

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

12 February 2004 *

In Case T-282/01,

Aslantrans AG, established in Rickenbach bei Wil (Switzerland), represented by
J. Weigell, avocat,

applicant,

v

Commission of the European Communities, represented initially by R. Tricot and
S. Fries, and subsequently by X. Lewis and S. Fries, acting as Agents, with an
address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision REM 19/00 of 18 July
2001 refusing to grant an application by the Federal Republic of Germany for
repayment of import duties in favour of the applicant,

* Language of the case: German.

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

composed of: P. Lindh, President, and R. García-Valdecasas and J.D. Cooke,
Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on
11 November 2003,

gives the following

Judgment

Legal Background

1 Under Article 91(1)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) (hereinafter 'the Customs Code'), the external transit procedure provides for the movement from one point to another within the customs territory of the Community of non-Community goods intended for re-export to third countries, without their being subjected to import duties and other charges or to commercial policy measures.

- 2 Pursuant to Article 37 of the Customs Code, goods brought into the customs territory of the Community are, from the time of their entry, subject to customs supervision. They must remain under supervision until they are re-exported. Under Article 203(1) of the Customs Code, the unlawful removal from customs supervision of goods liable to import duties on importation gives rise to a customs duty debt.

- 3 Article 239 of the Customs Code, however, provides for the partial or full repayment of import or export duties or the remission of the amount of that customs debt, in situations other than those referred to in Articles 236, 237 and 238 of the Code and which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

- 4 Article 239 was explained and expanded by Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1) (hereinafter ‘the implementing regulation’), most recently amended, as regards the legal context which is relevant for the purposes of this case, by Commission Regulation (EC) No 1677/98 of 29 July 1998 (OJ 1998 L 212, p. 18).

- 5 Under Article 899 of the implementing regulation, where the customs authority establishes that an application for repayment or remission submitted to it is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903 of the implementing regulation and that they do not involve any deception or obvious negligence on the part of the person concerned, it is to repay or remit the amount of import duties concerned.

- 6 Article 900(1)(a) of the implementing regulation provides in that respect that import duties are to be repaid or remitted where non-Community goods placed under a customs procedure involving total or partial relief from import duties or goods are stolen, provided that the goods are recovered promptly and placed again in their original customs situation in the state they were in when they were stolen.
- 7 Article 905(1) of the implementing regulation states that, where the customs authority 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 this authority belongs is to transmit the case to the Commission. Under Article 905(2), the case sent to the Commission must include all the facts necessary for a full examination of the case presented. The Commission may ask for additional information to be supplied if it is found that the information supplied by the Member State is not sufficient to enable a decision to be taken on the case concerned in full knowledge of the facts.
- 8 Article 906a of the implementing regulation provides that, when the Commission intends to take a decision refusing repayment or remission, it must send the applicant its objections in writing, together with all the documents on which it bases those objections, and allow the applicant one month in which to state its position.
- 9 Article 907 of the implementing regulation states that the Commission's decision as to whether or not the special situation which has been considered justifies repayment or remission must be taken within nine months of the date on which the case is received by the Commission. Where the Commission has found it necessary to ask for additional information from the Member State, that period is to be extended by a period equivalent to that between the date the Commission

sent the request and the date it received the information. Similarly, when the Commission has notified the applicant of its objections, the period is extended from the time those objections are sent and the date when the response from the party concerned is received or, failing a response, the expiry date of the time-limit set for making its views known.

- 10 Under Article 908(2) of the implementing regulation, the competent authority of the Member State is to decide whether to grant or refuse the application made to it on the basis of the Commission's decision. In accordance with Article 909 of the implementing regulation, if the Commission fails to take a decision within the nine months set in Article 907, the national customs authority is to grant the application for repayment or remission.

Facts of the case

- 11 On 14 May 1997, the applicant lodged a declaration with the Customs Bureau of the Port of Antwerp (Belgium) relating to the placement of a consignment of 12 110 000 cigarettes under the external transit procedure for the purpose of its transport between Antwerp and Montenegro (Serbia and Montenegro), the customs office of destination being Karawanken/Rosenbach (Austria). Upon entering the customs territory of the Community, the lorry, the trailer and the consignment were cleared through customs for temporary use. The lorry, the trailer and the consignment were placed under customs supervision.
- 12 On 15 May 1997, the lorry, the trailer and the consignment of cigarettes were stolen on a motorway service area in Rhein-Böllen (Germany), near the Belgian and Netherlands borders.

