OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 19 May 1987 *

Mr President,
Members of the Court,

1. Proceedings are pending between the German company Foto-Frost and the Hauptzollamt (Principal Customs Office) Lübeck-Ost concerning the post-clearance recovery of import duties in respect of goods manufactured in the German Democratic Republic and purchased by an undertaking established in the Federal Republic of Germany from companies established in other Member States. In connection with those proceedings the Finanzgericht (Finance Court) Hamburg has requested the Court to give a preliminary ruling on four questions, two of which bear on issues of great delicacy. The Finanzgericht wishes to know whether lower courts in the Member States are entitled to review the validity of Community measures — the measure involved in this instance is a decision addressed by the Commission to the Federal Republic of Germany — and how the rules governing the recovery of duties must be interpreted in the light of the Protocol on German internal trade annexed to the EEC Treaty.

2. Foto-Frost is an undertaking established in the Federal Republic of Germany which operates as an importer, exporter and wholesaler of photographic products. Between 23 September 1980 and 9 July 1981 it purchased various consignments of prismatic binoculars manufactured by Carl Zeiss, Jena (German Democratic Republic). But, in view of an agreement between that company and the Zeiss company of Oberkochen (Federal Republic of Germany) whereby products manufactured by Carl Zeiss, Jena, may be imported into the Federal Republic only via other countries, the products were purchased from companies based in Denmark and the United Kingdom and supplied from customs warehouses in Denmark and the Netherlands. Subsequently, some of the binoculars were exported (to Italy and South Africa) and some were sold to other companies which, in turn, exported them.

The goods were sold, invoiced and dispatched to Foto-Frost under the external Community transit procedure (Articles 12 *et seq.* of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit, Official Journal 1977, L 38, p. 1), under which goods coming from a non-member country which are not in free circulation in a Member State may be transported within the Community without renewed customs formalities when the goods cross from one Member State to another. As it had done in previous, similar cases, Foto-Frost declared the binoculars for release into free circulation, produced the necessary permits and asked for exemption from import duties in accordance with the Protocol on German internal trade. Since the goods had been manufactured in the German Democratic Republic, the customs offices granted exemption as requested.

However, that exemption was contested in September 1981 by the Hauptzollamt Lübeck-Ost. It pointed out that Article 1 of the Protocol on German internal trade of 25 March 1957 provides that 'trade between the German territories subject to the Basic Law for the Federal Republic of Germany and the German territories in which the

* Translated from the Italian.

Basic Law does not apply is a part of German internal trade' and hence 'the application of . . . [the EEC] Treaty in Germany requires no change in the treatment currently afforded this trade'. In other words the Protocol applied only to 'direct' trade between the Federal Republic and the German Democratic Republic and could therefore not apply to imports of goods effected via other States.

Despite this, the Hauptzollamt considered that Foto-Frost should not be subjected to the recovery of the duties, since it fulfilled the requirements set out in the first subparagraph of Article 5 (2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (Official Journal 1979, L 197, p. 1). In particular it had presented a duly completed customs declaration and, since it had been granted exemption on several occasions in the past, it had no reason to doubt the correctness of the decision taken with regard to it by the competent customs offices.

But that was not the end of the matter. The amount of the duty exceeded 2 000 ECU and hence the Hauptzollamt was not entitled directly to waive recovery (Article 4 of Commission Regulation (EEC) No 1573/80 of 20 June 1980, Official Journal 1980, L 161, p. 1). Consequently the Hauptzollamt referred the matter to the Federal Minister for Finance, who in turn asked the Commission to decide, on the basis of Article 6 of Regulation No 1573/80, whether it was possible to waive the recovery of import duties in this case. By a decision dated 6 May 1983, addressed to the Federal Republic of Germany, the Commission decided that this was not possible. It stated that the importer could have compared the provisions the application of which he was claiming and the circumstances in which the imports had taken place and was therefore in a position to detect any errors made by the authorities. Furthermore, it was not correct to say that the importer had observed all the requirements laid down by the rules in force with regard to customs declarations. Consequently duty amounting to DM 64 346.53 should be recovered.

On 22 July 1983, following that decision, which neither the Federal Republic of Germany, as addressee of the decision, nor Foto-Frost challenged before the Court of Justice, the Hauptzollamt issued an amendment notice requiring Foto-Frost to pay the sum indicated by the Commission and a further DM 12 786.10 by way of import turnover tax. Thereupon Foto-Frost contested the amendment notice before the Finanzgericht Hamburg, requesting that court provisionally to suspend the notice. By order of 22 September 1983 the Finanzgericht allowed that request. It found that the transaction carried out by Foto-Frost was to be regarded as exempt from duty under the Protocol on German internal trade. It was therefore appropriate to suspend the amendment notice until such time as it was established, possibly following a reference to the Court of Justice, whether post-clearance recovery was justified.

