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REM 16/01

EUROPEAN COMMISSION

Brussels, 01/08/02
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NOT FOR PUBLICATION

COMMISSION DECISION

of

finding that repayment of import duties is not justified in a particular case

(Only the German text is authentic.)

(Request submitted by the Federal Republic of Germany)

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(REM 16/01)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,[1] as last amended by Regulation (EEC) No 1854/96,[2] and in particular Article 13 thereof,

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92,[3] as last amended by Regulation (EC) No 993/2001,[4] and in particular Article 907 thereof,

1 OJ L 175, 12.07.1979, p. 1.
2 OJ L 186, 30.06.1989, p. 1.
3 OJ L 253, 11.10.1993, p. 1.
4 OJ L 68, 12.03.2002, p. 11.

Whereas:

(1) By letter dated 24 July 2001, received by the Commission on 1 August 2001, the Federal Republic of Germany asked the Commission to decide, under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 whether repayment of duties was justified in the following circumstances:

(2) Between February and June 1992 a German undertaking imported wine from the Amselfeld wine-growing region, now in Kosovo but at the time part of the Republic of Yugoslavia. The wine was released for free circulation in the context of a long-standing business relationship between the firm and its Yugoslavian clients. The consignments were either placed in a private customs warehouse belonging to the firm and then released for free circulation on 7 February, 10 March and 9 April, or released for free circulation immediately on 27 May and 2 and 3 June 1992.

(3) When these goods were released for free circulation the firm applied for preferential rates of duty to be applied on the basis of Council Regulation (EEC) No 314/83 of 24 January 1983 on the conclusion of the Cooperation Agreement between the European Community and Yugoslavia[5] and to this end presented EUR.1 certificates certifying the origin of the goods.

[5] OJ L 41, 14.02.1983, p. 1.

(4) The application for reduced rates of duty was initially granted by the competent customs office.

(5) However, following a post-clearance check the main customs office found that the trade concessions provided for in the Cooperation Agreement had been suspended with effect from 15 November 1991 by Council Regulation (EEC) No 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia[6] and denounced by Council Decision 91/602/EEC of 25 November 1991 denouncing the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia.[7]

(6) The consignments had therefore not been eligible for the preferential rate and the normal rate of duties should have been applied. Consequently, the customs office charged duties corresponding to the difference between the preferential rate paid by the firm and the normal rate; this difference, totalling XXXXX, was paid by the firm and is the amount for which a refund is now being requested.

(7) In their requesting letter the German authorities said they believed a special situation existed for the following reasons.

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6 OJ L 315, 15.11.1991, p.1.
7 OJ L 325, 27.11.1991, p.23.

(8) The firm had had a contractual business relationship with the supplier for many years, and the purchase commitments, for large sums, had been entered into well before 15 November 1991, the date of publication of the decision suspending the tariff concessions. According to the firm, the contractual relationship was legally protected since the commitments had been signed in the light of the existing cooperation agreement with the Republic of Yugoslavia and were initially of unlimited duration. The firm therefore considered that it could base legitimate expectations on the provisions of the Agreement and the preferential rules it contained, at least for orders placed before 15 November 1991. Furthermore, it argued, neither the unilateral suspension of the tariff concessions nor the revocation of the Cooperation Agreement provided for sufficient protection for Community traders. The firm had not subsequently been able to pass on to its clients the cost of the full-rate customs duties that it had to pay, since the goods concerned had already been re-sold at a set price agreed annually.

(9) The firm further claimed that it had not been obviously negligent since it had not clearly and deliberately failed in its obligation to complete customs formalities with due care.

(10) In support of the request submitted by the German authorities and in application of Article 905 of Regulation (EEC) No 2454/93, the firm indicated that it had been given access to the documentation the said authorities sent the Commission. The firm also stated its position and made observations on the documentation and the German authorities forwarded these to the Commission in their letter of 24 July 2001.

(11) In its letter of 17 January 2002, the Commission asked the Federal German authorities for additional information. This was sent in a letter dated 15 March 2002 and received by the Commission on 21 March 2002. In accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93 the administrative procedure was therefore suspended between 18 January and 21 March 2002.

(12) In a letter of 23 April 2002, which the firm received on 25 April 2002, the Commission informed the firm that it was considering taking a decision that went against the firm, and set out its reasons for doing so. The Commission also indicated that the firm could consult the papers relating to its request for reimbursement.

(13) On 15 May 2002 the firm's representative consulted these papers at the Commission's premises.

