter could not maintain that different bodies were responsible for investigating the fraud in order to justify the delay in providing the applicant with information.

44 Should the Court take the view that the Netherlands authorities did not deliberately allow a fraud to be committed, the applicant maintains that they were negligent in fact, in particular in their failure to inform it immediately of the fraudulent schemes of which they were aware. It also maintains that the Netherlands authorities did not act with due diligence in the course of their investigations into the irregularities concerned.

45 The fact that the Netherlands customs authorities withheld that information cannot be justified by the argument that it was first necessary to establish a link with other documents. In March 1995, those authorities were already in a position to establish the connection between the T 1 documents made out on behalf of Hector International and the forged stamps. Although it is true that the declarations at issue concerned different products, the fact remains that every case concerned the transport of meat and that the declarations always referred to the same declarant, the same consignee, the same carrier and the same customs office of issue and destination. The consequence of the negligence of those authorities in identifying the relevant pieces of information and in making the connection between them and of the fact that their investigation took so long was that the applicant, which had not been alerted to the irregularities and had therefore continued to issue T 1 documents, unnecessarily incurred a customs debt. The applicant should not have to bear the loss resulting from the fact that the customs authorities acted wrongly and negligently and acted belatedly.

46 The applicant also observes that, under Article 379(1) of the implementing regulation, the customs authorities must notify the declarant of any irregularity as soon as possible. Even if it cannot be established with absolute certainty that there is fraud, mere suspicions on the part of the customs authorities should prompt them to alert the operator concerned.

47 Moreover, the applicant submits that under Article 94 of the Customs Code, it was required, as the person making the customs declaration, to provide a guarantee for the T 1 documents issued. Thus, it set up a comprehensive guarantee to cover the operations taking place over time, in accordance with Article 191 of the Customs Code. Since the customs authorities had found that document T 1 No 5100508 of 16 January 1995 was not to be considered to have been discharged, it was obvious that it would be found liable to pay duties, which would have to be met from the guarantee provided. However, the customs authorities did not proceed within a short time to enter the duties in the accounts and recover the debt, in breach of the provision made by Article 220(1) and Article 221(1) of the Customs Code. Consequently, the applicant's security had ceased to be adequate by the end of March 1995. Accordingly, the applicant should not have been in a position to issue T 1 documents after that date, unless and until additional security had been provided in accordance with Article 198 of the Customs Code. The failure by the Netherlands authorities to comply with the Community customs legislation caused serious loss to the applicant.

48 The applicant concludes that it could have avoided incurring the subsequent customs debt if the Netherlands authorities had informed it of the possible occurrence of fraud. By intervening too late, and in the wrong way, the Netherlands authorities created a special situation as a result of which the applicant found itself in a more unfavourable situation than that of other economic operators (Case T-330/99 *Spedition Wilhelm Rotermund* v *Commission* [2001] ECR II-1619).

49 The Commission contends that in this instance the Netherlands authorities were not aware of the fraud and did not knowingly allow offences and irregularities to be

committed for the sake of the investigation, contrary to the situation obtaining in the *De Haan* case. As is apparent both from the Netherlands authorities' application for remission and from the letter of 24 September 1998 from the contributions department for the Rotterdam customs district rejecting the applicant's claim, it was only on 24 July 1995 that the FIOD established a link between the various irregularities uncovered by the various initially distinct investigations.

50 The Commission also submits that the Netherlands authorities did not take an unreasonable amount of time in establishing a link between the available information and in informing the applicant of it. Thus, the time which elapsed after receipt in the Netherlands of the notice about the first document to have been irregularly discharged was wholly necessary in order to establish the link with the irregularities found in the case of four other documents and determine the nature and extent of those irregularities. That was confirmed by the Netherlands tax authorities in their decision rejecting the applicant's claim. Throughout the investigation the relevant departments of the Netherlands authorities worked very hard.

51 The Commission also contends that the Netherlands authorities are not required by law to inform a declarant as soon as they find irregularities in a Community transit procedure and suggests that such an obligation would immediately preclude any investigation into whether the declarant was involved in the irregularities concerned. It is not appropriate to extend the protection of the *De Haan* judgment to this case, since a decision to that effect is at variance with the strict interpretation which must obtain in the case of provisions providing for remission of import and export duties (Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877).