When the main proceedings were resumed the Finanzgericht decided to stay them and to refer the following questions to the Court of Justice for a preliminary ruling (29 August 1985):

'(1) Can the national court: (a) review the validity of a decision adopted by the Commission pursuant to Article 6 of Commission Regulation No 1573/80 of 20 June 1980 on whether the post-clearance recovery of import duties should be waived pursuant to Article

5 (2) of Council Regulation No 1697/79 of 24 July 1979, which decision held that there was no justification for waiving the recovery of the import duties, and (b) can it, if appropriate, hold in proceedings challenging such a decision that recovery of the duties should be waived?

(2) In the event that (a) is answered in the negative, is the Commission's decision of 6 May 1983 (ECR 3/83) valid?

(3) In the event of an affirmative answer to (a), is Article 5 (2) of Regulation No 1697/79 to be interpreted as conferring a power to adopt a discretionary decision, which may be reviewed by the court only as regards abuses of that discretion or does it confer the power to adopt a measure of equitable relief, which is fully subject to review by the court?

(4) If the assessment of customs duties cannot be waived pursuant to Article 5 (2) of Regulation No 1697/79, do goods originating in the German Democratic Republic which have been introduced into the Federal Republic of Germany via a Member State other than Germany by way of the external transit procedure fall within the ambit of German internal trade within the meaning of the Protocol on German internal trade of 25 March 1957, with the consequence that when they are imported into the Federal Republic of Germany they are liable neither to customs duties nor to import turnover tax, or are such charges to be levied as in the case of imports from non-member countries, so that Community customs duties, in accordance with the relevant customs legislation, and import turnover tax, in accordance with Article 2 (2) of the Sixth Council Directive on the harmonization of turnover taxes in the European Communities, are to be levied?

In the proceedings before this Court written observations were submitted by the Hauptzollamt Lübeck-Ost, the Commission of the European Communities and Firma Foto-Frost.

3. For the sake of a better appreciation of the facts which I have just rehearsed and of the issues on which the Court is to give a ruling, it is desirable to examine the Community rules with regard to the post-clearance recovery of import duties and the rules applicable to German internal trade.'

The Community rules are set out in Article 5 (2) of Council Regulation No 1697/79 and Articles 4 and 6 of Commission Regulation No 1573/80, to which I have already referred. Article 5 (2) of Regulation No 1697/79 provides that the competent authorities 'may refrain from taking action for the post-clearance recovery of import duties ... which were not collected as a result of an error ... which could not reasonably have been detected by the person liable, the latter having ... acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned'. The other two provisions mentioned apply where the amount of duties involved is equal to or greater than 2 000 ECU. In that case, Article 4 of Regulation No 1573/80 provides that the competent authority 'shall request the Commission to take a decision on the case, submitting to it all the ... background information'. Article 6 provides in addition that the Commission is to decide, after consulting a group of national experts meeting within the framework of the Committee on Duty-free Arrangements,

'whether the circumstances under consideration are such that no action should be taken for recovery of the duties concerned'. Subsequently the decision is to be notified to the State whose authorities asked the Commission to take a decision on the case.

It is also worth mentioning Council Directive 79/695/EEC of 24 July 1979 on the harmonization of procedures for the release of goods for free circulation (Official Journal 1979, L 205, p. 19). Article 10 (2) thereof authorizes the national authorities to verify and, if necessary, correct amounts of import duty already charged.

Let us now turn to the rules governing German internal trade. The Protocol annexed to the EEC Treaty is based on three sets of rules: (a) the Berlin Agreement of 20 September 1951 between the Federal Republic and the German Democratic Republic on interzonal trade and relations between the central banks of the two States; (b) a series of laws and regulations issued during the occupation (1949-50) by the governments and the Allied military commanders with regard to the control of foreign exchange and the movement of goods; (c) various implementing regulations subsequently issued by the Federal legislature, including, most recently, that of 1 March 1979 on interzonal trade (*Bundesgesetzblatt*, I, p. 463).

The military rules referred to in (b), which are still in force, in principle prohibit the purchase and supply of goods as between the Federal Republic and the German Democratic Republic. However, the Federal Government may derogate from that prohibition, in which case the transactions authorized are effected via a clearing system: that is to say, the relevant payments are not made using freely convertible currency but are booked to two accounts held, in the case of the Federal Republic, by the Deutsche Bundesbank, and, in the case of the German Democratic Republic, by the Staatsbank. That is not all. As in this case, such operations may be carried out via another country and hence involve a risk that the German Democratic Republic may evade the clearing system and obtain convertible currency. To obviate such fraud the rules in question set up a system of prior authorizations and subsequent checks which the Government of the Federal Republic applies with great strictness.

