The reform of the procedural rules on the non-recovery, remission and repayment of customs duties

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Introduction

Since 1 July 1980, separate Community regulations have applied to the waiving of post-clearance recovery in cases where the customs duty was initially not levied because of an error by the customs authorities (Art. 5 Reg. [EEC] No. 1697/79), and to the remission and repayment of duties in cases in which special circumstances are present and the person concerned acted neither with deception nor obvious negligence (Art. 13 Reg. [EEC] No 1430/79). These provisions were incorporated – largely unchanged – into Arts 220 and 239 CC.

The rules for the division of powers between the Member States and the Commission have been modified several times over time. Where initially those cases not specifically covered in the rules and regulations were reserved for decision by the Commission regardless of the duty amount, the Member States were later also authorised to make decisions themselves in cases not expressly covered, if a waiver of post-clearance recovery concerned duty amounts of less than 2,000 ECU. This amount was later increased to 50,000 ECU or EUR, both with regard to non-recovery and repayment or remission. However, when Member States were in doubt about the decision to be taken, they could submit the case to the Commission even though the threshold was not reached. More than 20 years after the introduction of common rules, sufficient experience has been gained so that greater responsibilities could be transferred to Member States. Therefore, with Regulation (EC) No 1335/2003 (OJ EU 2003 No. L 187, p. 16), with effect from 1 August 2003, the threshold value was raised to 500,000 EUR, and the possibility of obtaining a decision from the Commission in cases below this amount was abolished. At the same time further rules aiming at more efficient procedures were introduced, as well as guidelines for the taking of decisions in these areas. The following article explains and appraises the new rules.

Reasons for a reform, counter-arguments

Experience gained

The initial centralisation at the Commission of decisions on the basis of equity could be justified by the fact that at the time of adoption of Regulations (EEC) No 1430/79 and No 1697/79 practices varied between Member States, and this would probably have continued, given that no well defined criteria existed at the time (notably with regard to the term "special circumstances"). With increased practical experience, it became possible to extend the scope of responsibility of Member States; this is reflected by the increase in the threshold. After more than 20 years of application of these rules and their clarification by numerous judgments of the European Court of Justice (ECJ) and the Court of First Instance (CFI), and decisions of the Commission, time had come to go a further step in the direction of more responsibility of Member States, as this is the case in the other areas of duty collection.

Investigation of the facts

Furthermore, the split of responsibilities between Member States and the Commission for cases of doubt or involving 50,000 EUR or more has lead to the effect that national administrations did not feel fully responsible insofar, and as a consequence sometimes submitted cases which were insufficiently investigated or contained contradictory statements. It happened that cases were submitted without sufficient indications being presented of the presence of special circumstances or the lack of obvious negligence. On the second point, it was often only stated that obvious negligence was not present. This necessitated constant further inquiries with the Member States, since the Commission itself does not investigate the facts. In other cases a submission to the Commission could have been avoided by a correct application of the customs rules. Nearly every case required additional correspondence (and translations) for these reasons, which increased the effort beyond the normal cost of a procedure before the Commission (see below).

A particular investigation problem existed (and will continue to exist) for the Member States where an error is committed by a customs authority in a different Member State than that which is responsible for the decision. This does not however justify the view expressed during the latest reform that the Commission should be responsible for the decision, since it cannot do anything but ask the Member State concerned for information. A corresponding level of mutual support must also be possible between the Member States (even if different languages make communication somewhat difficult).

Cases of doubt, contested customs debt

Even where a decision could be taken at national level, national administrations (sometimes at the request of a court) have submitted large numbers of cases to the Commission. The number of cases has also risen because Member States had to submit similar cases when a Commission decision did not give authorisation to decide on similar cases.

A further reason for this development was the previous possibility of sending a remission request to the Commission before definitive clarification as to whether a customs debt exists at all. Even if the Commission took the view that there was no customs debt, it was obliged to decide on a properly submitted request (see ECJ, case C-156/00 *the Netherlands v Commission* judgment of 13.3.2003). In this context, the justification given by some Member States during the legislative procedure, as to why this "twin track" system should be kept, is interesting. Since national legal proceedings on the existence of customs debt can last many years, it is useful that one can receive more quickly a decision from the Commission on a remission request. This argument ignores the fact that proceedings at the Commission cost approximately ten times as much as national proceedings.

