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Court of Auditors

2000/C 70/01 Special Report No 8/99 on securities and guarantees provided for in the Community Customs Code to protect the collection of traditional own resources together with the Commission's replies 1

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(Information)

COURT OF AUDITORS

SPECIAL REPORT No 8/99

on securities and guarantees provided for in the Community Customs Code to protect the collection of traditional own resources together with the Commission's replies

(pursuant to Article 248(4) second subparagraph, EC)

(2000/C 70/01)

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Summary

A substantial part of the ECU 14 100 million traditional own resources (primarily customs duties) collected in 1998 on behalf of the Community by the customs administrations of the Member States will have been covered by some form of security or guarantee before finally being made available to the Commission.

This system of securities and guarantees which is put in place by Community legislation is designed to facilitate trade by allowing operators the possibility of delaying payment of mature customs debts and suspending potential duties on goods in customs regimes. Securities or guarantees are compulsory in some circumstances, optional in others.

To the extent that the failure to respect the procedures relating to securities and guarantees results in the non-collection of customs revenues due to the Community, additional GNP contributions have to be paid by the Member States. Overall revenue remains the same, but the burden is distributed in a different way among the taxpayers in the Member States.

The report raises questions about the responsibilities of the Member States, where in four cases the procedures for management of securities and guarantees under national arrangements are inconsistent with the requirements of Community legislation. In this regard, the national authorities concerned have not assured the complete protection of the Community's financial interests.

It also questions whether the legislation is adequate to fulfil its role in protecting the Community's resources or is sufficiently clear and unambiguous to ensure its uniform application throughout the Community. It calls on the Commission to use its powers to resolve the inadequacies and ambiguities noted.

The inability of customs authorities in some instances to monitor the deferred payment accounts of traders using simplified procedures can sometimes result in these traders taking excessive unsecured credit.

The Community can sometimes suffer delays in receiving its income when customs authorities fail to follow up promptly cases where customs debts are suspended while awaiting supporting documents or where traders or importers permanently retain goods which have been imported temporarily into the Community's customs territory.

In the transit system, long considered to be one of the customs union's high-risk areas, shortcomings are still obvious — despite undoubted improvements.

In a number of Member States the provisions on the setting and monitoring of comprehensive guarantees and the application of these provisions in the Member States are not entirely reliable. The waiver of guarantee is too easy to obtain in some Member States. The absence of a requirement to provide information in the single administrative document on the nature and value of goods ties the hands of the customs authorities in their efforts to effectively monitor Community transit traffic. Cooperation between the customs authorities in tracing undischarged transit operations is still inadequate.

In three Member States, the provisions regarding appeals under national law allow many traders to bypass the administrative appeals procedures foreseen in Community customs legislation, such that traders can avoid the requirement to provide a security. In consequence, the Community's own resources may be put at risk.

A provision in the main regulation on own resources accounting, which requires secured debts to be passed on to the Community on their establishment (i.e. when identified rather than when collected) is widely breached by Member States, which prefer to wait until the debts are collected.

Customs debts which are supposed to be covered by guarantees in the transit system have remained outstanding for a number of years because of failings in the insurance arrangements made under the Customs International Conventions on the Transport of Goods under Cover of TIR Carnets (TIR Convention).

Finally, the report stresses the need for the Commission and the Member States to reach a consensus on the drawing-up and enforcement of harmonised legislation and calls on the Commission if the need arises to use its powers of initiative to propose the necessary improvements.

Introduction

1. Under Council Decision 94/728/EC, Euratom of 31 October 1994 the Community Budget is part-financed by customs duties and agricultural duties, collectively known as traditional own resources. For 1998, the budget outturn amounted to ECU 14 100 million net, approximately 16,9 % of the total own resources budget. The customs authorities of the Member States collect these revenues on the basis of the Community Customs Code ([1]) and in conformity with the provisions of Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 ([2]).

2. Definitive customs debts arise, in the main, on the 'release for free circulation' in the Community of imported goods that are liable to these duties.

3. To facilitate trade, Community customs legislation provides for the collection of duties to be suspended where goods are removed from direct customs control into customs procedures. The most significant of these procedures are customs warehousing, inward processing, temporary importation and transit.

4. Collection of duties may also be suspended or deferred where imported goods are moved within the Community customs territory under an approved transit scheme; in the event of an appeal against a decision of a customs authority; to enable periodic payments to be made; to facilitate the temporary movement of goods; and where documents supporting a lower or zero-rating of duty are unavailable at the time of customs clearance of goods.

5. To protect the financial interests of the Community and ensure that established entitlements of own resources are collected when due, provisions dealing with securities and guarantees ([3]) have been incorporated into Community customs legislation. While reliable statistics are not available, the Court noted that a substantial part of the ECU 14 100 million of traditional own resources entered in the Community's accounts for 1998 will have been covered by a security at least once before being made available. Securities also cover an unquantified level of potential debts in suspensive customs procedures.

6. Customs debts are required to be entered in accounts maintained in each Member State (hereafter called A accounts) and made available to the Commission. However, unsecured debts and secured but challenged debts may be entered in separate accounts (hereafter called B accounts). As soon as Community entitlements that have been entered in the B accounts are settled, they are required to be transferred within the prescribed period to the A accounts. The consolidated balance sheet of the European Community for 1998 shows the volume of debts entered in the B accounts at ECU 1 739 million (1 362 million in 1997). This balance comprises the unsecured debts arising from fraud and irregularity and the secured but contested debts.

Legal provisions in Community legislation

Mandatory securities

7. Community customs legislation makes the taking of securities mandatory in the following circumstances:

— when imported goods are released for free circulation in the Community with approval for deferment of payment of the duties involved ([4]),

— when goods which would be the subject of customs duty are being moved through the customs territory under a transit procedure ([5]),

— when goods are being imported temporarily into the Community ([6]),

— when the declarant seeks to benefit from a reduced or zero rate of customs duty but does not, at the time of declaration, have all the necessary supporting documentation but wishes none the less to have goods released for free circulation immediately (incomplete declarations) ([7]), and

([1]) Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1).