52 As to the applicant's arguments concerning the breach by the Netherlands authorities of Article 379(1) of the implementing regulation and Articles 220(1)

and 221(1) of the Customs Code, the Commission submits that these are new pleas, put forward by the applicant for the first time at the reply stage and not founded on matters brought to light during the proceedings. Consequently, the Commission asks the Court to declare them inadmissible. In the alternative, the Commission contends that it is clear from the wording of Article 379(1) of the implementing regulation that it was before the end of the 11th month following the date of registration of the Community transit declaration that the Netherlands authorities had to notify the declarant. As regards the alleged infringement of Articles 220 and 221 of the Customs Code, the Commission submits that, as soon as the Netherlands authorities established that there was a fraudulent scheme, they were quick to notify the applicant and proceeded, in accordance with the applicable legislation, to enter the customs debt thus established in the accounts, to notify the applicant and to recover the debt.

— Findings of the Court

53 The first point to be made is that the Court cannot accept the Commission's argument that the applicant advanced for the first time at the reply stage two new pleas in law, namely infringement by the Netherlands authorities of (i) Article 379(1) of the implementing regulation and (ii) Articles 220(1) and 221(1) of the Customs Code. It must be stated that the applicant uses those arguments merely to explain and develop its claim that the Netherlands authorities allegedly delayed informing it of the existence of irregularities concerning the discharge of its customs declarations. It should be noted that that claim does indeed form part of the application bringing these proceedings (see, in particular, paragraph 24 and paragraphs 34 to 40 of the application).

54 As to the merits, it must be stated that the demands of an investigation aimed at identifying and apprehending the persons who have carried out or are planning a fraud, or the accomplices of those persons, may justify a deliberate omission to

inform the principal about the investigation fully or at all, even where the principal is in no way implicated in the perpetration of the fraud (*De Haan*, paragraph 32). The national authorities are therefore properly entitled to allow offences or irregularities to be committed in order better to dismantle a network, identify perpetrators of fraud and obtain or consolidate evidence. However, to place on the person liable the burden of a customs debt arising from those choices made in connection with the prosecution of offences would be inimical to the objective of the fairness clause which underlies Article 905 of the implementing regulation inasmuch as that person would thereby find himself in an exceptional situation in comparison with other operators engaged in the same business. Therefore, the failure, on account of the demands of an investigation conducted by the customs authorities or the police, to inform the person liable that the investigation is being carried out constitutes, in the absence of any deception or negligence on the part of the person liable, a special situation (*De Haan*, paragraph 53, and *British American Tobacco*, paragraph 64; Case T-332/02 *Nordspedizionieri di Danielis Livio and Others* v *Commission* [2004] ECR II-4405, paragraph 51).

55 In this instance, as is clear from the report of the Rotterdam FIOD of 2 September 1996, the fraud affecting the declarations issued by the applicant was discovered in the course of three independent inquiries by various units of the Netherlands authorities. The first irregularity was detected on 20 and 23 March 1995 by the Rotterdam CIS in an investigation into the transportation of calf sweetbreads (see paragraph 11 above). The second was unearthed on 29 June 1995 by the Kerkrade customs office in the course of a samples control (see paragraph 12 above). The third was discovered on 10 July 1995 by the Kerkrade customs office following the finding that, in two customs declarations, the box marked 'Control by office of destination' had not been filled in (see paragraph 13 above). The last two irregularities also concerned meat products other than calf sweetbreads, namely beef and poultry. It should also be noted that the Rotterdam FIOD did not establish any link between those three cases until 24 July 1995. Accordingly, it must be concluded that in this instance the Netherlands customs authorities did not knowingly allow offences to be committed in order to identify and apprehend the perpetrators of the fraud or their accomplices.

56 In any event, as early as 23 March 1995 the Netherlands customs authorities were aware of a case of fraud concerning an external Community transit operation for which the applicant had drawn up the declaration and in respect of which the applicant was the principal for the purposes of the transit procedure. However, the Netherlands authorities notified the applicant only on 9 August 1995, four and a half months later.

57 It must be noted that Article 379(1) of the implementing regulation provides that where — as is the case here — a consignment has not been presented at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure is to notify the principal of this fact 'as soon as possible'. Although Article 379(1) thus does not lay down a specific time-limit within which the principal must be notified, merely providing that notification must take place before the end of the 11th month following the date of registration of the Community transit declaration, it none the less places a duty of care on national authorities in relation to notification of the principal.