In any case, most of the remission/repayment cases will be decided by the Member States in future. To that extent the "twin track" possibility remains, so that the national authority can also then grant a well-founded remission request, even if the existence of a customs debt is contentious. According to Art. 6 (2) (1st subparagraph) CC a requested decision must be made "as soon as possible", i.e. within shorter periods (usually 1 to 3 months) than under the procedure provided for decisions by the Commission (9 months; for negative decisions 10 months). The current practice of some Member States not to decide on the basis of equity (as in the case of Art. 239 CC) before a definitive decision on the existence or non-

existence of a customs debt has been taken, may however be continued. In fact, Art. 6 (2) (3rd subparagraph) CC grants the possibility of informing the applicant about the reasons for the delay in such cases.

Transparency

In this context I would like to deal with the argument, advanced by Wrobel/Dombrowski (see references at the end), that the transfer of responsibilities from the Commission to the Member States is to be regarded as a negative step because the Commission makes its decision known on request in accordance with Regulation (EC) No 1049/2001 (by the way, the Commission also has done this before, too). This is, however, not the case in certain Member States. The answer to this can only be that Member States should follow the Commission's good practices and make their decisions available to the public. The Commission now publishes its own decisions on the internet The risk of divergent decisions by national administrations and courts is a structural problem of the Community, as the authors themselves acknowledge. Even today, because of cost reasons, the solution cannot lie in all decisions having being taken by the Commission. Speaking of "good practices", the question may arise whether the right to be consulted that has been introduced by the Court of First Instance for cases in which the Commission intends to reject the request (CFI, case 42/96 *Eyckeler & Malt v Commission* [1998] ECR II-401), applies also to cases in which a Member State takes a decision unfavourable to the applicant. This jurisprudence has been taken on board in Arts 872a and 906a CCIP which deal with decisions taken by the Commission.

Cost of the procedure before the Commission

The Community has been growing constantly since 1980, and on 1st May 2004 will see the addition of 10 new Member States. This must inevitably affect the working methods of the Commission, given that the procedure for Commission decisions on the remission and repayment and the non-recovery of customs duties generates already today high costs, in particular for:

- the translation of every request from a Member State into all official languages (currently 11, soon to be 20 languages),
- meetings within the Commission and with the delegates from all Member States (the latter ones with interpretation into several languages),
- the letter granting the applicant the right to put forward his arguments if it is intended to reject the request (draft, internal consultation, translation),
- the voluminous decisions (draft, internal consultation, translation into all Community languages, adoption by the Commission, transmission through the permanent representation).

With an annual average of 40 cases, costs of far over a million EUR arise. Ten additional Member States and nine additional languages would probably double this amount.

A further negative effect consists of Commission personnel being withdrawn from more important tasks (such as the modernisation and simplification of the Customs Code, the changeover to electronic declarations and common risk analysis, as well

as the preparation for the accession of new Member States), in order to ensure compliance with deadlines and quality requirements.

Cases which are to be submitted to the Commission

In cases expressly covered in Arts 869 and 900 - 904 CCIP, the Member States continue to be responsible for taking decisions.

On the basis of the new Regulation, only three groups of cases can be submitted to the Commission (Arts 871 and 905 CCIP):

1. The submitting Member State is of the opinion that the Commission has committed an error under the terms of Art. 220 (2) (b) CC, or that special circumstances result from a failure by the Commission under the terms of Art. 239 CC (the mere assertion by the applicant is thus not sufficient).

2. The case concerned is based on the result of Community investigations, which were co-ordinated by OLAF (this is intended to avoid the Member States making different decisions in related cases, or jeopardising the results of investigations).

3. The duty amounts to 500,000 EUR or more (the Commission had originally suggested a threshold of one million EUR, but some Member States did not want to take the financial responsibility for such large sums).

For all three groups of cases a submission is excluded where the person concerned has acted with deception or obvious negligence. This condition must be examined in each individual case before the submission to the Commission.