(14) In a letter of 22 May 2002, which the Commission received on the same day, the firm stated its position on the Commission's objections. The firm maintained that this was a special situation and that no deception or obvious negligence could be attributed to the company. It reminded the Commission of the special nature of the long-standing business relationship with its suppliers and of the supply contracts and purchasing commitments entered into prior to 15 November 1991 which, according to the firm, were the main reason why this special situation had arisen. The firm described the business relationship as being of a special nature in the sense that the commitments had been based on a long-term cooperation agreement with the Yugoslav Republic which afforded preferential treatment to the goods in question and that the business relationship should therefore have enjoyed greater protection. The firm also stressed that it imported the goods under binding supply contracts.

(15) The firm added that it had been in an exceptional situation compared with other traders since it was the only importer of wines originating in the Amselfeld wine-growing region in Kosovo. It also argued that no restrictive conditions could be applied to the special situation criterion since - as the firm maintained - earlier Commission decisions had reimbursed or refunded import duties in cases where the facts were similar or a large number of traders were in an identical situation.

(16) Similarly, the firm considered the transitional measures provided for in Council Regulation (EEC) No 3300/91 inadequate as regarded equity, even if they were adequate from a legal viewpoint.

(17) It also considered that the Commission failed to fulfil its obligation of diligence in not informing importers sufficiently in advance of the imminent suspension of the cooperation agreement by publishing information in the Official Journal especially as, according to the firm, denunciation of the agreement was envisaged as early as 7 October 1991.

(18) The firm repeated that it did not consider itself obviously negligent since it had acted with due diligence.

(19) In accordance with the third paragraph of Article 907 of Regulation (EEC) No 2454/93, the administrative procedure was suspended for one month running from 25 April 2002 to 25 May 2002.

(20) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 12 July 2002 as the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.

(21) In accordance with Article 13(1) of Regulation (EEC) No 1430/79, import duties may be repaid or remitted in special situations, other than those laid down in sections A to D of that Regulation, resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

(22) The Court of Justice of the European Communities has consistently taken the view that this provision represents a general principle of equity designed to cover an exceptional situation in which an operator, which would not otherwise have incurred the costs associated with post-clearance entry in the accounts of customs duties, might find itself compared with other operators carrying out the same activity.

(23) In this case the documentation the German authorities sent the Commission showed that the firm applied for, and unduly benefited from, preferential import duties corresponding to trade concessions first suspended and then denounced by the dates when the goods concerned were released into free circulation. This caused customs debt to arise and meant that the firm, which was the declarant, therefore owed the amount in question.

(24) When the firm states that the above mentioned Council Regulation (EEC) No 3300/91 failed to take sufficient account of the interests of Community traders importing goods from Yugoslavia after 15 November 1991 in response to orders placed before that date, it is in fact contesting the validity of the Regulation. However, if a Community Regulation were invalid, it would not constitute a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79, and traders who consider that they are the victims of erroneous Community Regulations should have recourse to other legal means available to them for contesting any such Regulations if they consider the Regulations invalid.

(25) It should first be remembered that in its judgement of 16 June[8] the Court of Justice of the European Communities concluded that examination of the questions referred has disclosed no factor of such a kind as to affect the validity of Council Regulation (EEC) No 3300/91 of 11 November 1991 referred to

(26) Concerning the contractual relations entered into by the firm, the following points should be made.

(27) As opposed to what the firm states in its communication of 22 May 2002, the Commission never said in its communication of 23 April 2002 that contracts concluded under the Cooperation Agreement between the European Community and Yugoslavia on the basis of trade preferences granted thereunder were of a special nature.

8 Judgment of 16 June 1998, A.Racke GmbH & Co. (Case C-162/96).

(28) In the communication of 23 April the Commission indicated that the contracts were concluded taking account of the opportunities offered by the provisions of the Cooperation Agreement between the Community and Yugoslavia. However, that did not confer any particular status on the contracts of the kind that would place the firm in an exceptional situation in comparison with that of other operators. Any trader wishing to do so could sign contracts to import goods granted the preferential rates provided for in the said Agreement. The situation was thus an objective one affecting an indefinite number of traders, so that it cannot be considered a special situation.

(29) Furthermore, the private contractual relationship between the firm and its client (long-term business contract under private law with the Yugoslav suppliers, contractual undertakings of considerable value made prior to 15 November 1991) cannot be considered an exceptional situation in comparison with that of other operators carrying out the same activity.

(30) The situation was not beyond the firm's control, since it was the result of business contracts over which the firm had control when it signed them. Even if the contracts were concluded taking account of the opportunities offered by the provisions of the Cooperation Agreement between the Community and Yugoslavia, neither the Agreement nor the trade concessions it provided for forced the firm to sign such contracts. The duration of the contracts and the volumes they covered were entirely the choice and responsibility of the firm.

(31) The contracts it concluded, whatever their content and the context in which they were concluded, do not therefore constitute a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79.