([2]) Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ L 155, 7.6.1989, p. 1).

([3]) Securities encompass many forms of surety; cash deposits; pledging of goods; bills of exchange; charges on property, etc. while guarantees are specific undertakings by guarantors to pay on demand.

([4]) Article 224 et seq. of Council Regulation (EEC) No 2913/92.

([5]) Article 94 of Council Regulation (EEC) No 2913/92.

([6]) Article 88 of Council Regulation (EEC) No 2913/92 and Article 700 of 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 L 253, 11.10.1993, p. 1).

([7]) Article 257 of Commission Regulation (EEC) No 2454/93.

— when the declarant wishes to make an appeal against a decision of the customs authority while suspending the implementation of the decision where that decision has the effect of causing import or export duties to be charged [1].

Optional securities

8. The legislation also provides that securities may be taken by customs authorities as follows:

— when customs traders operate a suspensive procedure such as customs warehousing [2], inward processing [3], processing under customs control [4],

— when goods are in temporary storage awaiting a customs approved treatment [5],

— for imported goods which benefit from favourable tariff treatment as a result of their declared end use [6].

Determining the amount of security

9. Where a security is mandatory the customs authorities are required to fix its level equal to the precise amount of the customs debt where it can be established with certainty, or if not, the maximum amount, as estimated by the customs authorities [7], of the customs debts which have been or may be incurred. Special provisions apply under the transit procedure. Where the security to be provided is optional the customs authorities of the Member States determine the level on the basis of their evaluation of a number of financial and other factors relating to the individual declarants.

Scope and objectives of the audit

10. The Court's audit focused primarily on the management of securities and guarantees by the Member States' customs administrations and concentrated on the more significant customs procedures where securities or guarantees are taken to protect the Community's financial interests. The audit also examined the recovery measures that are available to the customs authorities where securities or guarantees prove to be insufficient or inadequate.

11. The principal objectives of the audit were to evaluate the extent to which Member States complied with the legal requirements, and how these requirements and the practices surrounding them cover the risks facing the customs authorities in their collection of Community own resources. The audit was conducted in eight Member States namely Belgium, Germany, Spain, France, Italy, the Netherlands, Austria and the United Kingdom, which together accounted for some 90 % of the total traditional own resources made available to the Commission in 1998.

Audit findings

Deferment of duty

12. Article 74(1) and Article 192 of the Community Customs Code [8] provide that where a customs debt has been incurred following the acceptance of a customs declaration, the goods in question may only be released to the declarant when the latter pays the import duties or provides security for the debt arising on them. A declarant may only be granted the right to defer payment in accordance with the Community Customs Code where he provides security corresponding to the amount of the customs debt in question. It is generally a requirement of the granting of deferral approval that the trader agrees not to exceed the authorised limits.

13. In four of the Member States visited, the procedures in operation are not adapted to ensure that the requirements outlined in paragraph 12 are adhered to. This is illustrated by the following examples.

— The customs authorities in two of these Member States cannot confirm or monitor compliance with these requirements where release of goods for free circulation occurs under a simplified scheduling arrangement. This is because they do not receive information on goods released under the scheduling arrangement until the beginning of the following month. The Court observed one case where the trader had released goods under this procedure where the customs duties exceeded the guarantee provided by a factor of 10,5.

(1) Article 244 of Council Regulation (EEC) No 2913/92.
(2) Article 104 et seq. of Council Regulation (EEC) No 2913/92.
(3) Article 88 of Council Regulation (EEC) No 2913/92.
(4) Article 88 of Council Regulation (EEC) No 2913/92.
(5) Article 51 of Council Regulation (EEC) No 2913/92.
(6) Article 82 of Council Regulation (EEC) No 2913/92.
(7) Article 192 of Council Regulation (EEC) No 2913/92.
(8) Council Regulation (EEC) No 2913/92.

— In another Member State, national procedures, which allow traders to clear goods at any customs office under an authorising certificate system, sometimes cannot monitor customs debts being incurred against authorised limits. This is because the information on customs clearances is physically sent to a centralised deferment office, with matching occurring days after clearance of the goods. In addition, a recently implemented computerised accounting system does not allow partially secured customs debts to be entered in the A accounts and made available to the Commission in the appropriate manner. As a result, where there is insufficient security to cover the whole of a customs debt, none of that debt is made available until the total amount has been collected.

14. In normal circumstances, when deferral monitoring by customs authorities indicates that traders may be about to exceed their authorised limits these traders are required to increase security or make physical payment before release of goods. It is acknowledged that customs cannot effectively monitor adherence to security requirements in all circumstances because of shortcomings in their systems and operational procedures. In order that no trader is put at a disadvantage, there may be a need to apply systematically the provisions of Article 232(1) of the Community Customs Code concerning compensatory interest in case of late payment of customs debts in excess of the authorised limits.

Temporary importation of goods

15. Goods may be imported into the Community customs territory for exhibition, testing or other temporary purpose without the payment of customs duties. Community customs legislation [1] lays down a maximum period of 24 months during which goods may remain under this procedure. The customs authorities may, however, determine shorter periods with the agreement of the person concerned. In exceptional circumstances, the maximum time limit may be extended. In practice, the maximum period of 24 months is normally applied. The facility may be used on the provision of security equivalent to the amount of the duties involved — in practice traders are very often required to provide a cash deposit as security. The Court found the following:

— In one jurisdiction, a major trader that frequently uses the temporary importation procedure had, at the time of audit, 470 temporary importation declarations uncleared after two years. The Court noted that the customs authority frequently terminates the temporary importation procedure by taking the cash security to account as customs duty on expiry of the maximum permitted period. It is not possible to determine whether and to what extent the own resources involved in these cases should have been made available to the Commission at an earlier date, had an effective review procedure been in operation to determine the actual date of the creation of the customs debt.