58 Notifying the person concerned that the customs procedure has not been discharged serves a number of purposes. First, under Article 379(2) of the implementing regulation, the notification must indicate, in particular, the time-limit of three months within which the trader concerned can provide to the office of departure proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed. Thus, notification of that time-limit to the principal constitutes a prerequisite for the recovery of the customs debt by the customs authorities and is intended to protect the principal's interests (Case C-300/03 *Honeywell Aerospace* [2005] ECR I-689, paragraphs 23 and 24). Second, notification makes the bona fide operator aware that a consignment has been deflected and thus enables him to take the measures necessary to prevent a customs debt being incurred as a result of similar subsequent consignments. Third, the fact that the principal is aware of the irregularity may allow him to provide additional security to the customs authorities in order to ensure payment of the customs debt in accordance with Article 198 of the Customs Code.

59 The fact that the customs authorities do not immediately inform the person concerned of the discovery of a fraud affecting him and go on to make some preliminary enquiries about him does not amount to negligence on their part. Just as it may be legitimate for those authorities to allow offences to be committed in order better to dismantle a network, identify the perpetrators of fraud and obtain or consolidate evidence (*De Haan*, paragraph 53), they may legitimately open investigations into irregularities discovered in the course of a Community transit operation without first notifying the principal, in order, inter alia, to determine the nature and the extent of the irregularities identified and assess the responsibility of the various operators involved in the operation at issue, including the principal himself. If the persons involved in the customs operation concerned were given prior notice of the fact that fraud has taken place, that could actually jeopardise the investigation and make it more difficult to assemble the relevant evidence.

60 However, as the Court stated in *De Haan*, although the exercise by the customs or police authorities of their investigative powers is legitimate, the demands of an investigation conducted by those authorities constitute, in the absence of any deception or negligence on the part of the person liable, and where that person has not been informed that the investigation is being carried out, a special situation (*De Haan*, paragraph 53). As the Commission acknowledged at the hearing, the fact that the principal, the victim of a fraud, is not informed of the fraud is, from a specific time to be determined in the light of the circumstances of the case, a factor of such a kind as to place the principal in a special situation, as regards the customs debt relating to fraudulent operations taking place after the discovery of the fraud and connected to it but before the principal has been notified of it.

61 To place on the bona fide operator the burden of a customs debt arising from the failure of the national authorities to alert him to the existence of a fraud affecting him, or their delay in so doing, would be inimical to the objective of the fairness clause inasmuch as the person liable would thereby find himself in an exceptional situation in comparison with other operators engaged in the same business.

Therefore, it would not be equitable to require that operator to bear a loss which he normally would not have incurred (*Coopérative agricole d'approvisionnement des Avirons*, paragraph 22, *British American Tobacco*, paragraph 63) and which would go beyond the normal commercial risk relating to his business (*Hyper* v *Commission*, paragraph 95).

62 In this instance, it is necessary to determine the point at or after which the Netherlands authorities could have informed the applicant about the irregularities in question. On 23 March 1995 the Rotterdam CIS uncovered the first case of fraud affecting the applicant, that relating to document T 1 No 5100508 of 16 January 1995. The Haarlem FIOD became aware of the fraud on 31 March 1995 and the Rotterdam FIOD was notified on 18 April 1995. The parties agree that the FIOD was the authority competent to investigate the irregularities at issue and to inform the applicant of them. The Rotterdam FIOD began its investigation into the fraud on or after 18 April 1995. However, it informed the applicant of the irregularity only on 9 August 1995.

63 In view of the foregoing, it must be held that, although the Netherlands authorities were not negligent in the conduct of their investigation, the fact that a period of time elapsed on account of the demands of that investigation before they alerted the applicant to the fraud concerning it is a factor which placed the applicant in a special situation in relation to a part of the customs debt pertaining to the external Community transit operations at issue. If the customs authorities had informed the applicant of the irregularity in the declarations within a reasonable period commencing on 18 April 1995, the date on which the Rotterdam FIOD was informed of the irregularity, it could have taken the necessary measures, after the fraudulent diversion of the consignments concerned, to avoid being liable for a customs debt deriving from consignments made on and after 12 June 1995. Accordingly, the Court finds that the conditions for there to be a special situation are met in this instance so far as the customs debt arising from the declarations completed by the applicant on and after 12 June 1995 is concerned.