(32) As regards respect for proportionality and the protection of legitimate expectations, operators cannot base legitimate expectations on legislation being maintained over time, since one piece of Community legislation may be superseded by another at any moment. Once a piece of legislation amends a previous piece of legislation, the provisions of the previous piece of legislation no longer apply, even if the period of application of the earlier legislation was indefinite. In this case Regulation (EEC) No 3300/91, which suspended the trade concessions under discussion, provides for transitional measures for products originating in Yugoslavia that were exported before 15 November 1991, the date of its entry into force, and was recognised as valid by the Court of Justice of the European Communities in its judgment of 16 June 1998. It is therefore normal that the tariff concessions no longer applied to goods exported after 15 November 1991. Consequently the application of the law in force could not give rise to an exceptional situation and did not constitute a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79. The equity clause should not be used as a means to obviate the will of the legislator, which itself established the terms of a balance between the absolute need to make the denounced agreement immediately ineffective and the wish to ensure appropriate protection for operators.

(33) Furthermore, the economic impact of Regulation (EEC) No 3300/91 and Council Decision (EEC) No 91/602 affected not only the firm but all traders who found themselves in a similar situation at that date (i.e. who had released for free circulation goods that were no longer eligible for preferential tariffs although when the goods had been ordered the preferential tariffs had still been applicable).

(34) This is because Regulation (EEC) No 3300/91 covered operators who, from 15 November 1991, imported goods from and originating in the Republic of Yugoslavia and would have benefited from tariff concessions if the goods had been imported under the Cooperation Agreement. What is important here is to compare the firm's situation with that of the kind of operator referred to above in order to determine whether the firm's situation was special by comparison. The firm's situation as the sole importer of wine from the Amselfeld wine-growing region does nothing to alter the fact that, as far as the effects of Regulation (EEC) No 3300/91 are concerned, its situation was no different from that of other importers of wine from other wine-growing regions of the Republic of Yugoslavia or of importers of products originating in the Republic that would have been eligible for preferential import arrangements prior to 15 November 1991 under the Cooperation Agreement.

(35) Consequently, the effects of the abovementioned Regulation (EEC) No 3300/91 do represent a situation that is objective and affects an indefinite number of traders, so that the circumstances in which the goods were imported cannot be considered a special situation within the meaning of Article 13 of Regulation (EEC) No 143079.

(36) The firm's reference in its communication of 22 May 2002 to past Commission decisions granting remission or reimbursement of import duty although they related to a large number of operators all in an identical situation, is not relevant to the question whether an objective situation may be cited to exclude the existence of a special situation. In the situations covered by the decisions to which the firm refers, a special situation had come about as a consequence of failure on the part of the authorities in question. In the present case there has been no failure on the part of the competent authorities. This is a normal situation which applied to many operators and is referred to in Court case law as an objective situation. It excludes the possibility of the circumstances in which the imports in question were made being regarded as a special situation.[9]

(37) As to the fact that the firm could not subsequently pass the cost of the full-rate customs duties on to its customers, the Courts have consistently ruled[10] that it is the responsibility of traders to take the necessary measures in the context of their contractual relations to protect themselves against the risks of post-clearance collection of duties and being unable to pass the cost of such duties on to their customers. This fact does not, therefore, constitute a special situation.

(38) Concerning failure on the Commission's part, the following should be noted.

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9 Judgment of 26 March 1987, Coopérative agricole d'approvisionnement des Avirons (Case 58/86). Judgment of 18 January 2000, Méhibas (Case T-290/97).

10 Judgment of 18 January 2000, Méhibas (Case T-290/97).

(39) The facts of the present case are not comparable to those presented by the firm in its communication of 22 May 2002. They do not imply any failure on the part of the authorities in question. Therefore the question whether the Commission failed in its duty to warn traders of potential risks due to the said authorities' failure does not arise in this case.

(40) It should also be noted that, contrary to what is said in the firm's communication of 22 May, the Commission's internal memos of 7 October 1991, which the firm was able to consult when given access to the files, are merely file notes which, in connection with a question of origin, examine the question of trade relations between the EEC and the Republic of Yugoslavia in the event of suspension of bilateral agreements and the question of relations between the Community and the Republic if the latter were to break up. Therefore these cannot, under any circumstances, be taken to be official preparatory documents for a future regulation on the suspension of tariff concessions or legislation denouncing the Cooperation Agreement. They are wholly internal think pieces.

(41) The firm may not therefore draw the conclusion that on 7 October 1991 an official decision had already been adopted regarding the future of the Cooperation Agreement between the Community and the Republic of Yugoslavia.

(42) Therefore the Commission has no case to answer regarding failure of duty.

(43) It also has to be said that it is difficult to see how the firm, had it been informed before 30 October 1991, could, as it maintains, have cancelled some of its supply contracts since it mentions elsewhere that its imports were made in accordance with firm supply contracts.

