Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 8 September 2016[1]

**Case C-365/15**

**Wortmann KG Internationale Schuhproduktionen**
**v**
**Hauptzollamt Bielefeld**

(Request for a preliminary ruling from the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany))

(Customs union and common customs tariff — Repayment of import duties — Annulment of the regulation imposing an antidumping duty — Validity of Article 241 of the Customs Code — Applicability of the Customs Code — Obligation to pay interest)

1. As a result of the cancellation of an assessment notice imposing antidumping duties on imports of footwear from China and Vietnam, following the Court's declaration of invalidity of the regulation imposing those duties,[2] the German customs authorities reimbursed the sum wrongly paid by the importing undertaking. However, the German customs authorities refused to increase the sum reimbursed by interest, applied for by that undertaking, from the date of payment of the principal.

2. The Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) is seised of the dispute between the importer and the German customs authorities and seeks from the Court a preliminary ruling on the interpretation of the EU legal provisions governing that area.

3. In particular, the customs authorities based their refusal to pay the interest applied for on Article 241 of the Community Customs Code,[3] read in conjunction with the national provision which provides that interest accrues only from the date on which it is claimed in court proceedings. According to the German authorities, their refusal to grant the importer's request is supported by the joint application of the two provisions.

4. The settled case-law of the Court lays down the general principle that, where the authorities are required to reimburse income they have received contrary to EU law, the sums reimbursed must be increased by interest from the date on which the undue payment was made. However, Article 241 of the Customs Code excludes (with certain qualifications) the payment of interest where the authorities are required to reimburse import duties.

1 — Original language: Spanish.

2 — Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam (OJ 2006 L 275, p. 1).

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

5. The tension between the general rule (supporting the payment of interest) and the specific provision (precluding the payment of interest) has been the focus of much of the preliminary-ruling proceedings, in which it has been claimed that Article 241 of the Customs Code is invalid on the grounds of its incompatibility with a general principle of EU law enshrined in the case-law of the Court.

6. The dispute echoes a debate which goes back many centuries in the history of legal interest, that is, interest which has not been agreed between the parties but is imposed ex lege. The remnants of the old fragment of the Book of Paulus on interest, Fiscus ex suis contractibus usuras non dat, sep ipse accipit,[4] contained in the Digest, still appear to resound in legal texts which apply– Ibid., paragraph 30 that ancient distinction depending on whether the debts concerned are owed to or by the tax authorities.

## I – Legal framework

### A – *EU law*

#### *1. The Customs Code*

7. Pursuant to Article 236(1):

‘Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

…’

8. According to Article 241:

‘Repayment by the competent authorities of amounts of import duties or export duties or of credit interest or interest on arrears collected on payment of such duties shall not give rise to the payment of interest by those authorities. However, interest shall be paid:

— where a decision to grant a request for repayment is not implemented within three months of the date of adoption of that decision,

— where national provisions so stipulate.

…’

#### *2. Regulation No 1472/2006*

9. Under Article 1(1) and (4):

‘1. A definitive anti-dumping duty is hereby imposed on imports of footwear with uppers of leather or composition leather, excluding sports footwear, footwear involving special technology, slippers and other indoor footwear and footwear with a protective toecap, originating in the People’s Republic of China and Vietnam and falling within [combined nomenclature] codes:

4 — The tax authorities pay no interest on their contracts, but they do receive it, in *Liber singularis de usuris*, Paulus, D.22.1.17.5. The term ‘contracts’ in that context denotes debtor-creditor relationships, as the rest of the sentence from Paulus indicates.

…

4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.'

**B – *German law: Abgabenordnung (the 'German Tax Code')***

10. In accordance with Paragraph 1(1) and (3):

'1. The present Code shall apply to all taxes, including the tax rebates governed by German federal law or by the law of the European Union in so far as these are administered by the revenue authorities of the *Bund* or of the *Länder*. It may be applied only subject to the law of the European Union …

3. Subject to the law of the European Union, the provisions of the present Code shall be applied *mutatis mutandis* to ancillary tax payments …'

11. Paragraph 3(3) and (4) states:

'3. Import and export duties pursuant to Article 4(10) and (11) of the Customs Code shall be taxes within the meaning of the present Code.