- 13 On 2 June 1997, the lorry was found in a motorway parking area in Grevenbroich-Kappeln (Germany). On 3 June 1997, the trailer was found, empty, in Zonhoven (Belgium). The consignment, however, could not be found.

- 14 The German criminal investigation police opened an investigation into the theft, during which they contacted the competent services of the Belgian police. In their investigation reports of 2 June and 29 October 1997, the German police stated that they suspected there was a link between this theft and other thefts and attempted thefts in parking areas near where the events in question took place, and concluded that there was possibly an organised criminal gang in the area of the border between Germany, Belgium and the Netherlands.

- 15 On 27 May 1997, the German competent authorities, namely the Hauptzollamt Koblenz (the main customs office in Koblenz, Germany), issued a tax notice, under Article 203 of the Customs Code, seeking from the applicant, as the person responsible for the proper functioning of the transit procedure, payment of DEM 395 392.01 by way of customs duty payable in respect of the consignment of cigarettes.

- 16 By application of 28 May 1998, the applicant, which had paid the amount claimed, asked the German authorities to repay the customs duties on the stolen cigarettes.

- 17 By letter of 1 August 2000, received by the Commission on 24 August 2000, the German federal finance ministry asked the Commission to rule on whether the repayment of the import duties sought by the applicant was justified in the circumstances of the present case.

- 18 By letter of 1 March 2001, sent on 6 March 2001, the Commission informed the applicant that it intended to rule against it, setting out the objections in support of the refusal of the application for repayment and inviting it to submit its comments within one month.
- 19 By letter of 30 March 2001, the applicant stated its position on the objections put forward by the Commission to the application for repayment.
- 20 By letter of 15 May 2001, the applicant drew the Commission's attention to a number of newspaper articles according to which a senior civil servant of the German federal finance ministry, seconded to the customs and customs investigations service, was under suspicion of corruption and breach of official secrets and the inquiries into organised cigarette smuggling had been hampered since that official had taken up his duties.
- 21 By letter of 17 May 2001, the Commission wrote to the German federal finance ministry asking it to state whether the official in question had been in charge of the customs investigation at the date when the debt in issue was incurred and whether it was possible that that official's activities could have had a direct impact on the present case.
- 22 By letter of 30 May 2001, which was received at the Commission on 14 June 2001, the German federal finance ministry indicated that the official in question did not take up his duties as director of the investigation department until December 1997, that is to say, after the events giving rise to the customs debt in issue. By fax of 27 June 2001, the German authorities forwarded to the Commission the applicant's declaration acknowledging having been made aware of the Commission's correspondence and of the response of the German ministry.

- 23 On 15 June 2001, the Commission, at the request of the German authorities, consulted the group of experts composed of representatives of all Member States, meeting under the aegis of the Customs Code committee.
- 24 On 18 July 2001, the Commission, by Decision REM 19/00 of 18 July 2001 (hereinafter ‘the contested decision’), decided not to grant repayment of the import duties. At Recital 29 of that decision, the Commission concluded that ‘the facts of the present case [were] not such as to create, either singly or together, a special situation within the meaning of Article 239 [of the Customs Code]’.
- 25 On 27 August 2001, the German authorities, having been notified of that decision by the Commission, refused the application for repayment.

Procedure and forms of order sought by the parties

- 26 By application lodged at the Court Registry on 2 November 2001, the applicant brought the present action.
- 27 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

28 The parties presented oral argument and answered questions from the Court at the hearing on 11 November 2003.

29 At the hearing, the applicant withdrew its claim for an order of the Court authorising the German Federal Republic to repay to it, in accordance with its application of 28 May 1998, the customs duties already paid.

30 The applicant claims that the Court should:

— annul Commission Decision REM 19/00 of 18 July 2001;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

- 32 In support of its claims, the applicant relies, first, on a plea in law alleging failure to observe the period prescribed for the adoption of the contested decision and, secondly, on a plea in law alleging the existence of a special situation and the absence of deception or obvious negligence within the meaning of Article 239 of the Customs Code and Article 905 of the implementing regulation.