4. In my estimation, the issue raised by the Finanzgericht's first question is one of the thorniest that the Court has ever had to tackle. What has in fact to be decided is whether, in the light of Article 177 of the EEC Treaty, inferior courts in the Member States have jurisdiction to rule on the validity of Community measures either directly or indirectly, that is to say by means of judgments and orders relating to the validity or implementation of the domestic provisions applying the Community measures in question. All the parties involved in these proceedings have asked the Court to answer this question in the negative. I shall say at once that my recommendation will be on the same lines but subject to one exception, a number of doubts and, above all, no little apprehension as to how a judgment in accordance with that proposal would be received.

My doubts and concern arise for two reasons: first, the considerable number of national judgments which have been published accepting or giving practical effect to the opposite solution and, secondly, the attraction of the arguments underlying that solution. The decisions in question are at least 10 in number and in seven of them the

national courts were held to have jurisdiction unequivocally and without restriction under Article 177: I refer to the judgments delivered between 1966 and 1968 by the Second Chamber of the Verwaltungsgericht (Administrative Court) Frankfurt am Main (12 December 1966, Nos AZ II/2 986/66 and II/2 987/66; 23 August 1967, No AZ II/2 E 24/67; 13 December 1967, No AZ II/2 E 79/67; 22 May 1968, No AZ II/2 E 20/86; 27 November 1968, No AZ II/2 E 33/68) and, more recently, by the Finanzgericht Munich. Indeed, on 11 September 1985 the Finanzgericht Munich simply declared that the Commission decision that exemption from customs duty should not apply in a particular case was invalid.

The other three judicial determinations are less explicit and, in any event, not directly based on Article 177. In an order dated 15 July 1970 the Finanzgericht Düsseldorf decided not to refer the question of jurisdiction to the Court of Justice because, it stated, there were compelling reasons of procedural economy for waiting until the whole area of issues liable to be referred to the Court of Justice for a preliminary ruling had been clarified. The English High Court has taken an equally pragmatic line. On 24 October 1985 it acknowledged that jurisdiction to rule on the validity of Community measures is restricted to the Court of Justice in Luxembourg; but that did not prevent it from declaring invalid a provision of a regulation by applying the Court of Justice's decision in *Man Sugar* (judgment of 24 September 1985 in Case 181/84 [1985] ECR 2889) in a similar case and with regard to a similarly worded provision.

Lastly there is the judgment of 28 March 1985 of the Oberlandesgericht (Higher Regional Court) Frankfurt am Main. That court also considers that in principle it is for the Court of Justice to review the validity of measures adopted by the Community institutions. However, in its opinion it is possible to envisage a national court (or, in any event, a German court) having jurisdiction in two exceptional situations; the first arises out of a well-known line of decisions of the Bundesverfaßungsgericht (Federal Constitutional Court) (see judgment of 29 May 1974) and occurs when the compatibility of a Community measure with the fundamental rights guaranteed by the Grundgesetz (Basic Law) is under consideration; the second occurs when, because of the time needed for the preliminary ruling, effective protection for the traders concerned could not be guaranteed. When this happens — in practice only in the case of proceedings for interim measures — the court may declare acts which are 'manifestly invalid' inapplicable by virtue of Community law.

Let us turn to the arguments deployed in support of the first group of judgments. Their authors and the jurists who approve them rely above all on the wording of Article 177, deriving from it a syllogism of undeniable persuasive force. First, indent (b) of the first paragraph of Article 177 places the 'validity' and the 'interpretation' of acts on an equal footing. Secondly, it is clear from the second and third paragraphs of Article 177 that when 'such a question' arises, only courts of last instance must request the Court for a preliminary ruling, whilst courts against whose judgments an appeal may lie may request the Court for a preliminary ruling. Therefore, it is concluded, the second paragraph of Article 177 can be interpreted only as meaning that the latter courts have jurisdiction to rule on the validity of Community measures. According to the Verwaltungsgericht,

Frankfurt, comparison between Article 177 and Article 100 of the Grundgesetz bears out those findings. Under Article 100 of the Grundgesetz any court is under a duty to refer a matter to the Constitutional Court if it considers that the rule whose applicability is at issue conflicts with provisions of the Grundgesetz; that the wording of Article 177 is less peremptory is therefore in itself evidence of the power which the Treaty confers on the national courts.