Even if the above mentioned criteria are fulfilled, a case may not be submitted if the Commission, on the basis of the new implementing provisions:

- has already decided on a comparable case (so that a system of automatic authorisation is introduced instead of the previous individual authorisation; in its decision, the Commission can then record restrictions on its application to other cases - Arts 875 and 908 (3) CCIP),

- is already dealing with a comparable case (in this way it needs to decide only on one case; in the remaining cases, the automatic authorisation will apply). If a Member State submits such a case unaware of a case already communicated or decided, the Commission sends back the documents (Arts 871 (6) and 905 (6) CCIP).

Cases which are sent back by the Commission

To avoid the Commission having to deal with inconclusive, incomplete or contradictory submissions, the request will be returned (with the possibility of a renewed submission) in the following cases (Arts 871 (6) and 905 (6) CCIP):

- There is disagreement between the Member State and the person concerned as to the facts of the case (since the Commission does not conduct investigations into the facts of cases, this task must be undertaken completely by the Member State).

- There are no indications in the request that could justify a positive decision under the terms of Art. 220 (2) (b) or 239 CC (if a negative decision is to be

taken, the Member States are responsible; this provision has been introduced in order to allow the rejection of totally inconclusive submission; a new submission with better arguments is not excluded).

- It is not one of the cases which are to be submitted to the Commission (e.g. because the duty amount is lower than 500,000 EUR, or because it is a case covered by Arts 869, 900 - 904 CCIP).
- The existence of a customs debt was not (yet) established (if the applicant has also lodged an appeal against the notification of the debt, the result of the proceedings – in court if necessary – must be awaited; the request not to proceed to post-clearance recovery, or for remission and/or reimbursement can and should however be raised at the same time as the appeal; this proceeding then waits for the definitive decision as to the existence of the customs debt).
- During the proceedings, documents or data are submitted which cause the case to appear in a completely different light (e.g. introduction of criminal proceedings against the person concerned in relation to the import procedures, or previously unavailable information on a failure on the part of a customs authority involved in collecting customs duties).

Decision procedure of the Commission

The previous decision period of nine (or ten) months and prior consultation of the experts from the Member States have been maintained (Arts 873, 907 CCIP). Only the cases where the period does not run were expanded. The period is now suspended in the following cases:

- The statement on the submitted request from the person concerned is missing (the inclusion of such a statement in the request had been already stipulated before).
- The submission does not contain any exhaustive appraisal of the behaviour of the party involved, to the extent that this is necessary for a positive decision in accordance with Art. 220 (2) (b) and/or 239 CC (good faith or lack of obvious negligence).
- Additional information is necessary (this was already provided for).
- Additional investigations are carried out on the part of the Commission (this concerns cases in which investigations are carried out in third countries – usually by OLAF; beyond nine months the period cannot be suspended).

At the latest on the last day before the end of the stipulated period the Commission must – as before - make its decision. If it does not do this, the request – as before – is granted (Arts 876, 909 CCIP). The only new aspect is that the Member States not concerned can no longer request a copy of the decision (in their language), but are only informed about the decision (Arts 874, 907 (1) CCIP). This should avoid the necessity of translation into all Community languages.

Legal protection

As before, the person concerned can appeal against a decision of the Commission, which rejects the request totally or partly, before the Court of First Instance,

although the decision is addressed to the Member State, and not to the applicant (see CFI, case T-42/96 *Eyckeler & Malt v Commission* [1998] ECR II-401). Besides, while an appeal against the negative decision of the national customs authority may be possible, it is not appropriate, since it ultimately concerns the validity of the Commission decision on which only a Community court can judge. In case C-239/99 (*Nachi v Hauptzollamt Krefeld* [2001] I-1197) the Court of Justice has decided that an importer cannot claim the invalidity of an anti-dumping duty before a national court if he had been in a position to make a direct appeal before the Court of First Instance. The situation seems to be comparable here.