4. Ancillary tax payments shall mean … interest (paragraphs 233 to 237), … as well as interest within the meaning of the Customs Code …'

12. Paragraph 37(1) and (2) provides:

'1. Claims arising from the tax debtor-creditor relationship shall be … the refund claim pursuant to subparagraph (2) below …

2. Where a tax … has been paid or repaid without any legal basis, the person on whose account the payment was made shall be entitled to a refund from the recipient of the amount paid or repaid …'

13. Under Paragraph 233:

'Interest shall be charged on claims arising from the tax debtor-creditor relationship (Paragraph 37) only to the extent to which this is legally prescribed …'

14. Paragraph 236(1) reads:

'Subject to the provisions of subparagraph (3) below, where an assessed tax is reduced or a tax rebate granted by a final and unchallengeable judicial ruling or as a result of such a ruling, interest shall accrue on the amount to be refunded or rebated from the day on which the proceedings were brought to the day of payment.'

## II – Facts of the main proceedings and the question referred for a preliminary ruling

15. During the period 2006 to 2012, Wortmann KG Internationale Schuhproduktionen ('Wortmann') placed in free circulation, in its own name, goods belonging to its subsidiaries stored in a customs warehouse. These were shoes with uppers of leather originating in the People's Republic of China and in Vietnam, purchased from the supplier Brosmann Footwear (HK) Ltd ('Brosmann') and the manufacturer Seasonable Footwear (Zhong Shan) Ltd ('Seasonable').

16. The Hauptzollamt Bielefeld (Bielefeld Customs Office, Germany) imposed an antidumping duty on Wortmann under Regulation No 1472/2006. Starting on 22 July 2010, that company, relying on two cases in which judgment was pending before the Court (appeals in Cases C-247/10 P [5] and C-249/10 P [6]), submitted a number of applications for reimbursement of antidumping duties paid since 2006.

17. In its judgment of in *Brosmann* [7] the Court annulled Regulation No 1472/2006 'in so far as it relates to Brosmann Footwear (HK), Seasonable Footwear (Zhongshan) Ltd, …'.

18. In the light of that judgment, by decision of 17 April 2013, the Bielefeld Customs Office reimbursed to Wortmann antidumping duties for 2007 (EUR 61895.49) and 2008 (EUR 92870.62).

19. On 29 November 2013, Wortmann applied for interest on each of the reimbursements from the time of payment of the anti-dumping duties. The customs authority refused this application on the grounds that the criteria laid down in Article 241 of the Customs Code were not met: there had been no delay of three months in implementation of the reimbursement decision and the German legislation provides for the right to payment of interest only from the date on which the claim was lodged with the courts.

20. The Finanzgericht Düsseldorf (Finance Court, Düsseldorf), which is seised of an action contesting the refusal to pay interest, considers that, in principle, interest should not be paid, in accordance with Article 241 of the Customs Code, since the applicant's claim can be based only on the provisions of national law which grant the right to claim interest accruing as a result of a tax debt solely from the time when such interest is claimed in legal proceedings (Paragraphs 233 and 236 of the German Tax Code).

21. However, the Finanzgericht Düsseldorf (Finance Court, Düsseldorf), harbours doubts as to the compatibility of that refusal with the general principles of EU law encapsulated in the case-law of the Court, according to which the right to a refund extends not only to the tax unduly levied but also to the amounts paid to that State or retained by it which relate directly to that tax. That applies specifically to losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely. [8] Accordingly, under EU law, Member States must refund tax collected contrary to that law, together with interest.

22. Against that background, the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) has referred the following question to the Court of Justice for a preliminary ruling:

'Is Article 241 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code to be interpreted as meaning that the national law referred to therein must, having regard to the general EU-law principle of effectiveness, provide for the payment of interest on reimbursed import duties from the time of payment of those duties up to the time of their reimbursement, even in cases in which the right to reimbursement has not been the subject of a claim before a national court?'