Academic legal writing does take up the point that it may be objected that that power was conferred as a result of an error or a lack of attention on the part of the draftsmen of Article 177 when coordinating its first two paragraphs. But, it is argued, this theory is implausible bearing in mind that the authors of the EEC Treaty had before them as a model Article 41 of the ECSC Treaty which gives the Court exclusive jurisdiction. They could have followed that example, yet did not do so. They did not do so precisely because they took a different approach which consisted in translating the national courts to the ranks of genuine Community courts by conferring jurisdiction upon them with regard to the application of the relevant law and hence also to the non-application of measures considered to be invalid (see Couzinet, 'Le renvoi en appréciation de validité devant la Cour de justice des Communautés européennes', in *Revue trimestrielle de droit européen*, 1976, p. 660, and Braguglia, 'Effetti della dichiarazione d'invalidità degli atti communitari nell'ambito dell'articolo 177 del Trattato CEE', in *Diritto comunitario e degli scambi internazionali*, 1978, p. 667).

This is followed up by a further argument to the effect that the exclusion of the ECSC system and the power to rule on the validity of Community acts which is implicit in the choice which is left to the national courts by the second paragraph of Article 177 afford the not inconsiderable advantage of saving the Court of Justice from being swamped by a flood of requests for preliminary rulings and, for that very reason, of preventing the time needed for the main proceedings from expanding beyond tolerable limits. It is also argued that the risk of divergent application of Community law which is undoubtedly entailed by leaving that option to the national courts and by conferring that power on them should not be exaggerated, since a declaration by a national court that a Community measure is invalid does not have general scope, that is to say its application does not extend beyond the subject-matter of the actual proceedings. It is always possible to bring an appeal against such a declaration and, in any event, the fact that courts of last instance must request the Court of Justice for a preliminary ruling blocks any possible loophole by guaranteeing that Community rules — albeit belatedly — are applied on the basis of uniform criteria.

The Court's case-law is also claimed to afford arguments in support of this hypothesis. In the judgment of 13 February 1979 in Case 101/78 *Granaria BV* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, it is stated that 'every regulation . . . must be presumed to be valid so long as a *competent court* has not made a finding that it is invalid. This presumption may be derived, on the one hand, from Articles 173, 174 and 184 . . . , which reserve to the Court of Justice *alone* the power to review the legality of regulations and, . . . , on the other hand, from Article 177, which *empowers the same Court to give rulings as a court of last instance* on the validity of regulations' (paragraph 4, my emphasis). The distinction made in that passage between the

two powers of the Court — the argument goes — could not be clearer. When it is a question not of 'declaring an act void' but of 'declaring an act invalid' in proceedings for a preliminary ruling, the Court of Justice may only pass a final judgment: consequently, ordinarily the 'competent court' is bound to be the court of the Member State.

Nor let it be said that that conclusion conflicts with what the Court said in its judgment of 1 December 1965 in Case 16/65 *Schwarze* [1965] ECR 877. At first sight the *obiter dictum* which is commonly quoted from that case — 'any other approach would have the effect of allowing the national courts to decide themselves on the validity of Community measures' (p. 886) — would seem to claim exclusive powers for the Court. But that is not the position. It is sufficient to read the passage in question in the light of the one immediately preceding it ('if it appears that the real purpose of the questions submitted by a national court is concerned rather with the validity of Community measures than with their interpretation, it is appropriate for the Court to inform the national court at once of its view') to appreciate that the Court of Justice was concerned to lay down quite another principle: that is to say its power/duty to provide an answer not to what the court requesting the preliminary ruling seems to be asking for (an interpretation) but to what, behind a veil of inappropriate words or concepts, it is really asking for (a determination on validity) (Couzinet, *op. cit.*).

That is not sufficient. The Court's real thinking on this subject, it is said, emerges with particular clarity from a document which is not a procedural one. In its 'Suggestions with a view to the attainment of a European Union' (1975) it is stated that '[while the procedure of the preliminary ruling should be extended to cover any other field covered by the future Treaty or any other convention between Member States] a provision should be included to prohibit national courts from treating a Community act as invalid unless the European Court . . . has declared the act invalid. This is the position under the ECSC Treaty.' (*Bulletin of the European Communities*, Supplement 9/75, pp. 20 and 21). The inference to be drawn from this passage is obvious: precisely because it is suggested that the power to appraise the validity of a Community measure be taken away from the national courts there can be no doubt that the national courts now have such a power under existing law.

5. Of the arguments which have just been summarized, the last ones — that is to say those based on the case-law of the Court — seem to me to be of the least significance. The fact is that the question which has been placed before the Court by the Finanzgericht Hamburg is a wholly novel one. It is only today that the Court is called upon to tackle the question expressly; the observations which the Court has made in the past in this connection when determining completely different issues and which therefore took the form of *obiter dicta* (which, moreover, if I am not mistaken, are intentionally ambiguous) for that very reason cast very little light on the matter. In any event it is certain that those *dicta* — and *a fortiori* the proposals with regard to legislative policy which the Court was considering 12 years ago — do not commit the Court in the slightest.