(44) None of the information included in the dossier therefore allows the conclusion that a special situation of the kind referred to in Article 13 (1) of Council Regulation (EEC) No 1430/79 existed.

(45) Nor has the Commission found any other factors constituting a special situation.

(46) Concerning the second condition of Article 13 of Regulation (EEC) No 1430/79 referred to above, i.e. whether there has been deception or obvious negligence, the Court of Justice of the European Communities has consistently taken the view that account must be taken, in particular, of the operator's experience and diligence, and of the complexity of the law.

(47) The abovementioned Council Regulation (EEC) No 3300/91 clearly states that from 15 November 1991 the trade concessions granted by, or pursuant to, the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia are hereby suspended.

(48) The firm had been importing similar products for many years. In its letter of 8 September 1999 it said that it had been making contractual undertakings to purchase and import wine from Yugoslavia (Kosovo region) since May 1971. It can therefore, in accordance with consistent rulings of the Courts, be considered an experienced economic operator. As such it should be familiar with customs rules and the commercial risks to which its business is subject.

(49) Several months before the imports in question were carried out, a conflict broke out in Yugoslavia, and was given intensive media coverage from the outset. The international community, including the European Community, tried to play an active role in bringing it to an end. With this objective, at the beginning of July an embargo was placed on military equipment and economic assistance to Yugoslavia was suspended. In September 1991 a peace conference was organised, and was given extensive media coverage. Then the European Community and its Member States, meeting within the framework of European Political Cooperation, issued declarations on 5, 6 and 28 October 1991, taking note of the fact that there was a crisis in Yugoslavia and that the UN Security Council, in its Resolution 713 (1991), had expressed its concern that the continuation of this situation would constitute a threat to international peace and security. On that occasion, as the Court of Justice points out in its judgment of 16 June 1998, the Community and its Member States had announced that they would adopt restrictive measures against those parties which did not observe the cease-fire agreement of 4 October 1991 which they had signed in the presence of the President of the Council and the President of the Conference on Yugoslavia. The declaration of 6 August 1991 stated that in the event of non-observation they would bring the Cooperation Agreement with Yugoslavia to an end and only renew it with those parties that contributed to the peace process in the region.

(50) For that reason the Representatives of the Governments of the Member States meeting in the Council adopted a decision on 11 November 1991 suspending the application of the Agreements between the European Community, its Member States and the Socialist Federal Republic of Yugoslavia[11], and the Council adopted Regulation (EEC) No 3390/91 of 11 November 1991 referred to above.

[11] OJ L 315, 15.11.1991, p. 47.

(51) Moreover, as the Advocate General found in his opinion of 4 December 1997 on case C-126/96 cited above (Court of Justice judgment: 16 June 1998), traders based in the Community could not reasonably expect, in November 1991, that the Community would continue to grant tariff preferences for imports from Serbia and Montenegro. Indeed, from 31 May 1992 all trade with the Republics of Serbia and Montenegro was prohibited under Council Regulation (EEC) No 1432/92 of 1 July 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro.[12]

(52) Therefore, given its experience and the volume of goods it was importing from Yugoslavia (Amselfeld region in Kosovo), the firm should have kept abreast of the country's situation and the possible economic consequences that the conflict might have.

(53) In any event, on the dates of release for free circulation concerned (i.e. between February and June 1992 - which are the relevant dates from the point of view of when customs debt was incurred, as opposed to the dates quoted in the communication of 22 May 2002 which are the dates when the orders were placed), the firm should have known that the tariff concessions between the European Community and Yugoslavia had been suspended. The Commission would point out that in its judgment of 12 July 1989,[13] the Court of Justice added that it was not unreasonable to expect an experienced economic operator, like the firm in question, to keep abreast of the Community law applicable to its transactions by reading the relevant Official Journals. Regulation (EEC) No 3300/91 suspending the trade concessions concerned had, after all, been published in the Official Journal of the European Communities on 15 November 1991, several months before the imports concerned were released for free circulation.

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12 OJ L 151, 6.06.1992,p. 4.

13 Judgment of 12 July 1989, Binder (Case 161/88).

(54) If the firm had read the Official Journals cited above with due care, it would have realised that it was not entitled to apply for tariff concessions for the imports concerned (transactions which, it should be remembered, occurred between February and June 1992, i.e. several months after entry into force of the abovementioned Regulation (EEC) No 3300/91) and would have had doubts about the fact that the German customs authorities initially granted it those concessions. In failing to do so it manifested negligence.

(55) Therefore, the second condition laid down in Article 13 of Regulation (EEC) No 1430/79 has not been met in this case.

(56) Repayment of the import duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

Article one

Repayment of import duties in the sum of XXXXXX requested by the Federal Republic of Germany on 24 July 2001 is not justified.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 01/08/02

For the Commission

Member of the Commission