The first plea in law, alleging failure to observe the time-limit for the adoption of the contested decision

Arguments of the parties

- 33 The applicant submits that the Commission adopted the contested decision after the expiry of the nine-month period which began to run from the date of reception of the case sent by the national authorities, as mentioned in Article 907 of the implementing regulation. The applicant claims, in essence, that the Commission was not entitled to avail itself of its request for information, sent on 17 May 2001 to the German authorities, as to whether there was any corruption in their customs fraud prevention department, in order to extend that period, since that request was altogether unnecessary.
- 34 The applicant points out in that regard, first, that the Commission was already aware of the facts and circumstances with which its request of 17 May 2001 was concerned. The Commission was already aware of, among other things, the date on which the person under suspicion of corruption had taken up his duties in the

customs fraud prevention department because the Commission official responsible for the case had previously worked at the German federal finance ministry and was familiar with the case.

35 The applicant points out, secondly, that the facts with which the Commission's request was concerned could not have any effect on the way in which the application for repayment was handled since, in its view, the German customs fraud prevention department was not involved in the case in question, the investigation having been handled by the German criminal investigation police. The applicant submits that, in its letter of 15 May 2001, it had merely drawn the attention of the Commission to the fact that the possible corruption to which it referred was an additional indication of obvious shortcomings, but that it had in no way suggested that that could have had any effect on the handling of its application for repayment.

36 The Commission maintains that the decision was taken within the prescribed period, in view of the fact that, in accordance with Article 907 of the implementing regulation, that period was validly extended by its request for additional information sent to the national authorities.

Findings of the Court

37 According to the third subparagraph of Article 905(2) of the implementing regulation, if it is found that the information supplied by the national authorities is not sufficient to enable a decision to be taken by the Commission on the case concerned in full knowledge of the facts, it is entitled to ask for additional information to be supplied. Under the second subparagraph of Article 907 of the implementing regulation, such a request for information extends the period available to the Commission to take a decision on the application for repayment.

38 In order to ascertain whether the Commission's request of 17 May 2001 to the German authorities validly extended the period provided for the adoption of the contested decision, it is necessary to examine, first, whether the information sought by that request was likely to have an effect on the adoption of a position by the Commission *vis-à-vis* the application for repayment.

39 It must be borne in mind that, in its letter of 17 May 2001, the Commission asked the German federal finance minister to state whether the official who was under suspicion of corruption had been in charge of the customs investigation when the customs debt in question was incurred and whether it was possible that his activities could have had a direct effect on the case referred to him. It should be noted, in that respect, that it is clear from the case-law that, in order to determine whether the circumstances of the case constitute a special situation, the Commission is required to assess all the relevant facts (Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others* [2001] ECR II-1337, paragraph 222). However, the Court took the view that the Commission was right to consider in that case that circumstances falling within the purview of the national authorities, such as the possibility of corruption in the departments of those authorities, could constitute, if there were a causal link with the event giving rise to the customs debt, a special situation within the meaning of Article 239 of the Customs Code and Article 905 of the implementing regulation (see, to that effect, Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 53). Accordingly, it must be concluded that the Commission was justified in considering that the information sought was relevant in order to allow it to rule in full knowledge of the facts on the application for repayment.

40 That conclusion is not invalidated by the applicant's argument to the effect that the German customs fraud prevention department was not involved in the investigation into the theft of the goods. The fact remains that the person under suspicion of corruption was a senior civil servant in the German administration, holding a post in the federal finance ministry, with special powers in the field of

customs investigations and that, as a result, he could well have had access to information capable of facilitating the theft or the receiving of stolen goods or concealment of a crime.

41 Furthermore, the applicant's argument on this point contradicts the argument it put forward both during the administrative procedure and before the Court when submitting its second plea in law. Thus, it was the applicant which by letter of 15 May 2001 drew the Commission's attention to the possible existence of corruption. Likewise, the applicant referred on several occasions in its application bringing this action to the investigation into the conduct of the official under suspicion of corruption with the purpose, in particular, of demonstrating that there were exceptional circumstances.