On the other hand, as I have said, the arguments based on the wording of Article 177 are solid ones. Nevertheless, they also lead to such dangerous and anomalous results as to overshadow the undeniable uneasiness which one feels in rejecting them. In short, I agree with the writers who maintain that a literal interpretation of Article 177 gives rise to consequences which

are 'undesirable', 'improper' or liable to create 'grave problems'; and since the authors of the Treaty could not have overlooked those consequences, I, too, consider that the 'elliptical' wording of Article 177 is attributable to a singular but not impossible oversight on their part (Tomuschat, *Die gerichtliche Vorabentscheidung nach den Verträgen über die europäischen Gemeinschaften*, Cologne, 1964, pp. 57 *et seq.*; Schumann, 'Deutsche Richter und Gerichtshof der europäischen Gemeinschaften', in *Zeitschrift für Zivilprozeß*, 1965, pp. 119 *et seq.*; Bebr, 'Examen en validité au titre de l'article 177 du traité CEE et cohésion juridique de la Communauté', in *Cahiers de droit européen*, 1975, p. 384; Hartley, *The foundations of European Community law*, Oxford, 1981, p. 265; Brown and Jacobs, *The Court of Justice of the European Communities*, London, 1983, pp. 154 *et seq.*; Schermers, *Judicial protection in the European Communities*, Deventer, 1983, p. 232; Boulouis, *Droit institutionnel des Communautés européennes*, Paris, 1984, p. 213).

The theory which I am asking the Court to reject gives rise to at least four anomalies. The first and perhaps the most striking of them is a paradox: according to the theory, inferior courts have a power — that of reviewing the validity of acts — which the third paragraph of Article 177 expressly removes from courts of last instance (Bebr, *loc. cit.*; Telchini, 'Le pronunzie sulla validità degli atti comunitari secondo la giurisprudenza della corte di giustizia', in *Diritto comunitario e degli scambi internazionali*, 1978, p. 257). However, it is the second anomaly which is decisive — the contradiction to which such a power would give rise in the context of the system for reviewing the legality of Community acts. As we know, Articles 173 and 174 confer that role on the Court alone; it is not apparent why this exclusive jurisdiction should no longer obtain when the involvement of the Court of Justice is brought about not by the party concerned but by a national court. Admittedly, the mediating role of the national court is far from being restricted to simply passing on the papers and hence it narrows the area within which the Court is called upon to carry out its task; in the space which it leaves the Court, however, it does not change the nature of that task. In other words, as Bebr observes, the assessment of the validity of Community acts by way of preliminary ruling remains a 'contrôle constitutionnel', albeit 'larvé' (covert).

But that is not all. This contradiction is not only logically unjustifiable. It has weighty institutional consequences in so far as it detracts from the principle laid down by Article 189, according to which measures adopted by the institutions must be applied uniformly throughout the territory of the Community. That principle has a dual aim: that of securing legal certainty and — which is equally, if not more, crucial — of guaranteeing the legal cohesion of the Community. Consequently, consciously or unconsciously, the national court which extends its mediation to the extent of declaring that a Community rule is invalid introduces a subversive factor within the system; to put it more plainly, its judgment opens a breach in the foundation on which the structure created by the Treaty of Rome is based.

It may be objected that this observation applies equally to judgments which interpret a Community measure incorrectly or simply differently from the way in which it has been construed in other judgments of national courts and hence it is inferred that the end result is to treat the whole of the second paragraph of Article 177 as if it had never been written. But the criticism does not hold good. To interpret a rule invariably also assumes an intention to apply it. A

court which takes such a step without the cooperation of the Court of Justice and, as it may well do, comes to wrong or even absurd results will therefore damage a whole series of interests, including interests of a Community nature; however, it is certain that such a court will not come into conflict with Article 189 or, at least, will not damage the essential core of the rule laid down by Article 189. In contrast, a declaration that a provision is invalid will inevitably cause it not to be applied; hence in that case the nucleus of the rule laid down by Article 189 is certainly undermined.

Certainly and I would add, in many cases, irremediably. As we have seen, the Verwaltungsgericht Frankfurt and some academic writers deny this on the grounds that, in the first place, the provision in question is not declared to be inapplicable in general and abstract terms but simply within the context of a dispute, and, secondly, an appeal will invariably lie against the relevant judgment. But that argument fails to take account of the fact that numerous Community provisions (relating to competition, State aid and anti-dumping procedures and also in situations such as the one with which the Court is now dealing) are individual in nature, that is to say, they are addressed to one or more specific persons. It also overlooks the fact that it is never certain that an appeal will be brought by the relevant national authority. In effect, as a Spanish jurist, who infers from this interesting consequences with regard to the weakness of our system of indirect administration, points out, there is nothing to guarantee that that national authority will identify its own interest with that of the Community (Peláez Marón, 'Ambito de la apreciación prejudicial de validez de los actos comunitarios', in *Revista de las instituciones europeas*, 1985, p. 758).