— In another, the Court noted that security of only 10 % of the potential customs duties was taken on goods entered under the temporary importation procedure at one customs office visited. The Court understands that the percentage taken varies from office to office and circumstance to circumstance, but that where the goods are to be used in any other Member State 100 % of the potential duties is taken. However, customs legislation provides that in any circumstance where a security is compulsory, as in the temporary imporation of goods, the level of the security shall be set as a minimum at the amount of the duties involved [2].

16. It is incumbent on the customs authorities of the Member States to treat the two-year limit allowed for temporary importation as that and to recognise that failure to carefully monitor goods introduced into the Community under this procedure can result in major delays in giving the Community benefit of the duties involved. In order to protect the Community's financial interests properly, the Commission should ensure that Member States put in place appropriate monitoring procedures designed to identify, on a timely basis, those declarations relating to temporary importation which are uncleared after the time limit agreed by the customs authorities and, at the latest, 24 months after the initial declaration.

Incomplete declarations [3]

17. Under Community legislation [4], customs authorities may allow traders up to one month to provide missing documents or

(1) Article 140 of Council Regulation (EEC) No 2913/92.

(2) Article 192 of Council Regulation (EEC) No 2913/92.

(3) When the declarant seeks to benefit from a reduced or zero rate of customs duty but does not, at the time of declaration, have all the necessary supporting documentation but wishes none the less to have goods released for free circulation immediately, he lodges an incomplete declaration.

(4) Article 256 of Commission Regulation (EEC) No 2454/93.

other particulars in support of a customs declaration. Where the missing documents may enable a declarant to qualify for a reduced or zero rate of duty, customs authorities may grant a further extension of up to three months in which to produce the documents. They are, however, required to take security to cover the difference between the full rate of duty and the reduced or zero rate being sought. Where the missing documents or particulars are not provided by the end of the time limit set out the amount of the security taken shall be entered immediately in the A accounts.

18. In three Member States, the Court noted cases where the maximum permitted period had elapsed but the procedures in operation failed to ensure that the secured duties at the full rate were entered in the A accounts to be made available to the Commission at the appropriate time.

19. As Community legislation covering so-called incomplete declarations is quite clear, the Court sees the delay in entering the duties involved in the A accounts as resting with the Member States' administrations rather than with the traders concerned. The use of a drawback procedure may be appropriate here.

Transit

20. The Community Customs Code [1] provides for an external transit procedure that allows the movement from one point to another within the customs territory of the Community of:

— non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures,

— Community goods, which are subject to a Community measure involving their export to third countries and in respect of which the corresponding customs formalities for export have been carried out.

The most significant movements are made under the external Community transit procedure and under cover of a TIR carnet issued pursuant to the TIR Convention [2].

[1] Article 91 of Council Regulation (EEC) No 2913/92.

[2] Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) (OJ L 252, 14.9.1978, p. 2).

Monitoring and adequacy of comprehensive guarantees

21. The implementing provisions of the Community Customs Code require that operators using the transit procedure must have one of three forms of guarantee: individual, for a range of listed sensitive goods; flat rate, for intermittent users of the procedure; and comprehensive, for habitual users who satisfy certain criteria. Article 361 of the provisions implementing the Community Customs Code sets out a procedure to evaluate the level of comprehensive guarantee to be provided by operators. This procedure determines that the amount of the guarantee shall be set on the basis of one week's transit operations. The adequacy of the level of the guarantee must be reviewed and if necessary amended each year by the customs authorities. Customs authorities are required to use information from customs offices of departure in the review process. However, as there are at present no procedures in place to obtain such information from the departure offices in other Member States, the Court sees this as implying a need to use the commercial and accounting documentation of the operator to achieve a meaningful result from the process [3].

22. The Court found that the arrangements for carrying out these reviews were inadequate in a number of Member States as the following examples illustrate.

— In two, the customs authorities used data provided by transit operators covering only a reference period in the year's activities. Although the customs authorities concerned considered that the reference periods were representative it was not possible to confirm that those selected were typical of the traders' activities and therefore that the comprehensive guarantees were adequate.

— In another, the Court noted that a review of guarantees had not been carried out for five years.

— While reviews are carried out in five Member States, the frequency and method of the review do not conform to the requirements of Community legislation. For instance:

    — In one, a computerised review process is in operation but is such that it cannot confirm the continuing adequacy of the level of guarantee because, in common with other Member States, it cannot access details of transit operations commenced in other Member States (see paragraph 21).

[3] Article 361 of Commission Regulation (EEC) No 2454/93.

— In another, reviews were only carried out every two years, while in a customs office of another reviews were only carried out on a sample basis in 1996 and 1997.

— In the fourth regular reviews are carried out but the global guarantee figures suggested by operators in a number of cases examined by the Court were accepted by customs without reference to or verification of information contained in the commercial or accounting documentation of the operators.

— Finally, the customs authorities of two Member States do not make use of a central transit office. This means that individual customs offices that issue transit certificates cannot monitor transit operations carried out under these certificates at other offices of departure. The national authorities are therefore not in a position to verify that comprehensive guarantees in place are adequate for operations commencing within its own jurisdiction.

23. The Court noted a transit case where the unlawful introduction of cigarettes into the Community gave rise to a demand for customs duties of approximately ECU 2,8 million. The comprehensive guarantee, provided to the customs authority of a third country under common transit arrangements, only amounted to approximately ECU 200 000. The authorities of the contracting state are responsible for monitoring the adequacy of guarantees accepted by them. In this instance, the insufficient guarantee had been exhausted by prior claims on it.

24. This case serves to illustrate a significant shortcoming in the ability of the comprehensive guarantee provisions to protect the Community's financial interests. Under Article 360 of the amended provisions implementing the Community Customs Code, customs authorities may issue multiple copies of guarantee certificates, each of which may be used up to the limit of the guarantee and from any office of departure in the customs territory. This fact and the time lag in clearing existing transit operations effectively mean that the debts supposed to be covered by a guarantee may be many times greater than it. The inevitable consequence is that in the event of a transit failure and subsequent default by the operator in paying his debts, the guarantor will only be liable for debts up to the limit set.