64 Accordingly, it must be held that the Commission made a manifest error of assessment in taking the view that, in relation to the customs debt deriving from operations carried out on and after 12 June 1995, the applicant was not in a special situation within the meaning of Article 239 of the Customs Code and Article 905 of the implementing regulation.

65 Consequently, there is no need to adjudicate on the other factors put forward by the applicant and the first part of the plea must be accepted.

Second part of the plea: absence of deception and obvious negligence on the applicant's part

Arguments of the parties

66 The applicant maintains that it is not disputed that it acted in good faith and that it was not involved in the fraud. The Commission none the less claims — wrongly — that its conduct was obviously negligent.

67 The applicant states that the Netherlands authorities, in their application for remission of duty, pointed out to the Commission that it could not be claimed that there was any obvious negligence on the applicant's part. They restated that view throughout the administrative procedure, in particular in their answers to the Commission's two requests for additional information dated 8 August 2001 and 2 August 2002. The applicant submits that the Commission's assessment of whether such negligence has occurred must be carried out on the basis of all the relevant

information, including the statements of the national authorities (*France-aviation* v *Commission*, paragraph 36), before which the operator concerned has the right to be heard (Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraphs 27 to 29). The Commission disregarded the view of the Netherlands authorities without, however, sufficiently explaining its reasons for doing so.

68 Likewise, as is clear both from the Commission's practice (Commission decision REM 21/00, 22/00, 23/00 and 24/00 of 23 July 2001, paragraph 42) and from case-law (Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraphs 159 and 160), it is necessary, for a finding of obvious negligence, to consider whether the conduct of the operator concerned was at variance with usual commercial practice. In this instance, the applicant's conduct was consistent with such practices. As regards, in particular, the allegation that it did not take out insurance in respect of the carriage of the goods, the applicant states that the Netherlands authorities, in their response of 2 August 2002 to the Commission's request for information, stated that at the material time it was not easy to take out insurance and that was it not customary to do so either. Moreover, it maintains that whether or not it had taken out insurance has no bearing on whether it acted in a manner which was obviously negligent. Finally, although the Commission stated that the taking out of insurance was only one of the criteria used in deciding whether to make a finding of obvious negligence, it did not identify or explain the other criteria applied in this instance. The applicant concludes that it was therefore unable to react in an appropriate manner.

69 Nor did the applicant act negligently in its commercial relationship with Hector International. Since March 1993, Hector International had been acting wholly satisfactorily as a carrier for LEP International UK, a company in the same group as the applicant. At Hector International's request, LEP International UK put it in touch with the applicant. The applicant began to prepare T 1 documents for Hector International only after it had made sure that the latter was solvent and had received a statement relating to Hector International's responsibilities and its guarantees in the event of customs documents being wrongly discharged. Moreover, the applicant ensured that only a limited number of T 1 documents were drawn up on each

occasion and that further documents were completed only when the earlier documents could reasonably be considered to have been discharged. It always pressed Hector International to return the 'slips' from copy No 5 of the T 1 documents, which always bore the Spanish customs stamp and the signature of a Spanish customs official, both of which nevertheless subsequently turned out to be forgeries. The applicant also received in return for each consignment the 'CMR' consignment notes signed and stamped received, which proved that the meat had reached its destination. Therefore, the applicant did everything reasonable to guard against any loss resulting from the failure to discharge customs documents and thus did not act negligently.

70 The Commission contends that it established sufficiently in the contested decision that the applicant acted with obvious negligence.

71 The question as to whether there was obvious negligence on the applicant's part is unconnected to the question as to whether or not it acted in good faith. The Commission accepts that the Netherlands customs told it that there was neither deception nor obvious negligence on the applicant's part. However, it asked them on two occasions to be more specific about their position, first in its request for information of 24 November 2000 and, second, in its request for information of 22 November 2001. However, the Netherlands authorities' answers were of no help in determining whether the applicant was guilty of obvious negligence in this case, since, in their responses, the authorities merely applied the principle of the presumption of innocence, considering the applicant to be bona fide until the contrary was proved.