5 — Judgment of 15 November 2012, *Zhejiang Aokang Shoes* v *Council*, C-247/10 P, EU:C:2012:710.

6 — Judgment of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53), 'the *Brosmann* judgment'.

7 — Judgment in *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, EU:C:2012:53.

8 — Judgment of 18 April 2013, *Irimie*, C-565/11, EU:C:2013:250, paragraph 20 et seq.

## III – Procedure before the Court of Justice and submissions of the parties

### A – *Procedure*

23. The order for reference was received at the Court Registry on 14 July 2015.

24. Written observations were lodged, within the period stipulated in the second paragraph of Article 23 of the Statute of the Court of Justice, by Wortmann, the Bielefeld Customs Office, the German and Italian Governments and the European Commission.

25. In accordance with the second paragraph of Article 24 of the Statute of the Court of Justice, the Court decided to ask the Council for a written response setting out the Council's position on the validity of Article 241 of the Customs Code in relation to the case-law of the Court pursuant to which the principle of the obligation of Member States to repay with interest the amount of any tax paid in breach of EU law follows from that law.[9] The Council replied on 2 May 2016.

26. On 13 May 2016, the Commission lodged documents relating to the procedure for drawing up Regulation (EEC) No 1854/89[10] so that these could be forwarded to the parties and discussed at the hearing, which duly occurred.

27. After the date was set for the hearing, the parties were requested, under Article 61(2) of the Rules of Procedure of the Court of Justice, to focus in their submissions on whether Article 241 of the Customs Code could be reconciled with the case-law of the Court cited in the question sent to the Council and, as appropriate, on the validity of that article.

28. The hearing was held on 25 May 2016 and oral argument was presented by Wortmann, Bielefeld Customs Office, the German Government, the European Commission and the Council.

### B – *Summary of the parties' observations*

29. Wortmann submits that the obligation to pay interest as a corollary of the annulment of Regulation No 1472/2006 by the *Brosmann* judgment does not result from the application of the Customs Code but rather directly from primary EU law; in particular, first, from a general principle developed and enshrined by the Court of Justice and, second, from a reading of that judgment in accordance with Article 266 TFEU, from which follows the right to the removal *ex tunc* of all the effects derived from the application of an act which the Court has declared unlawful.

30. Wortmann argues that it is a direct beneficiary of the *Brosmann* judgment, in that it is an importer of footwear supplied by its suppliers, Brosmann and Seasonable, and that the principle of sincere cooperation enshrined in Article 4(3) TEU requires full reimbursement, including interest, of the wrongly paid antidumping duties which were the subject of that judgment, since these were the European Union's own resources collected through the customs authorities of the Member States.

31. In short, Wortmann suggests that the Court's reply to the national court should be that Article 241 of the Customs Code is not applicable and that an importer who has paid antidumping duties pursuant to a regulation which has been annulled by the Court is entitled to reimbursement of the sums paid and of the sums corresponding to interest accruing from the date of the payment to the date of full

9 — Communication of 6 April 2016.

10 — Council Regulation of 14 June 1989 on the entry in the accounts and terms of payment of the amounts of the import duties or export duties resulting from a customs debt (OJ 1989 L 186, p. 1).

reimbursement. In the event that the Court holds that Article 241 of the Customs Code is applicable, Wortmann proposes that that article should be interpreted as meaning that national law, to which that article refers, must provide for the payment of interest on refunded import duties, even where proceedings have not been brought before a national court.

32. The Bielefeld Customs Office, the German Government and the Commission submit that neither of the two exceptions laid down in Article 241 of the Customs Code arises in the main proceedings. That article of EU law excludes the application of the principle of effectiveness, although it grants Member States the power to provide for different arrangements by way of derogation from the general rule that there is no obligation to pay interest.

33. In particular, the Bielefeld Customs Office submits that Article 241 of the Customs Code cannot be interpreted as meaning that national law, to which it refers, must automatically provide for the payment of interest on sums reimbursed in respect of import duties paid but not due.