42 Secondly, it is important to examine the applicant's argument that the Commission already had the information it sought from the German administration. In that regard, it is sufficient to state that, even considering it to have been proven that the Commission official responsible for the case did have information concerning the alleged case of corruption in question, as a result of his previous position within the German tax administration, the mere fact that an official could have personal knowledge concerning matters relating to a given case in no way obviates the need to obtain appropriate evidence. In the present case, such evidence could come only from the national authorities affected by the supposed corruption, in particular by means of a request for information on the basis of Article 905 of the implementing regulation.

43 Finally, the Court finds that the steps taken by the Commission were in accordance with the third subparagraph of Article 905(2) of the implementing regulation. That request for additional information to the German authorities therefore extended the period prescribed for the adoption of the decision, in accordance with the second sentence of the second paragraph of Article 907 of the implementing regulation. The Court therefore holds that the contested decision was adopted within the period prescribed for that purpose.

44 Accordingly, the first plea in law is dismissed.

The second plea in law alleging the existence of a special situation and the absence of deception or obvious negligence within the meaning of Article 239 of the Customs Code and Article 905 of the implementing regulation

Arguments of the parties

- 45 The applicant claims that it found itself in a special situation as a result of circumstances in which no deception or obvious negligence may be attributed to it, within the meaning of the second indent of Article 239(1), of the Customs Code and Article 905 of the implementing regulation, and that, therefore, the repayment application was justified.
- 46 The applicant submits, first, that it did not prevent by deception the normal course of the external transit procedure or its re-establishment, nor was it guilty of obvious negligence in that respect but that, on the contrary, it was the victim of criminal acts perpetrated by organised criminal gangs in which none of its representatives was involved. The applicant points out that it had implemented all technical means possible to prevent the theft of the vehicle or to find it again promptly should it be stolen by, among other things, installing in it a satellite tracking system.
- 47 Secondly, the applicant claims that the theft of the vehicle and of the cigarettes took place in special circumstances, within the meaning of Article 239 of the Customs Code. In that regard, the applicant submits that there exists a special situation within the meaning of the abovementioned provision where the taxable person is in an exceptional situation as compared to those of other operators engaged in the same business (Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041).

48 The applicant points out that the Court, in its judgment in *C-48/98 Söhl & Söhlke* [1999] ECR I-7877, held that exceptional circumstances which, although not unknown to the trader, are not events which normally confront any trader in the exercise of his occupation, may constitute such circumstances. The applicant states that, although that judgment concerns circumstances considered extraordinary for the purposes of Article 49 of the Customs Code, it is nevertheless true, first, that both that provision and Article 239 of that code include rules on fairness and, secondly, that their respective implementing rules, namely Articles 859 and 905 of the implementing regulation, are substantially the same.

49 The applicant states that the circumstances of the present case contributed not only to making real the risk of theft to which all goods hauliers within the Community are exposed, but also brought about exceptional circumstances within the meaning of the case-law of the Court by making the theft possible or even facilitating it. In that connection, the applicant again claims that it was the victim of organised crime. Next, the applicant states that the German enforcement services prevented in several respects the reinstatement of the stolen cigarettes into the Community external transit procedure. The applicant is particularly critical of the absence of cooperation between the German police and the Belgian and Netherlands police forces, reminds the Court of the investigation into the head of a customs fraud prevention service for hindering inquiries into cigarette smuggling and states that, although the police were aware, since March 1997, of the increased risk of theft involving high-value goods transiting through the area in which the crime was perpetrated, they none the less failed to take any particular step to improve the security of the consignment in question and failed to inform the applicant of the dangers. The applicant thus ran, on the route it had to follow, a significantly greater risk of theft than other transport operators on other European routes. Finally, the applicant argues that the Commission took no action despite institutional weaknesses in the area of cross-border enforcement within the European Union, which made theft easier.