72 The Commission observes that the particular responsibilities of the principal under the Community transit procedure must be taken into account when determining

whether it has acted in a manner which is obviously negligent. As is stated at point 46 of the contested decision, the Commission must bear in mind for that purpose the experience of the operator concerned, the degree of care which it exercised and the complexity of the rules (Case T-75/95 *Günzler Aluminium* v *Commission* [1996] ECR II-497). In its capacity as a customs forwarding agent, the applicant was an experienced economic operator which was duty bound to understand the commercial risks inherent in its business (point 47 of the contested decision). Furthermore, the rules relating to transit operations clearly set out the duties of the principal and the responsibilities following from them (point 48 of the contested decision). Finally, the declarant should have made all the necessary arrangements to guard against the commercial risk: it failed to do so (points 49 and 50 of the contested decision).

73 As regards in particular whether the applicant acted with due care, the Commission states that the taking out of insurance is only one criterion. The Commission, in view of the facts of this case, contends that it rightly concluded that the applicant had not taken the precautions necessary to guard against possible risks.

74 As to the steps which the applicant took to make sure that Hector International was reliable, the Commission observes that the applicant mentioned those facts only in its reply. The applicant signed a statement in which it confirmed that it had nothing to add to the file provided by the Netherlands authorities and that it had an opportunity to put forward its observations on the Commission's letter of 11 October 2001, in which the latter made an express finding of obvious negligence on the part of the applicant. Therefore, in the Commission's submission, the applicant has no basis for relying on those new matters of fact at this stage of the proceedings for the purpose of its claim that the Commission failed adequately to state reasons in the contested decision.

Findings of the Court

75 In order to determine whether or not there is obvious negligence within the meaning of Article 239 of the Customs Code and Article 905 of the implementing regulation, account must be taken in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, and the relevant experience of, and care taken by, the trader (*Söhl & Söhlke*, paragraph 56).

76 In this case, the Commission stated in the contested decision, first, that the applicant, as an experienced trader, was duty bound to understand the customs rules and the commercial risks inherent in its business (point 47), second, that the rules relating to transit operations set out clearly the duties of the principal and the responsibilities following from them (point 48) and, third, that in view of its responsibilities as principal, it was the applicant's responsibility to take all the measures necessary to provide against commercial risks (point 49).

77 However, the three factors mentioned above, the complexity of the legislative provisions, the trader's relevant experience and the care taken by him, are merely criteria, on the basis of which the Commission must ascertain whether in a specific case there was obvious negligence on the part of the trader (see, to that effect, *Söhl & Söhlke*, paragraph 59). The Commission must, as part of its assessment, identify the specific acts or omissions of the person applying for remission which, taken separately or as a whole, amount to obvious negligence, and it must do so in the light of, inter alia, the criteria mentioned.

78 On that point, it must be noted that the Netherlands authorities, both in their application for remission and subsequently on two occasions during the administrative procedure before the Commission, concluded that it could not be

established that there was deception or obvious negligence on the applicant's part. The Commission none the less held, in the contested decision, that the applicant's conduct was to be regarded as the result of obvious negligence on its part (point 51). Although the Commission was entitled to diverge from the position adopted by the national authorities (see, to that effect, *France-aviation* v *Commission*, paragraph 36), it had a duty to prove, on the basis of the relevant facts, that the applicant acted in a manner which was obviously negligent.

79 As the Commission acknowledged at the hearing, the contested decision identifies only two specific instances of conduct which might establish that there was obvious negligence on the applicant's part. First, it failed to supervise the other parties involved and, second, it failed to take out appropriate insurance (point 49).

80 As regards the first complaint, alleging that the applicant did not supervise the other parties involved, the contested decision wholly fails to specify in what respect the applicant was negligent in this connection. In the absence of even the most minimal details substantiating that complaint, the Court must consider it not to have been proved. To uphold that complaint would be tantamount to considering there to have been obvious negligence on the part of every operator who is the victim of the fraudulent schemes of third parties with whom it has maintained commercial relations.

81 Furthermore, it is noteworthy that the applicant claims that it took a series of precautionary steps in relation to Hector International. Hence, it began to draw up T 1 documents for Hector International only after it had made sure that the company was solvent and had received a statement concerning its responsibilities and its guarantees in the event of customs documents being wrongly discharged. Furthermore, it ensured that only a limited number of T 1 documents were drawn up on each occasion and that further documents were completed only when the earlier documents could reasonably be considered to have been discharged. Finally,

it always insisted on the slips of copy No 5 of the T 1 documents being returned to it, which always bore a stamp from the Spanish customs and the signature of a Spanish customs official, as well as the 'CMR' consignment notes signed and stamped received. Those precautionary steps, which the Commission does not dispute, show that the applicant acted with due care and in an appropriate manner in the supervision of the parties involved in the customs operations concerned.