I mentioned four anomalies. The last two are practical in nature but no less important for all that. First of all, to review the validity of Community measures is a delicate task necessitating perfect knowledge of the relevant provisions, which are often drafted in an unpalatable, even esoteric jargon, or of economic data to which there is no ready access (the example given in one learned article is 'was there a surplus of apples or of mushrooms in the Community, at a certain date?'). Therefore, what is involved is a task for which the national court is ill equipped or, in any case, very much less well equipped than the Court of Justice (Koopmans, 'The technique of the preliminary question — A view from the Court of Justice', in *TMC Asser Instituut, Article 177:* Experiences and Problems, North-Holland, 1987, p. 330). Secondly, the national court could never put temporal limits on the effects of the judgment by which it declares a measure to be invalid, as the Court of Justice can do on the basis of the very well-known line of cases which extended to preliminary rulings the rule laid down in Article 174. Consequently, to allow the national court to review Community measures would fail to resolve the economic problems which that extension is intended to obviate, which would have potentially disruptive consequences on the functioning of the common market.

If all those observations are correct, the conclusion of which I have given advance notice is not irrefutable, but certainly reasonable and, in any event, more satisfying than the opposite view. I shall reduce it to a straightforward proposition: a national court which has doubts about the validity of a Community provision must stay the proceedings and refer the matter to the Court (see, in addition to the sources quoted, Ehle, 'Inzidenter Rechtsschutz gegen Handlungen der europäischen Gemeinschaftsorgane', in *Monatsschrift für*

deutsches Recht, 1964, p. 720; Constantinesco, *Das Recht der europäischen Gemeinschaften*, I, Baden-Baden, 1977, p. 827; Daig, 'Artikel 177', in *Kommentar zum EWG-Vertrag*, 3rd Edition, II, 1983, p. 395; Donner, 'Les rapports entre la compétence de la Cour de justice des Communautés européennes et les tribunaux internes', in *Recueil des cours de l'Académie de droit international de La Haye*, 1965, p. 39; Plouvier, *Les décisions de la Cour de justice des Communautés européennes et leurs effets juridiques*, Brussels, 1975, p. 252; Waelbroeck, 'Commentaire à l'article 177', in *Le droit de la Communauté économique européenne*, X, Brussels, 1983, p. 209).

On the other hand, there is nothing to oblige the national court to refer a matter to the Court of Justice where one party is asking it not to apply a measure and the national court considers that its arguments should be dismissed. In such a case, the option given to the national court by the second paragraph of Article 177 becomes fully operative; and this fact, which means that the national court's role is not reduced to merely 'passing on the papers', mitigates the uneasiness which I mentioned at the beginning of Section 4. After all, the solution that I am proposing does not conflict head-on with the wording of the provision but simply means that the expression 'such a question' should be understood in a narrow sense; that is to say in the sense of a question in regard to which the national court is inclined to come down in favour of validity.

I would add a few words to defend my solution from any attempt to limit its scope. For instance, a ready answer can be found to the suggestion that the national court may not have authority to declare the Community measure in question invalid but certainly has jurisdiction to annul the relevant national implementing measure, since, as a rule, the two measures are too closely linked to be amenable to separate assessment. Indeed, the case at present before the Court bears this out. It is clear from a combination of the second subparagraph of Article 5 (2) and Article 10 of Regulation No 1697/79 that the decision on the post-clearance recovery of import duties is to be taken by means of a special procedure at Community level. If the Finanzgericht had definitively declared inapplicable the corresponding decision of Hauptzollamt Lübeck-Ost, the three-year period laid down for the recovery of duties in Article 2 of Regulation No 1697/79 might have expired in the course of proceedings before the appeal court.

Equally unacceptable is the view, put forward by some writers, that the national court may declare a Community measure inapplicable at least when the measure is 'clairement illégal' (Couzinet, *op. cit.*, p. 662). This must be rejected in the light of previous decisions of the Court of Justice. In particular, in its judgment in the *Granaria* case, cited above, the Court stated that every measure must be presumed to be valid so long as the Court has not made a finding that it is invalid, and it can be inferred from the judgment of 13 May 1981 in Case 66/80 *International Chemical Corporation* [1981] ECR 1191, that for a measure to be *manifestly* unlawful there must already have been a declaration to that effect by the Court of Justice.

6. I stated earlier that there is 'an exception' to the rule that the national court lacks jurisdiction to rule on the validity of Community measures. I would now make it clear that that exception refers to a clearly defined situation: the question of validity must arise in summary proceedings and it matters not whether they are pending before an inferior court or a court of last instance.