- 50 Finally, the applicant submits that the circumstances of the present case are different from those of the case which gave rise to the judgment in Joined Cases 186/82 and 187/82 *Magazzini Generali* [1983] ECR 2951. In particular, the applicant points out that, in the abovementioned case, no one other than the Italian authorities were in charge of the inquiry and their ability to act was not hindered by any of their own members. Furthermore, in *Magazzini Generali*, the Court had been called upon to determine whether theft could, in principle, be considered a case of *force majeure*, while in this case it is not a matter of ascertaining whether theft constitutes, in principle, a special circumstance within the meaning of Article 239 of the Customs Code, but of determining whether the facts as a whole leading up to the theft in question constitute special circumstances which, as an exception, exonerate the applicant of liability.
- 51 The Commission argues, in essence, that theft or fraud committed by third parties are not, as such, treated as special circumstances within the meaning of Article 239 of the Customs Code; rather, they constitute a constant risk to which economic operators are normally exposed in the course of carrying on business. Likewise, the Commission contends that none of the applicant's arguments relating to the circumstances of the case is such as to substantiate the classification of that theft as an exception and, thus, to justify the application of the principle of fairness underlying Article 239 of the Customs Code.

Findings of the Court

- 52 Article 905 of the implementing regulation, which explains and expands the rule contained in Article 239 of the Customs Code, constitutes a general fairness clause intended, *inter alia*, 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 (*Trans-Ex-Import*, paragraph 18).

- 53 It is clear 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, secondly, the absence of deception or obvious negligence on the part of the economic operator (see, to that effect, *De Haan*, cited above, paragraph 42, and Case T-290/97 *Mehibas Dordtselaan v Commission* [2000] ECR II-15 paragraph 87). Accordingly, repayment of duties must be refused if either of those conditions is not met (Case T-75/95 *Günzler Aluminium v Commission* [1996] ECR II-497, paragraph 54; *Mehibas Dordtselaan v Commission*, cited above, paragraph 87).
- 54 Since, in the contested decision, the Commission took the view that the repayment application was not justified on the ground that the circumstances of the case were not such as to bring about a special situation, it did not examine the second condition, as to the absence of obvious negligence or deception on the part of the applicant. Consequently, the present discussion must relate solely to the issue as to whether or not the Commission made an erroneous assessment of the concept of special situation.
- 55 It must be noted in that connection that it is settled case-law that the Commission enjoys a power of assessment when it adopts a decision pursuant to the general equitable provision contained in Article 905 of the implementing regulation (see, by analogy, Case T-346/94 *France-aviation v Commission* [1995] ECR II-2841, paragraph 34; Case T-50/96 *Primex Produkte Import-Export and Others v Commission* [1998] ECR II-3773, paragraph 60; and *Mehibas Dordtselaan v Commission*, cited above, paragraphs 46 and 78). It must also be pointed out that repayment or remission of import duties, which may be granted only subject to certain conditions and in cases which have been specifically provided for, constitute an exception to the usual body of rules governing import and export and, consequently, that the provisions providing for such repayment or remission are to be interpreted strictly (*Söhl & Söhlke*, cited above, paragraph 52).

- 56 The Court has thus held that circumstances which constitute a special situation within the meaning of Article 905 of the implementing regulation exist where, having regard to 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*, cited above, paragraph 22, and *De Haan*, cited above, paragraph 52, and Case C-253/99 *Bacardi* [2001] ECR I-6493, paragraph 56).
- 57 In the present case, the applicant submits that what gave rise to a special situation in its case was not the mere theft of the goods, but the circumstances of the case as a whole, which are such as to exonerate it, exceptionally, from liability. It is therefore necessary to determine whether the elements raised by the applicant are such as to constitute a special situation within the meaning of Article 905(1) of the implementing regulation.
- 58 First, the applicant points out that the theft was carried out by an organised criminal gang. The Court considers that the fact that the theft was apparently perpetrated by a gang as part of what is generally known as organised crime, is not such as to make it exceptional. Indeed, operators involved in the business of hauling high-value goods are generally exposed to the risk of criminal acts perpetrated by well-organised criminal gangs. In any event, the high level of organisation of the thieves does not make a crime special for the purposes of customs provisions. Thus, the Court, when interpreting the concepts of '*force majeure*' and 'irrecoverable loss of the goods' with regard to the application of Council Directive 79/623/EEC of 25 June 1979 on the harmonisation of provisions laid down by law, regulation or administrative action relating to customs debt (OJ 1979 L 179, p. 31), has held that the removal by third parties of goods subject to customs duty, even through no fault of the taxable person, does not extinguish the obligation attaching to them 'regardless of the circumstances in which it has been committed' (*Magazzini Generali*, cited above, paragraphs 14 and 15).