Waiver of comprehensive guarantee in transit

25. Member States may grant a waiver of the comprehensive guarantee to an operator under Community customs legislation [1] provided the operator meets the following conditions:

— be established in the Member State where the waiver is granted,

— be a regular user of the Community transit procedure,

— be in a financial situation such that he can meet his commitments,

— not have committed any serious infringement of customs or fiscal laws, and

— undertake to pay, upon the first application in writing by the customs authorities, any sums claimed in respect of his Community transit operations.

26. Community legislation [2] requires that guarantee waiver should not be granted for the movement of goods of value in excess of ECU 100 000.

27. The Court noted the use of the waiver provisions in a number of Member States and in two of them was unable to confirm the use by their respective customs authorities of formal procedures to verify the financial suitability of applicants for guarantee waiver.

28. The Court was unable to confirm that procedures were in place to monitor compliance with the requirement that movements of goods of value in excess of ECU 100 000 were not granted guarantee waiver. The fact that the single administrative document used for transit purposes does not include information on the value of consignments nor customs tariff number militates against effective monitoring by Member States of this provision. It also hampers the customs authorities in assessing risk inherent in individual transit operations and in ensuring the adequacy of the guarantees provided.

29. Given the tendency of Member States to enter all debts arising from undischarged transit operations in the B accounts, the Court questions whether the undertakings required to be given as a condition of the granting of guarantee waivers represent 'self-guarantees' and that the associated debts should be deemed to be secured debts under the terms of Council Regulation (EEC, Euratom) No 1552/89 and therefore made available to the Commission without delay.

30. In a review of outstanding transit operations in one Member State, the Court noted four cases where the customs authorities had established own resources debts due from operators that had been granted guarantee waivers. At the time of audit, payment

(1) Article 95 of Council Regulation (EEC) No 2913/92.

(2) Article 95 of Council Regulation (EEC) No 2913/92.

had not been received in any of these cases nor were the sums due made available to the Commission on their establishment. It is clear that the grant of a guarantee waiver should be given only to those traders involved in transit operations who have displayed a willingness to abide by the provisions of the scheme. The Court noted that proposals [1] have recently been made to make the granting of waiver dependent on traders meeting higher standards of reliability in the use of the transit procedure and in their cooperation with the customs authorities.

Notification of potential transit debts to guarantors

31. Community customs legislation [2] provides that a guarantor shall not be required to honour his guarantee covering debts arising from undischarged transit operations if he is not notified of the potential debt within a period of 12 months from the date of registration of the operation. The Court noted 10 cases, entered in the B accounts, where the customs authority failed to notify the guarantors within the prescribed period of potential liabilities of approximately ECU 200 000 under guarantees in place. Another customs authority did not demand payment from a guarantor of an established debt of approximately ECU 330 000, entered in the B accounts, for an undischarged transit operation under a guarantee, because in its view although it had notified the guarantor within the prescribed time limit it had not determined the amount of the debt on time.

32. In the Court's view the own resources involved should have been entered in the A accounts and made available to the Commission as the amounts were guaranteed and not subject to challenge within the prescribed time limit. As a consequence of this error or failure on the part of customs, the Member States in question should assume the financial consequences and make the established duties available without delay, independently of whether or not the debts will be recovered from the debtors or guarantors. The Commission should charge interest to compensate for making payments available belatedly, which resulted from the administrative practice described above.

Mutual assistance issues

33. A major tool in the Community's fight against fraud in the context of customs union and common agricultural policy is Council Regulation (EC) No 515/97 [3] on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission. This Regulation asserts that 'effective cooperation in this field strengthens the protection of the financial interests of the Community'.

34. During its audit, the Court reviewed the application of mutual assistance procedures in transit and noted one instance involving four Member States where only ECU 99 707 had been collected from a total debt of ECU 645 557 resulting from apparent delays in passing on demands for payment, insufficient guarantee or incorrect name of guarantor.

35. The Court, in its report on the 1994 financial year [4], commented on inadequacies in cooperation and follow-up by Member States and the Commission in their implementation of the regulations on mutual assistance. The Court has also commented in past reports that the single market has become a reality for traders — especially those who would evade the payment of duties and taxes, while for the Community services it still seems to be constrained within the national borders.

TIR (transports internationaux routiers/international road transport))

36. Article 91(2) of the Community Customs Code [5] provides, *inter alia*, that movements of non-Community goods can be made, under certain conditions, under the TIR Convention of 14 November 1975 using TIR carnets. In these cases, approved guaranteeing associations act as guarantors up to a maximum of USD 50 000 per TIR carnet (depending on the Member State involved) relieving the operator of the need to provide a specific transit guarantee.

37. The guaranteeing associations are invariably road hauliers' associations in individual States, both Community and third countries. The Convention provides for the honouring, by the relevant association in any State through which goods are being

(1) Opinion of the Commission pursuant to Article 189b(2)(d) of the EC Treaty, on the European Parliament's amendment to the Council's common position regarding the proposal for a European Parliament and Council Regulation (EC) amending Regulation (EEC) No 2913/92 establishing the Community Customs Code (transit) (COM(1999) 47 final).

(2) Artice 374 of Commission Regulation (EEC) No 2454/93.

(3) Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ L 82, 22.3.1997, p. 1).

(4) OJ C 303, 14.11.1995, p. 25.

(5) Council Regulation (EEC) No 2913/92.

transported, of any debts arising from the non-discharge of a TIR operation, even though the carnet holder's contract is with an association which is incorporated and carries out its activities in another State.

38. The guaranteeing associations have arranged — through the International Road Transport Union (IRU) — insurance to cover potential liabilities they could face from the issue of carnets under the Convention. In the course of the audit in a number of Member States and at the Commission the Court became aware of difficulties in relation to these insurance policies. The pool of insurance companies, underwriting the potential liabilities of the IRU, refused to honour their policies because of the magnitude of debts arising in trade between the central and east European countries and the Community. The bulk of these debts arose in one Member State as a consequence of its proximity to these countries.