34. The German Government puts forward a similar argument to that of the Bielefeld Customs Office, but also submits that a negative reply to the question referred for a preliminary ruling is supported by the following reasons:

— The new Customs Code[11] deletes the exception relating to any rules laid down in national legislation, which further restricts the right to receive interest in the event of reimbursement.

— Exemption from the payment of interest under Article 241 of the Customs Code is justified by the process of the initial assessment of the amount of customs duties payable, which enables goods to be made immediately available for trade.

35. The Italian Government submits that any reimbursement of undue income necessitates a prior claim, and therefore interest can only be granted from the date of that claim. A national provision which lays down such a rule is not contrary to EU law. The case-law of the Court in *Littlewoods Retail and Others* and *Irimie*[12] is not applicable to this case for it concerns antidumping duties payable in accordance with a Council regulation which was fully valid and effective at the time of payment but was later annulled by the Court. The Italian Government further submits that, in order to establish whether the effects of the *Brosmann* judgment extended to Wortmann, the German authorities ought to have assessed the particular circumstances of that undertaking, and therefore the request for reimbursement of the duties paid created the right to reimbursement.

36. Lastly, the Italian Government points out that the infringement generated by the right to reimbursement in this case cannot be imputed to the Member States but to the EU institutions. The Italian Government proposes, therefore, that, if the Court decides to apply the case-law laid down in *Irimie*,[13] it should declare that the Member State concerned may bring proceedings against the EU institution responsible, seeking reimbursement from that institution of the ancillary charges paid by the Member State.

11 — Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1), Article 116(6).

12 — Judgments of 19 July 2012, *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, and of 18 April 2013, *Irimie*, C-565/11, EU:C:2013:250.

13 — Judgment of 18 April 2013, *Irimie*, C-565/11, EU:C:2013:250.

37. In addition to those arguments, the Commission further contends that it is necessary to differentiate between compensatory interest and interest on arrears and to take into account the prohibition of unjust enrichment. The Commission observes that the case-law on the right to claim interest [14] was laid down in cases in which a national provision had breached EU law and, moreover, the applicants had provided proof of the losses they had suffered. Payment of compensatory interest, which would be the appropriate interest in the case at issue, requires concrete proof of the loss suffered by the claimant.

38. In the alternative, the Commission contends that Wortmann cannot rely on Article 266 TFEU in support of its claims because: (a) it was not a party to the proceedings before the EU courts which led to the *Brosmann* judgment, and (b) interest on arrears accruing under Article 266 TFEU applies only after the date of that judgment. As regards compensatory interest, the procedure for claiming such interest is an action based on non-contractual liability against the Council and the Commission.

39. In relation to the alleged breach of higher-ranking legal rules by Article 241 of the Customs Code, [15] the Commission observes that the national court did not call into question the validity of that article. The Commission further submits that the EU legislature has a margin of discretion which it has not exceeded, since non-recognition of the right to receive interest on overpaid sums constitutes a fair balance: importers benefit from the immediate availability of goods whilst agreeing in return not to receive interest on any overpaid sums.

40. According to the Commission, if the Court decides that interest must be paid on the sums reimbursed, it should take the following into account: (a) the entitlement to payment of compensatory interest requires proof of actual loss or damage, which does not exist in this case because the importer passes on to the purchaser, through the system, the amount of the antidumping duty; (b) the defendant authority is entitled to raise a plea of unjust enrichment on the part of the importer; [16] and (c) in the absence of EU rules, it is for national law to address all ancillary matters relating to the reimbursement of undue income, including the payment of interest, the type of interest and the dates for calculation of that interest.

41. In short, the Commission submits that Article 241 of the Customs Code rules out the payment of compensatory interest for the undue levy of antidumping duties unless national law recognises such a right. There is no need for national law to provide automatically for the obligation to pay interest on reimbursed import duties during the period from the date of payment of those duties to the date of reimbursement if there is no prior claim made through the courts.