As we have seen, the Oberlandesgericht Frankfurt am Main has expressed the same view. But it is also to be found in a

significant fraction of academic opinion (Astolfi, 'La procédure suivant l'article 177 CEE', in *Sociaal-economische Wetgeving*, 1965, p. 463; Ferrari-Bravo, 'Commento all'articolo 177', in *Commentario CEE*, Milan, 1965, III, p. 1325; Bertin, 'Le juge des référés et le droit communautaire', in *Gazette du Palais*, 1984, doctrine, p. 48; Daig, *op. cit.*, p. 403) and, what is more important, in the case-law of the Court. It is stated in the Court's judgment of 24 May 1977 in Case 107/76 *Hoffmann-La Roche* v *Centrafarm* [1977] ECR 957 that 'the third paragraph of Article 177 ... must be interpreted as meaning that a national court or tribunal is not required to refer to the Court a question of interpretation or of validity ... when the question is raised in interlocutory proceedings for an interim order ..., even where no judicial remedy is available against the [relevant] decision ... provided that each of the parties is entitled to institute proceedings ... on the substance of the case ... [in which] the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a reference to the Court under Article 177'.

Plainly, what is underlying this interpretation is the need — so well explained by the Oberlandesgericht Frankfurt am Main — to prevent the time taken up by the proceedings for a preliminary ruling from frustrating the interim protection which the trader seeks in instituting the summary proceedings. However, I would add to the conditions on which the Oberlandesgericht and the Court of Justice make the exception depend the requirement that it must be impossible to have recourse to other remedies: for example, an action for a declaration that a provision is void under Article 173 of the EEC Treaty, under which interim measures are available in circumstances of urgency.

7. The Finanzgericht's second question seeks to establish whether the Commission's Decision of 6 May 1983 addressed to the Federal Republic of Germany is valid. Foto-Frost would answer the question in the negative on the basis of two arguments: (a) where the requirements for the application of the first subparagraph of Article 5 (2) of Regulation No 1697/79 are fulfilled, the Commission is *under a duty* to decide that the duty should not be recovered; (b) in the case at issue those requirements are fulfilled.

Contention (a) above is derived from a reading of Article 5 (2) together with Article 5 (1) and the second recital in the preamble to Regulation No 1697/79. Article 5 (2) provides that in certain cases 'the competent authorities *may refrain from taking action* for ... recovery' and the second recital in the preamble states that 'the taking of action for post-clearance recovery is *under no circumstances justified* where the original determination of ... duties ... has been established on the basis of ... elements of taxation ... recognized by ... [the competent authorities] as complying with those declared by the person liable' (my emphasis). Foto-Frost infers from this that the rules give legal certainty preference over the payment of duty in the amount due. And it is obvious that that aim has a bearing on the interpretation of Article 5 (2). Consequently, it is argued that if the amount of customs duties exceeds 2 000 ECU and if the requirements laid down in the provision are fulfilled, all the Commission can do is ask the national authorities to waive recovery.

That argument is without foundation. Article 5 (2) expressly states that the national authorities '*may*' refrain from recovering duties and Article 6 of Regulation No 1573/80 provides no less clearly that 'the Commission *shall decide* whether the circumstances under consideration are such that no action should be taken for recovery of the duties concerned'. That is not all. Although it is true that the provisions referred to by Foto-Frost are designed to secure the utmost certainty for

persons liable, to maintain that that principle should prevail over proper fulfilment of an obligation seems to me, to say the least, to be going too far. On the contrary, Article 10 (2) of Directive 79/695, which empowers the national authorities to verify and correct amounts of duty already charged, suggests that preference is intended to be given to the interest of maximizing the Community's revenue.

Foto-Frost's second argument is based on its view that the requirements laid down in Article 5 (2) of Regulation No 1697/79 were fulfilled in this case. In point of fact, the error was committed by the German customs authorities, which failed to apply the Protocol of 25 March 1957 correctly. It further maintains that the undertaking could not have detected the error since (a) the customs authority had always exempted imports of goods manufactured in the German Democratic Republic from duty; (b) whether the goods in question were liable to duty was doubtful, as the Finanzgericht itself conceded in its order of 22 September 1983; and (c) in any event, Foto-Frost did not have the necessary resources to determine its own legal situation. Lastly it claims that the charge laid against it by the Commission in the Decision of 6 May 1983 that it failed to observe all the provisions laid down in the rules in force with regard to customs declarations is manifestly unfounded.