82 The Court cannot accept the Commission's argument that the applicant has no basis for relying on those facts because they were advanced only at the reply stage. It must be borne in mind that it is for the Commission to prove that there was in this case obvious negligence on the part of the applicant. In its letter of 11 October 2001 by which it stated its objections, the Commission did not specify why it considered the applicant to have been negligent in its supervision of the parties involved. The applicant, in its response of 9 November 2001, maintained that it had not been negligent, stating in particular that it had acted diligently in relation to transportation and that it was not in a position to check whether any irregularities had occurred at the time of discharge. Later, in the contested decision, the Commission reiterated the complaint alleging that there were shortcomings in the supervision of the parties involved but failed to give any further details. In its application in these proceedings, the applicant again stated that it was blameless as regards the irregularities and claimed that its conduct in this case was in keeping with usual commercial practice. In its defence, the Commission restated its position and disputed the applicant's statements. In view of the foregoing, fault cannot be found with the applicant for having used its reply to supplement the arguments and facts relevant to counter the position taken in the contested decision and the defence.

83 As regards the second complaint, alleging that the applicant did not take out appropriate insurance, the Court notes that, although it is the responsibility of traders to guard against ordinary commercial risks and although, consequently, the mere fact of having suffered financial loss does not constitute a special situation

within the meaning of the Community customs legislation (see, to that effect, *Hyper* v *Commission*, paragraphs 113 and 114), it cannot be accepted that as a general rule the failure to take out insurance amounts, on its own, to obviously negligent conduct on the part of the trader. The Commission did not explain in the contested decision why, given the circumstances of the case, the fact that the applicant had not insured against risks flowing from the operations at issue was obviously negligent conduct. In that regard, it must be stated that whether or not appropriate insurance has been taken out determines who will be responsible for the customs debt and the loss resulting from the operations at issue, i.e. either the customs agent or its insurer. The fact that the applicant is not able to turn to an insurance company and recover the amount of the customs debt for which it is liable, and therefore must itself assume the burden of the debt, has no bearing either on the conditions giving entitlement to remission of the debt on equitable grounds or, therefore, on the Commission's obligation to allow remission if those conditions are met. Further, the insurer could either substitute itself for the customs agent vis-à-vis the customs authorities or wait for the outcome of the agent's dealings with the Commission. Accordingly, the fact that insurance has not been taken out does not amount to negligence.

84 What is more, Article 239 of the Customs Code provides that duties may be repaid or remitted in situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. Similarly, Article 905 of the implementing regulation provides that the application for remission must be supported by evidence which might establish that there is a special situation resulting from circumstances entailing no deception or obvious negligence. It is clear from the very wording of those provisions that there must be a link between the trader's alleged negligence and the special situation. In the absence of such a link, it would be inequitable to refuse the application for remission or repayment. In this instance it is to be noted that the applicant's failure to take out insurance neither played any part in the fraud nor made discovery of the fraud more difficult. A fortiori, that circumstance is wholly unrelated to the fact that a period of time elapsed before the Netherlands authorities informed the applicant of an instance of fraud concerning one of its declarations.

85 It must therefore be concluded that the Commission made a manifest error of assessment in holding there to have been obvious negligence on the applicant's part.

86 Consequently, the second part of the plea must be accepted.

87 Accordingly, the application must be upheld.

Costs

88 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicant, in accordance with the form of order sought by the applicant.

89 Under Article 87(4) of the Rules of Procedure, the Kingdom of Spain, intervener, is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls Commission Decision REM 08/00 of 7 October 2002 in so far as it refuses to remit the import duties for which the applicant was found liable in respect of customs operations carried out by it on or after 12 June 1995;**

2. **Order the Commission to bear its own costs and to pay those of the applicant;**

3. **Orders the Kingdom of Spain to bear its own costs.**

Cooke García-Valdecasas Labucka

Delivered in open court in Luxembourg on 27 September 2005.

H. Jung J.D. Cooke

Registrar President

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