42. The Council relies on the historical origins of Article 241 of the Customs Code to support its contention that that article is valid. The Council submits that the case-law of the Court of Justice cited in the order for reference is not applicable to the case, since it refers to situations not governed by EU law. Rather, these proceedings concern an express provision governing the payment of interest, namely Article 241 of the Customs Code, which reflects the balance that the EU legislature sought to maintain between customs authorities and importers. In the alternative, the Council proposes an interpretation of Article 241 in accordance with primary law, from which it concludes that national provisions have to provide for the payment of such interest.

14 — Judgments of 8 March 2001, *Metallgesellschaft and Others*, C-397/98 and C-410/98, EU:C:2001:134, paragraphs 83 and 87 to 95; of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraphs 197 to 220; of 19 July 2012, *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, paragraphs 22 to 34; and of 18 April 2013, *Irimie*, C-565/11, EU:C:2013:250, paragraphs 16 to 29.

15 — At the hearing, the Commission argued that Article 241 of the Customs Code was valid, referring to the drafting process and to the conditions under which, in the Commission's submission, the obligation to pay interest arises, including the need to provide evidence of loss. The Commission agreed that, ultimately, it was possible to interpret that article in accordance with EU law.

16 — Judgment of 9 November 1983, *San Giorgio*, 199/82, EU:C:1983:318, paragraph 13.

## IV – Assessment

43. It is necessary to dispel at the outset any uncertainty regarding the connection between the Customs Code and this dispute. First, in providing for antidumping duties on imports of footwear, Regulation No 1472/2006 referred expressly to the Customs Code.[17] Second, the procedure for calculating antidumping duties is based, essentially, on the structure of the procedure for calculating customs duties,[18] so that, although antidumping duties are distinct from customs duties, they cannot, in reality, be disconnected from the Customs Code.[19]

44. It is, furthermore, my belief that that issue is resolved implicitly by the case-law of the Court,[20] pursuant to which the Customs Code lays down criteria for the reimbursement of antidumping duties.

45. Three options present themselves to the Court in relation to the application of Article 241 of the Customs Code to the instant case. The first favours a 'linear' interpretation of the article, in accordance with which the general rule would prevail (in other words, the payment of interest would be refused) because neither of the two exceptions laid down therein arise. The second supports a declaration that, because it prohibits the payment of interest in addition to reimbursement of the principal sum, the rule in that article is contrary to a basic principle of EU law and, therefore, invalid. The third advocates a nuanced reading of Article 241 of the Customs Code, which excludes from its scope factual situations like the present one, in which the reimbursement of antidumping duties is required as a result of the earlier decision on the invalidity of the legislative act which imposed those duties.

46. For the reasons I shall now go on to explain, I believe that the third option is the most suited to the circumstances of this case. Article 241 of the Customs Codes governs 'ordinary' situations in which an assessment notice (including one relating to antidumping duties) is cancelled as a result of defects in the detailed specification of the individual components of the customs debt.[21] However, I do not believe that it encompasses situations in which the reimbursement of undue payments made by importers is the result of a decision on the invalidity of the regulation imposing the obligation to make those payments.

47. In order to ascertain the reasons underlying the general rule (precluding the payment of interest on the reimbursement of customs duties), I think it is helpful to have a look at the origins of the provision, according to the documents submitted by the Commission and debated at the hearing.

48. It can be established from those documents that Article 241 of the Customs Code originates from Article 17a of Regulation (EEC) No 1430/79,[22] which was inserted by Article 25(3) of Regulation No 1854/89. In accordance with a draft issued by the Council Working Group on Economic Questions, sitting on 11 and 12 March 1986, the sixth recital of the latter regulation contained two phrases which were deleted as a result of a Council *corrigendum* of 28 November 1988, which

17 — See Article 1(4) of Regulation No 1472/2006, transcribed in point 9.

18 — In the particular case of the duties referred to in Regulation No 1472/2006, these were fixed as a percentage of the customs duty. The step prior to calculation of the duties was, therefore, the application to the customs value of the appropriate rate for calculation of the amount of duty. Next, the percentage corresponding to the antidumping duty was added to that amount of customs duty (Article 1(3) of Regulation No 1472/2006).