39. Under Community rules, the Member State responsible for the collection of duties in undischarged TIR cases is that in which the goods were last known to be or where the goods were first introduced into the Community where their whereabouts is not known. As a result of its particular geographical position, one Member State accounts for a disproportionate amount of undischarged transit cases.

40. The Court noted from an internal Commission report on a monitoring visit to this Member State that the national authority had concluded an agreement with one of the guaranteeing associations not to press for payment under the Convention but that an arbitration case is in progress.

41. Community legislation [1] requires that own resource entitlements not collected but covered by a guarantee should be made available to the Commission by the 19th day of the second month following the establishment of the debt. The Court has asked the national authority for the legal justification not to make the debts available at the appropriate time in this instance.

42. The Court noted that demands for payment of customs duties to the guaranteeing association were withdrawn when it was discovered that the demands were erroneously sent to the guarantor before a request for payment was made to the principal. The guarantor cannot now be proceeded against for these debts. These duties have not been made available to the Commission despite the fact that their non-collection resulted from an error of the customs authorities. The Commission should take steps to collect these duties and late payment interest thereon.

(1) Council Regulation (EEC, Euratom) No 1552/89.

43. The TIR Convention is an integral part of the Community's facilitation of trade in moving goods through and throughout the Community territory. The Court is of the opinion that the difficulties giving rise to the failure to collect the considerable amounts of customs duties and other taxes arising from these TIR operations indicate the consequences of not putting in place an effective monitoring system in the whole field of transit of goods. Monitoring here means not only supervision of the adequacy of guarantees and reliability of guarantors but also the timely clearance of operations carried out.

Appeals

44. Article 244 of the Community Customs Code permits a customs authority to suspend implementation of a disputed decision which would have given rise to a customs debt provided a security for the debt exists or is lodged. Security need not be provided where this requirement could have serious social or economic consequences for the appellant. Examples of circumstances where security has not been requested are:

— in one customs authority, the Court noted from a review of the B accounts that demands for payment of own resources amounting to ECU 10 737 129 in respect of undischarged TIR operations remained uncollected up to November 1998. The carnet holder lodged an appeal against these demands, which was accepted for hearing with suspension of the decision but without the requirement to provide a security. The appeal was rejected as unfounded in December 1998,

— in three other Member States, the provisions of national law allow many traders to bypass the administrative appeals procedure foreseen in Article 244 of the Community Customs Code. By following national law, traders can avoid the requirement to provide a security by making their appeals direct to the relevant courts of the respective Member States.

45. The Commission should carry out a review of the provisions of national law relating to security on appeals to establish the extent to which national legislation is inconsistent with the requirements of the Community Customs Code.

Situations where no security exists

46. Earlier in this report (see paragraph 25) the Court commented on the responsibilities of the Member States where customs debts cannot be collected and the principal concerned was granted a guarantee waiver under the transit procedure.

47. Other circumstances exist where no security is required although own resource debts may arise. These are:

— Article 189 of the Community Customs Code which provides that no security is required where the debtor or potential debtor is a public authority, and

— Article 94 of the Community Customs Code which provides among other things that for transit operations no guarantee is required from the railway companies of the Member States.

48. With regard to the Article 189 provisions, there are many situations in the Member States where the nature of a public authority, as used by customs authorities, is far from uniform. There are significant numbers of arm's-length agencies and public utilities where it is by no means certain the Member States will underwrite the debts of these agencies or bodies. As regards Article 94, in several Member States the railway companies now constitute private enterprises.

49. Where the customs authorities decide not to take an optional security, such decisions are based on their assessment of the reliability of the principals concerned. This implies that the Member States assume liability for customs debts arising in cases of non-recovery.

50. The only situation in which Community customs legislation does not oblige customs authorities to take a security is where a demand is made for payment of a customs debt after clearance of goods. In all other cases customs authorities make or are deemed to have made an assessment of the risk of not collecting debts which may arise. The Court is of the opinion that the provisions of Article 17(2) of Council Regulation (EEC, Euratom) No 1552/89 are sufficiently clear to deal with the problem outlined. It is incumbent on the Commission to exercise its supervisory role to ensure that Member States only exercise their prerogative under the Article 'in cases of *force majeure*' or where collection of customs debts cannot be effected if 'it appears that recovery is impossible in the long term for reasons which cannot be attributed to them'. The Court is of the view that failure to make a proper assessment of risks of non-collection of customs debts does not constitute a reason for not making available own resources in accordance with this Article.

Making available to the Commission secured entitlements

51. Article 6(2) of Council Regulation (EEC, Euratom) No 1552/89 makes the following provisions regarding the making available of Community own resources:

(a) Entitlements established in accordance with Article 2 shall, subject to point (b) of this paragraph, be entered in the accounts at the latest on the first working day after the 19th day of the second month following the month during which the entitlement was established (A accounts).

(b) Established entitlements not entered in the accounts referred to in point (a) because they have not yet been recovered and no security has been provided shall be shown in separate accounts within the period laid down in point (a). Member States may adopt this procedure where established entitlements for which security has been provided have been challenged and might upon settlement of the disputes which have arisen be subject to change (B accounts).

52. These provisions are not widely respected in the Member States, with the consequence that frequently the Community's entitlements are not made available to the Commission when required. This is illustrated by the following examples.

— In many Member States, secured but uncollected and uncontested customs debts are wrongly entered in the B accounts until such time as they are collected when they are transferred to the A accounts.

— In one of these, the administration argues that Member States cannot know that the debt has been accepted until after it is communicated to the debtor. Thus it follows logically they should always have the possibility of entering the amount of duties in the B accounts, since they do not know whether the entitlements have been challenged. Furthermore, under national legislation, failure to make payment within the time limit is adequate evidence of contestation of the debt.

— In another, the administration contends that Community legislation does not permit the transfer of an amount from the A accounts to B accounts and that therefore it is inappropriate to enter debts that may be challenged in the A accounts.