59 Secondly, the applicant argues that the German, Belgian and Netherlands police forces failed to cooperate with each other during the investigation into the theft. However, the matter concerning the way in which the investigation was conducted relates to a time after the customs debt was incurred, which was, in accordance with Article 203(2) of the Customs Code, when the goods were removed from customs supervision. In that respect, alleged shortcomings during the police investigation cannot constitute circumstances which give rise to a special situation within the meaning of Article 905 of the implementing regulation.

60 Thirdly, the applicant mentions the fact that an investigation was conducted into a member of the German tax administration who had allegedly hindered inquiries into cigarette smuggling. It suffices to recall in that regard that the matter was the subject, during the administrative procedure, of a request for information sent by the Commission to the German authorities, who ruled out the possibility that the alleged corruption could have had any effect on the present case. Accordingly, the Court concludes that that fact, even if proved, cannot constitute special circumstances so far as the applicant is concerned.

61 Fourthly, with regard to the applicant's argument that it ran, on the route it had to follow, a significantly greater risk of theft than other transport operators on other European routes, on the ground that the competent authorities, despite being aware of the increased risk of theft involving high-value goods in the area in question, none the less failed to take specific measures to increase security in the area or inform the applicant of that risk, cannot be upheld either. Even if those allegations proved to be true, the fact remains that those circumstances would affect in the same way all economic operators using that route and would therefore not place the applicant in an exceptional situation by comparison with many other economic operators.

- 62 Fifthly, the applicant places reliance on the fact that the Commission took no action despite institutional weaknesses in the area of cross-border enforcement within the European Union, which made it easier to carry out that and other thefts committed in similar circumstances. Even if it were considered to be well founded, that argument is even less likely to place the applicant in a special situation inasmuch as that circumstance would affect in the same way an indefinite number of economic operators, namely those transporting goods through the border areas of the European Union.
- 63 Finally, the Court finds that none of the arguments put forward by the applicant, taken individually or together, are such as to place it in an exceptional situation as compared to other economic operators engaged in the same business, within the meaning of the case-law cited at paragraph 56 above.
- 64 That conclusion is not invalidated by the applicant's reference to the judgment in *Söhl & Söhlke*, cited above, in which the Court, interpreting the concept of 'circumstances' within the meaning of Article 49(2) of the Customs Code, pointed out that the applicant could be placed in an exceptional situation in relation to other traders carrying on the same activity as a result of exceptional circumstances which, while not unknown to the trader, were not events which normally confront any trader in the exercise of his occupation (*Söhl & Söhlke*, cited above, paragraphs 73 and 74).
- 65 It is important to note, in that regard, that the judgment in *Söhl & Söhlke*, cited above, concerns the interpretation of Article 49(2) of the Customs Code, which relates to the extension of the periods prescribed for completing the requisite formalities necessary for goods covered by a summary declaration to be assigned a customs-approved treatment or use, whereas Article 239 of that code refers to a very different matter, namely the repayment or remission of import duties or export duties. In any event, irrespective of whether or not *Söhl & Söhlke* is relevant for the interpretation of Article 239 of the Customs Code, the Court

considers that the conditions laid down in that judgment are not met in the present case. None of the factors relied upon by the applicant constitutes exceptional circumstances not coming within any of the occupational hazards inherent in the business, within the meaning of the case-law. In particular, as the Commission pointed out in the contested decision, the theft of goods is one of the most frequently reported incidents, against which traders are normally insured, in particular those which specialise in the haulage of ‘high-risk’ goods, that is to say those which are heavily taxed.

66 The Court therefore holds that the Commission has not committed a manifest error of assessment by taking the view that the circumstances of the present case did not constitute a special situation within the meaning of Article 239 of the Customs Code and Article 905 of the implementing regulation.

67 It follows from the foregoing that the second plea in law is not well founded.

68 Accordingly, the application must be dismissed.

Costs

69 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 applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission, in accordance with the form of order sought by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

hereby:

1. Dismisses the application;
2. Orders the applicant to bear its own costs and to pay those incurred by the Commission.

Lindh

García-Valdecasas

Cooke

Delivered in open court in Luxembourg on 12 February 2004.

H. Jung

Registrar

P. Lindh

President