19 — The formal expression of antidumping duty is based on the nomenclature of the unified customs code through the addition of four alphanumeric characters to the combined nomenclature codes (additional Taric code). Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1) mentions so-called 'Taric subheadings' and refers to Annex II, point 4 of which lists antidumping duties.

20 — See, in that connection, the judgments of 27 September 2007, *Ikea Wholesale*, C-351/04, EU:C:2007:547; of 14 June 2012, *CIVAD*, C-533/10, EU:C:2012:347; and of 4 February 2016, *C & J Clark International*, C-659/13 and C-34/14, EU:C:2016:74. In those cases, the Court held that antidumping duties paid under a regulation that had been declared invalid were not legally owed for the purposes of Article 236(1) of the Customs Code and that Article 236(2) of the Customs Code should be interpreted since that was the relevant provision for determining whether or not reimbursement was appropriate.

21 — At the hearing, the Commission referred to these as 'technical defects'.

22 — Council Regulation of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1).

adopted the definitive wording.[23] Notwithstanding the deletion of those phrases, it may be inferred that the purpose of the rule was to establish a degree of symmetry between the situation of operators and that of customs authorities with regard to the accrual of interest, where an initial assessment subsequently has to be amended, in one sense or the other, as a result of errors which may have occurred on account of the speed of the clearance system.

49. The wording of the recital, which sheds light on the true meaning of the provision, places the parties involved on a reasonably equal footing. The procedure for initially establishing the amount of the customs debt is conducted on such a fragile basis that this explains why, where the amount of that debt has to be corrected post clearance, either because it is excessive or insufficient, neither the customs authority nor the person liable for the customs debt is required, as a general rule, to pay interest during the (brief) intervening period.

50. The Commission agrees that, in some cases, the customs authority does not inspect goods before releasing them and only later carries out checks on whether imports were properly carried out. If, at that later date, a new assessment is required, it may lead either to the importer having to pay what he had hitherto not paid (initial under-assessment) or to the customs authority having to reimburse the amount overpaid; in both cases, there is no interest.

51. That balanced principle, which takes account of the usual process of releasing goods in shortened time limits, was transferred to the Customs Code and was encapsulated in the general rule in Article 241 and in another article. Specifically, Article 232(1)(b) provides for the payment of interest on arrears by the debtor where he has not paid the amount of duty owed within the prescribed period (indicated in Article 222(1) of the Customs Code),[24] which is the reverse of the general exemption of customs authorities from the payment of interest, laid down in Article 241 of the Customs Code.[25]

52. In that context, the exemption from payment of interest is reciprocal (authorities and economic operators) and is justified in the light of the *normal* circumstances of application of the elements necessary for calculation of the customs debt, on the implicit assumption that it is not possible to call into question the legislative framework governing those elements but only the quantification or certain specific features of those elements or of the assessment carried out.[26]

53. A rule conceived for those cases cannot simply be applied to other cases which have little connection with the speed of customs clearance or the particular parameters of each assessment but are, however, related to the invalidity of the regulation imposing antidumping duties. To my mind, in the latter case, entitlement to reimbursement of the sum wrongly paid and interest on that sum arises directly as a result of the declaration of invalidity of the regulation which imposed the antidumping duties. Those duties are deprived of their legal basis so that there is no legal 'cause' for the obligations which they created and the sums paid in respect of antidumping duties must be reimbursed to those who paid them.

23 — The recital, the deleted phrases of which I have highlighted, was worded as follows: '… having regard to the constant growth in commercial traffic and the need to release goods as quickly as possible, the methods of control used by the customs departments have been adjusted so that they only examine goods before release in a very small number of cases; whereas checks on compliance with import and export rules are thus deferred and consist mainly of bookkeeping checks, which may entail post-clearance recovery of an additional amount of duties; [*whereas such post-clearance entry in the accounts must not give rise to the payment of interest to the customs authority*;] whereas such post-clearance checks may similarly give rise to repayment of an amount of duty paid in excess; whereas the amount of duty paid in excess will have been calculated on the basis of information declared for tax purposes by the person concerned himself and whereas the latter will have had access to the goods far more rapidly than if they had been examined before release was granted; [*whereas such repayment must not therefore give rise to the payment of interest by the customs authority either*]'.