— Although the customs authority of one agrees that the regulations require that such entitlements should be entered in the A accounts immediately, the Court noted that in practice where customs debts are only partly secured the whole amounts are entered in the B accounts.

— In another, the national instructions governing accounting for uncollected debts covered by comprehensive guarantees under the Community transit and TIR procedure, state that such debts are to be considered unsecured for the purpose of applying the provisions of Council Regulation (EEC, Euratom)

No 1552/89. This view is supported by two others, which contend that it is not possible to confirm, at the time of establishing a transit debt, that the comprehensive guarantee has not been exhausted by prior calls on it, it is appropriate to enter the amount in the B accounts until collected.

53. This report cites a number of circumstances where Member States fail to make available own resources on their establishment that are covered or partly covered by security and that do not show evidence of being appealed by the debtors involved. The Court is concerned that:

— despite the fact that it has reported on this issue repeatedly over the past number of years, and

— despite the fact that the Commission services have also raised the problem with the Member States over the years,

no meaningful solution has been found to ensure that the Community receives the resources to which it is entitled in good time. This matter is of particular importance given that, at its meeting of 24 and 25 March 1999 in Berlin [1], the European Council agreed that the amount deducted by Member States by way of collection costs [2] would be increased from 10 % to 25 % effective from 2001.

Conclusion

54. This report highlights a number of situations where the procedures applied by the Member States in the management of securities and guarantees are either inconsistent with the requirements of Community customs legislation or are simply ineffective (e.g. see paragraphs 13 and 14). The customs authorities of the Member States have a clear responsibility to remedy these deficiencies. Equally however, the Commission must use its powers to enforce improvements. In so far as inadequacies and ambiguities in the legislation give rise to difficulties in assuring consistent application of customs rules, the Commission has the possibility of raising any such problems with the Member States in the Customs Code Committee and to seek appropriate solutions through discussion. If this forum does not resolve these problems, then the Commission has the power of initiative to propose the necessary improvements, although their successful implementation depends on the willingness of the Council and the Parliament to approve them; and of the Member States to take the necessary action on the ground.

55. The Court's objective was to assess the suitability of the procedures. The main conclusions are:

(a) compensatory interest should be levied on traders who effectively use unauthorised credit in their deferment accounts to ensure that all traders receive equality of treatment (see paragraph 14);

(b) similarly, use of a drawback procedure for incomplete declarations would, if implemented, ensure that the Commission and Member States receive customs duties in a timely manner and should also reduce the current level of monitoring required by the procedures (see paragraph 19);

(c) concerning the Community transit system:

— the purpose of the comprehensive guarantee and its effectiveness as a financial instrument to protect Community revenue are put in doubt by a number of system weaknesses,

— the Court questions whether there is a greater emphasis placed on goods than on the operator in the context of comprehensive guarantee in the light of the level of undischarged transit operations encountered during the audit. The system as constituted entitles the operator to take up the facility to use multiple guarantee certificates each of which can be used up to the limit of the guarantee rendering it almost ineffective for a great many operations (see paragraph 24),

— the priority given to the monitoring of the levels of guarantee set for operators up to now has been inadequate but there are signs of improvement. To be effective the monitoring process must formally include review of the accounting and commercial documents of the operator (see paragraphs 21 to 24),

— to facilitate the review and also alert customs authorities to potential risks from high value goods the minimum contents of the transit single administrative document must be revised to include consignment values and tariff code number (see paragraph 28),

— guarantee waivers should only be granted to operators proven to have continuing reliability and financial standing. The evaluation of reliability should be rigorously carried out and documented. There should be no need for the currently unenforceable ceiling of ECU 100 000 consignment value in waiver cases (see paragraphs 27-30);

(1) European Council 24 and 25 March 1999, Conclusions of the Presidency. Press Release: Brussels (25.3.1999) - No SN 100 (Presse).
(2) Article 10 of Council Regulation (EEC, Euratom) No 1552/89.

(d) given the significant unpaid customs duties involved the Commission should take steps to help bring the reported problems in the use of TIR carnets to a speedy conclusion (see paragraphs 36 to 43);

(e) the report highlights a far from homogenous view across the Member States of what constitutes a secured debt or indeed the conditions indicating that such a debt has been challenged. The Commission must review the legislative requirements to ensure their clarity, counsel the accounting departments in the Member States or issue new instructions (see paragraphs 51 and 52);

(f) the status of debts ostensibly covered by comprehensive guarantee in the transit system needs to be clarified since clearly customs authorities are put in the invidious position of not being in a position to be satisfied if any particular transit consignment is in fact secured (see paragraph 52);

(g) the extent to which the Member States' national law regarding appeals is consistent with Community legislation needs examination by the Commission. The customs authorities may at present (under Article 244 of the Community Customs Code) waiver the requirement to take a security in cases of greatest risk — where it would put the appellant in a serious economic situation. However, if national law permits traders to bypass the appeals procedure foreseen in the Customs Code, the relevant national provisions should be reassessed since such circumvention of Community legislation does not protect the Community's financial interests (paragraph 44).

This report was adopted by the Court of Auditors in Luxembourg at its meeting of 16 December 1999.

For the Court of Auditors

Jan O. KARLSSON

President

THE COMMISSION'S REPLIES

Summary

The Court of Auditors' special report on securities and guarantees concerns the application of Community legislation on guarantees. It examines the implementation of the three forms of guarantee: the mandatory guarantee which covers the (customs) debt incurred, in particular in cases where payment is deferred following release of the goods; the conditional guarantee which may be obligatory, partial or optional and which covers the debt which may be incurred (the report addresses in particular the treatment of guarantees under certain customs procedures such as the external transit procedure and temporary importation and in cases of administrative or judicial appeal), and finally, the report analyses the implementation of legislation on guarantee waiver. In its observations the Court criticises the way in which eight Member States apply Community provisions on guarantee and the accounting consequences which may result. More particularly, the problems linked to the implementation of the TIR transit procedure were highlighted.