The last claim is undoubtedly correct (see the written reply from the Commission to the question put to it by the Court in that connection). In contrast, the rest of the argument is untenable. An undertaking habitually importing into the Federal Republic goods originating in the German Democratic Republic is bound to be informed about the rules applicable to German internal trade; in particular, it is bound to be aware that, at least as regards 'triangular' transactions, that is to say transactions carried out via another country, exemption from customs duty is precluded by the most authoritative German case-law (see Bundesfinanzhof, judgment of 3 July 1958, in *Zeitschrift für Zölle und Verbrauchssteuern*, 1958, p. 373). Therefore it cannot be said that the Commission went too far in accusing the applicant of lacking the good faith and the minimum standard of diligence on which, under Article 5 (2) of Regulation No 1697/79, waiver of the recovery of duties depends.

8. There is no need to consider the third question since it was formulated to cover the case of the first question's being answered in the affirmative. It remains, therefore, to answer the fourth question. It will be recalled that the Finanzgericht asks the Court to determine whether goods originating in the German Democratic Republic which had been introduced into the Federal Republic of Germany via a Member State other than Germany by way of the external Community transit procedure fall within the ambit of German internal trade within the meaning of the Protocol annexed to the EEC Treaty, with the consequence that they are exempt from duties, or whether they must be regarded as having been imported from non-member countries and so become liable to the consequences to which such importation gives rise as regards duties and turnover tax.

Foto-Frost asks the Court to answer the question in accordance with the first alternative. It admits that it is undeniable that triangular transactions were defined by a provision which was adopted after the Protocol (Paragraph 16 of the Federal Regulation of 1 March 1979). However, it claims that the legislation in force at the time when the EEC Treaty was signed did not preclude such transactions from falling within the ambit of German internal trade (see Bundesfinanzhof, judgment of 12 February 1980, and Bundesverwaltungsgericht, judgment of 26 June 1981, in *Zeitschrift für Zölle und Verbrauchssteuern*, 1980, p. 247, and 1982, p. 55 respectively). The case-law of the Court of Justice is even more explicit. In its judgment of 27 September 1979 in Case 23/79 (*Geflügel-*

schlachterei Freystadt GmbH & Co. KG v *Hauptzollamt Hamburg-Jonas* [1979] ECR 2789), the Court held that, in order to determine whether the Protocol applied to a given transaction, the sequence of commercial operations and their forms did not need to be taken into account.

With regard to turnover tax, Foto-Frost refers to the German Government's declaration concerning Article 3 of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes. According to that declaration, the territory of the German Democratic Republic is to be regarded as forming part of the national territory of the Federal Republic for the purposes of turnover tax. As the Federal Minister for Finance subsequently recognized, this means that turnover tax is inapplicable to goods which are in free circulation in the area of the mark of the German Democratic Republic and are introduced into the Federal Republic within the ambit of German internal trade.

The whole argument must be rejected. For this to be evident, it is sufficient to observe that the Protocol of 25 March 1957 expressly concerns 'the conditions *at present existing*' with regard to German internal trade (my emphasis). Hence — and this is admitted by the national court itself, which, as a result, altered the view which it took in its order of 22 September 1983 — it can refer only to legislation in force at the time when the Treaty was signed. However, the Federal Government and the Commission have stated, without being challenged, that at that time triangular transactions were subject to duty. Consequently, even if the Protocol is regarded as covering such transactions, it cannot have the effect of exempting them from duty or, of course, from turnover tax.

9. In the light of all the foregoing considerations I propose that the Court should answer the questions referred to it for a preliminary ruling by the Finanzgericht Hamburg by order of 29 August 1985 in the proceedings pending before it between Firma Foto-Frost and Hauptzollamt Lübeck-Ost as follows:

'(1) As a result of the principle of the uniform application of Community secondary legislation in all the Member States laid down in Article 189 of the EEC Treaty, the second paragraph of Article 177 must be interpreted as meaning that, if a national court has doubts about the validity of a Community measure, it must stay the proceedings and ask the Court of Justice to give a preliminary ruling on the matter.

By way of exception, where individuals have no other form of redress through the courts and in particular where they are not entitled to bring an action for a declaration that a measure is void pursuant to Article 173, the court before which summary proceedings are brought is not bound to submit a question of validity to the Court of Justice, provided that the parties are entitled to institute proceedings on the substance of the case in which the question provisionally decided in the summary proceedings may be re-examined and hence may be the subject of a reference to the Court of Justice under Article 177.

(2) There are no factors such as to cast doubt on the validity of the decision (ECR 3/83) issued on 6 May 1985 by the Commission of the European Communities.

(3) The Protocol on German internal trade annexed to the EEC Treaty concerns the rules to which such trade was subject at the time at which the Treaty was signed; therefore, it enables exemption from duty to be granted only in respect of imports of goods coming from the German Democratic Republic which were granted such treatment at that time.'