If the Commission sends the documents back to the national customs authority in accordance with Arts 871 (6) or 905 (6) CCIP, this will be an interim measure, which as such cannot be contested (see ECJ, joined cases C-133/87 and C-150/87 *Nashua v Commission and Council* [1990] ECR I-719 [I-771]). To this extent the subsequent negative decision of the Commission or the Member State must be awaited where applicable. In this context it may for example be argued that it is not the Member State concerned, but the Commission, which was responsible for the decision (see ECJ, case 258/84 *Nippon Seiko v Council* [1987] ECR I-1923 [I-1970], and CFI, case T-212/45 *Oficemen v Commission* [1997] ECR II-1161).

If the national customs authority rejects a waiver from post-clearance recovery or a remission or repayment on the basis of a negative decision from the Commission, a possible damage suit claiming that the Commission did not appreciate the facts correctly can only be directed only against the Commission (see CFI, case T-52/99 *T. Port v Commission* [2001] ECR II-981).

Appraisal and outlook

According to Art. 10 of the EC Treaty, the Member States are in principle responsible for the execution of the Community law. They apply the customs law independently, for example by classifying goods, giving binding tariff information, determining the customs value and setting the duty amount. They are liable to the Community budget for any errors. In return for this responsibility they receive 25% of the collected customs duties . If a decision on the levying or waiver of customs duty is to be reserved to the Commission, this is a deviation from the general rules and this requires therefore a special justification. The present regulation can therefore be regarded as a further step towards a re-establishment of the normal division of powers between the Member States and the Commission and as an application of the subsidiarity principle.

In order to allay the fears of some Member States that the progressive decentralisation of the decisions in this area could lead to a more unequal treatment of the participants in the customs union, the Commission has drawn up guidelines based on previous decisions of the Commission as well as the judgments of the ECJ and the CFI. To that extent a situation comparable with the tariff classification exists: goods have constantly to be classified, and it cannot be ruled out that individual customs offices may behave inconsistently. For this reason explanatory notes and classification regulations are adopted and classification problems are discussed in the Customs Code Committee.

Comparable mechanisms also exist in relation to decisions on post-clearance recovery and on remission or repayment decisions:

- each problem can be discussed in the Customs Code Committee and thus be subject to a consistent application (see Art. 249 CC),
- constantly recurring cases can be settled in the CCIP (see Arts 869 (a) and 900 CCIP) and
- the guidelines from the Commission can be constantly adapted to developments – as in the case of the explanatory notes concerning the Combined Nomenclature.

Even if the guidelines cannot be - like a regulation - legally binding on the Member States, they nevertheless reflect the interpretation of Community law as it results from the previous decisions of the Community institutions, and thereby contribute to a uniform application of Community law. One can assume therefore that the Member States will comply with the principles set out in it, and the decisions underlying it, as is the case with the explanatory notes concerning the customs tariff, which the ECJ has recognised as a "valid aid to interpretation" (see ECJ, case 167/84 *Hauptzollamt Bremen-Freihafen v Drünert* [1985] ECR 2235).

Apart from this, the following mechanisms protect against greater deviations:

- in the case of a more generous decision practice, the Member State concerned would run the risk of being made financially liable for the missing amounts,
- in the case of a more restrictive decision practice, the Member State concerned would run the risk of its decisions being annulled by the national courts – possibly after a preliminary ruling by the ECJ,
- increasingly, economic operators are active throughout the Community and learn – also via their federations – about decision practices in other Member States; they will draw attention to possible deviations, at least insofar as they are unfavourable for them.

The current reform is largely in the interest of economic operators. In many cases they will receive a decision earlier than previously possible. The normal period for a decision by the customs authorities is – insofar as no appeal with regard to the customs debt has been lodged – between one and three months. A procedure before the Commission lasts at least nine months, without taking into account the time a Member State needs to submit the case to the Commission, and the suspension of the procedure when additional information is sought or the right of defence is granted. Furthermore, the guidelines elaborated during the reform will contribute to terminate the information deficit regarding Commission decisions in the area of non-recovery, remission and repayment, about which complaints have been made in the past by many economic operators (even though it has been possible to request the transmission of a specific Commission decision). Increased transparency will also be achieved when the guidelines and the Commission decisions will be made available to the public through the Europa-server.

Finally, it should be highlighted that for cases submitted before the 1st of August 2003 the previous implementing provisions still apply.

References

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