With regard to the substance, the Commission agrees with these criticisms, which do indeed confirm the results of its own inspections, on which follow-up action is already well under way, including, in one case, steps to launch infringement proceedings under Article 226 of the Treaty. With regard to the external transit procedure, the Commission is aware of the problem and has adopted measures to remedy it, both on the legislative and operational side and by setting up a computerised system which should be completed by 2003. The Commission also shares the Court's opinion on the need to ensure that national legislation conforms with Community law on the provision of a security in the event of an appeal (Article 244 of the Community Customs Code). Lastly, with regard to a guarantee for deferred payment, the Commission is prepared to study the Court's suggestions regarding the application of compensatory interest in certain cases where the guarantee threshold is exceeded.

However, the Commission does not share the Court's opinion on broader recourse to the drawback procedure envisaged by the Community legislation in the event of incomplete declarations. The Commission considers that the benefit which could be drawn from systematic use of this system, compared with the cost it would involve, is not immediately apparent.

Findings

Deferment of duty

13. The Commission considers that whenever payment of a debt incurred is deferred, and must therefore be covered by a 100 % guarantee, the amount of the debt must be entered in the accounts and, if it is not contested, made available within the prescribed time limit. The anomalies pointed out by the Court are being followed up in an appropriate fashion by the Commission. If there are financial consequences, the Commission will take the necessary steps; in the case of Germany, demands have already been sent for the amounts due.

14. The Member States must take the appropriate measures to implement the Community legislation on payment deferral; a reminder of this will be sent to the Member States. The Commission is happy to study the Court's suggestion to apply Article 232(1)(b) of the Community Customs Code, including in cases where the guarantee for payment deferral is exceeded, provided that recovery of the amounts due is jeopardised.

Temporary importation of goods

15. For the cases notified by the Court, the Commission is examining the replies of the Member States concerned. After it has done so it will decide on its position and any corrective measures which may need to be taken.

16. The Commission considers that it is for the Member States to ensure correct application of Community legislation and to assume the responsibility resulting from any shortcomings on

their part in doing so. A reminder to this effect will be sent to the Member States concerned.

Incomplete declarations

18. For the cases cited by the Court concerning Belgium and Spain, the follow-up action already taken by the Commission means that the financial consequences are negligible. In the case of the United Kingdom, the Commission will undertake any follow-up action that may be necessary once it has analysed the United Kingdom's reply.

19. The Commission agrees with the Court concerning the responsibility of the Member States to ensure correct application of Community legislation on incomplete declarations. The drawback system to which the Court refers is already provided for in the Community legislation if requested by the declarant. Under Article 257 of the implementing provisions of the Community Customs Code, the declarant can request that the maximum amount to which the goods may be liable be entered in the accounts and then ask for reimbursement on production of the missing document. However, the Commission considers that systematic use of this procedure would not be cost effective, particularly in terms of management of accounts.

Transit

Monitoring and adequacy of comprehensive guarantees

22. The Commission shares the Court's concerns regarding the shortcomings found in the application of the provisions on the comprehensive guarantee. It also considers that the level of the guarantee that is set must take account of the operator's actual economic activity. The Commission will draw the attention of the Member States concerned to the need to adhere to the existing provisions on guarantees and the accounting obligations which arise from them; they will be sent a note to this effect. Verifying guarantees is also one of the priority measures to be implemented by the customs authorities, in line with the shared framework of objectives for the national transit management plans.

As part of the transit reform, the Commission is working on the installation of a computerised system, completion of which is scheduled for 2003, given the constraints imposed by the subsidiarity principle, the scale of the project and the budgetary and human resources requirements (at both Community and national administration level). The Commission and the national administrations concerned are aware of the need to consolidate the current procedure as soon as possible and have therefore decided to take a step-by-step approach in order to make substantial improvements in the management and verification of transit operations. This approach will mean that the countries concerned will be able, from the first step, to verify transit movements in real time, considerably reduce the time needed for clearance and overcome most shortcomings in the current paper system. The functions developed in this way will then be extended to eventually encompass computerised management of the guarantees between all the partners in common and Community transit. In the same spirit, the national administrations have the option of developing computerised management of the guarantees at national level, in line with the specifications of the New Computerised Transit System, as soon as the initial implementation is started.

The Commission is also preparing a transit manual which will give examples for determining the amount of the guarantee, and is planning action for 2001 on monitoring implementation of the reform, which will apply particularly to the management of guarantees.

23. The case highlighted by the Court and the consequences which may arise from it are being examined by the Commission which has, in the mean time, requested further information from Italy. If necessary, appropriate action will be taken.

24. The Commission endorses the Court's comments that the comprehensive guarantee provisions, particularly the possibility of issuing multiple copies of certificates for a single guarantee, should be changed. It has in fact made a number of proposals to this end, which, unfortunately, were not supported by the Member States in the Customs Code Committee. The Member States consider that only the New Computerised Transit System will provide adequate remedies.

Waiver of comprehensive guarantee in transit

27. Regarding possible shortcomings in the application of guarantee waivers, the Commission is currently examining the Member States' replies. If necessary, they will be reminded of their obligations under the Community Customs Code.

28. The Commission is aware of the difficulties caused by the lack of information on the transit document. It has made proposals within the competent committee and the EC-EFTA working party on common transit with a view to ensuring that the tariff code and value of the goods are put on the declaration for transit. Without prejudice to the final decision, the discussion on this point has been moving towards a limited extension of the tariff code requirement. The Commission will have to determine, before 1 January 2003 and in collaboration with the system's users, the

situations and conditions in which the obligation to provide this code and, if necessary, other data on the goods placed under the procedure could be extended to most transit operations.

29 and 30. The Commission considers that a commitment made under a guarantee waiver is not equivalent to a guarantee provided in due form, and that, therefore, in the case of a guarantee waiver, the debts do not have to be entered in the A account. However, any shortcoming in the granting of the guarantee waiver is likely to be the responsibility of the Member State.

Notification of potential transit debts to guarantors

31. The Commission is currently studying the cases noted by the Court in the light of the replies given by the Member States concerned. Once it has further information, and after in-depth examination, the Commission will adopt a position and draw the appropriate financial and other consequences.

32. The Commission wholly agrees with the Court's assessment on the consequences of entering guaranteed and uncontested amounts in the B accounts. If the basic facts are confirmed, it will make sure that the Member States concerned take responsibility for it, both for the principal amounts and for the default interest.

Mutual assistance issues

34. The Commission is studying the anomalies highlighted by the Court. As soon as the answers are analysed, it will draw the appropriate conclusions. In any case, in the event of failure to provide a compulsory guarantee, consideration should be given to invoking the financial liability of the Member State concerned.

35. The remarks made by the Court have been incorporated in the recasting of the system of mutual assistance which resulted in Council Regulation (EC) No 515/97 of 13 March 1997. The Regulation modernised and improved the institutional framework for mutual assistance considerably. Its application should correct the shortcomings encountered in the past.

TIR (international road transport)

39. The Commission considers that guaranteed, uncontested amounts should be entered in the A account and made available. These obligations, which derive from the regulations in force, were drawn to Germany's attention and a letter calling for funds was sent to that Member State. Given Germany's refusal to comply, the Commission is currently examining the case with a view to possible infringement proceedings under Article 226 of the Treaty.

40. The Commission is aware of the substantive features of the agreement mentioned by the Court. It has already contacted the German authorities on several occasions in order to obtain the document in question. Although Germany has not yet replied favourably, the consequences of the agreement will be handled by the Commission under the infringement proceedings referred to in the reply to paragraph 39.

41. See the replies to paragraphs 39 and 40.

42. The Commission shares the Court's concerns regarding the anomaly indicated. As soon as the reply from the Member State concerned has been received, it will take the appropriate measures and will ask, where appropriate, for default interest.

43. The Commission is aware of the difficulties which have arisen in the past over application of the TIR Convention. In cooperation with the Member States, it is taking steps to improve this situation which, in the international context, will lead to revision of the TIR Convention.

Appeals

44 and 45. With regard to the case raised by the Court concerning Germany, the Commission will ask the German authorities to explain why they did not require a guarantee. As to the other cases mentioned, the Commission is aware of the problems raised by the Court — it too had identified them during its own inspection visits. The Commission will conduct a survey in all the Member States of guarantee practices in cases where appeals are lodged. It would seem that in some Member States there are national laws which conflict with Article 244 of the Community Customs Code. Once this analysis has been confirmed, the Commission will take the necessary corrective measures.

Situations where no security exists

48. The Commission realises that the liberalisation of the railways must lead to a review of the guarantee waiver in the case of operations carried out by the railway companies of the Member States. This work has already started in the competent bodies (Customs Code Committee and the EC-EFTA working group on common transit). New provisions will be incorporated in the rules.

49. The Commission can confirm that in the case of the optional guarantee, if the part not covered by the guarantee cannot be recovered, the Member State must assume liability. This principle was applied in the past, and the amounts in question were made available.

50. See the reply to paragraph 49.

Making available to the Commission secured entitlements

52. The Commission shares the Court's concerns about the cases of erroneous entry in the accounts reported by the Court.

— As regards Belgium, the Commission was already aware of these from its own inspections and is taking the appropriate follow-up action.

— As regards the reasons put forward by Austria, they undeniably contradict the rule that guaranteed, uncontested amounts should be entered in the A account; if, after the time limit for making the amounts available has expired, an appeal is lodged, the only possibility for correcting the A account would be following a refund or remission procedure as laid down by the Community Customs Code.

— Suitable follow-up action will be taken regarding the cases reported in Italy so as to identify the financial consequences for the Community budget, if any.

— The situation in Germany concerning the entry in the accounts of guaranteed amounts is currently being investigated by the Commission in connection with infringement proceedings (see also the reply to paragraph 39).

53. The Commission can confirm that the accounting procedures for traditional own resources can be a source of mistakes, which are sometimes specific and sometimes structural. For this reason, the accounting system in Member States' administrations is always checked by the Commission. If the rules are not obeyed, the Commission does not hesitate to take the requisite measures, including starting infringement proceedings where necessary. In all cases reported by the Court, if the practice objected to means that the resources are made available late, the Commission asks that the financial interests of the Union be protected by payment of default interest.

Conclusion

55. (a) Concerning guarantees in cases of deferred payment, the Commission is prepared to study the Court's suggestions regarding the levying of compensatory interest in certain cases where the amount of the guarantee granted is exceeded.

(b) Community legislation already provides for a drawback procedure, which must be requested by the declarant, in cases of incomplete declarations. The Commission can, however, see no justification in cost-benefit terms for making such a procedure systematic.

(c) The Commission is aware of the difficulties with the transit system. The proposals made by the Commission in certain fields (use of several copies of guarantee certificates) have not been taken up by the Member States, but the Commission is working on introducing a new computerised system which will provide general solutions to the problems encountered. In the present set-up, the emphasis is on the sensitivity of the goods. In the new set-up created by Regulation (EC) No 955/1999, the approach will take account of both the status of the operator and the nature of the goods transported, by incorporating criteria for the reduction of the comprehensive guarantee or the guarantee waiver.

(d) In cooperation with the Member States, the Commission is taking action to improve the situation and involving a revision of the TIR Convention at international level.

(e) In all cases, the Commission notifies the Member States of the problems encountered and the solutions it provides. These items are discussed at meetings of the Advisory Committee on own resources, and the Commission follows up each anomaly detected.

(f) Given that a guaranteed, uncontested customs debt must be entered in the A account within the time limit stipulated in the Community rules, any failure by a Member State to comply with this provision renders that State liable. The Commission is monitoring this matter closely.

(g) To ensure that national provisions comply with Article 244 of the Community Customs Code as far as provision of a guarantee in the event of an appeal is concerned, the Commission will carry out a survey of the Member States. Depending on the results, it will take the necessary measures to remedy any shortcomings.