24 — In the judgment of 31 March 2011, *Aurubis Balgaria*, C-546/09, EU:C:2011:199, the Court held that 'Article 232(1)(b) of … the Community Customs Code … must be interpreted as meaning that interest on arrears in relation to customs duties still to be recovered may be charged under that provision only in respect of the period falling after the deadline by which those duties were to be paid'.

25 — The same balance has been transferred to the new Customs Code (Regulation No 952/2013, Articles 114 (governing interest on the customs debt) and 116(6) (on interest in the case of repayment or remission of import or export duties)).

26 — At the hearing, the Commission gave the example of errors in the customs classification of goods, the quantities of goods released or the types of customs duties calculated.

54. Before going any further, I believe it would be helpful to review the case-law of the Court on the repayment of sums which national authorities (including customs authorities) have wrongly levied, in breach of EU law. At the end of that summary, I shall propose a reply to the referring court in terms which will be of assistance to it for the purposes of its final decision. [27]

55. The judgments in *Metallgesellschaft and Others* and *Test Claimants in the FII Group Litigation* [28] dealt with the repayment of tax that is not due, the application of the principle of procedural autonomy and the reimbursement of interest, as an ancillary claim. [29] In particular, in the latter judgment, the Court observed that, 'where a Member State has levied charges in breach of the rules of Community law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax. … that also includes losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely.' [30] Compensation for the unavailability of money is, therefore, an obligation ancillary to the reimbursement of the principal debt.

56. The judgment in *Littlewoods Retail and Others*, [31] given in a case involving the reimbursement to a taxpayer of tax (VAT) which had been overpaid as a result of non-compliance with EU law, repeated the above case-law on the right to obtain reimbursement of the tax unduly levied and of losses resulting from the unavailability of money. That judgment also stated that 'it follows from that case-law that the principle of the obligation of Member States to repay with interest amounts of tax levied in breach of EU law follows from that law.' [32]

57. The judgment in *Zuckerfabrik Jülich and Others*, [33] given in preliminary-ruling proceedings concerning an issue of validity, declared invalid Regulation No 1193/2009, [34] in so far as the method of calculation it used was contrary to basic Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector (OJ 2001 L 178, p. 1). Consequently, the Court concluded that sugar production levies paid unduly had to be reimbursed and, reiterating its earlier case-law, held that 'individuals entitled to reimbursement of sums paid unduly … determined on the basis of an invalid regulation are also entitled to payment of the interest on such sums.' [35]

27 — It falls to the Court 'to extract from all the factors provided by the national court and in particular from the statement of grounds contained in the reference, the elements of Community law requiring an interpretation — or, as the case may be, an assessment of validity — having regard to the subject-matter of the dispute' (judgment of 29 November 1978, *Redmond*, 83/78, EU:C:1978:214, paragraph 26).

28 — Judgments of 8 March 2001, *Metallgesellschaft and Others*, C-397/98 and C-410/98, EU:C:2001:134, and of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774. Both those judgments ruled on an alleged infringement of the freedom of establishment and the free movement of capital as a result of different treatment for tax purposes of the distribution of dividends between parent companies and subsidiaries, depending on whether or not they were residents.

29 — The specific feature of the case which led to the judgment in *Metallgesellschaft and Others*, C-397/98 and C-410/98, EU:C:2001:134, was that the obligation to pay interest was not ancillary but was the very objective sought by the plaintiffs' actions in the main proceedings.

30 — Judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 205.

31 — Judgment of 19 July 2012, *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478.

32 — Ibid., paragraph 26.

33 — Judgment of 27 September 2012, *Zuckerfabrik Jülich and Others*, C-113/10, C-147/10 and C-234/10, EU:C:2012:591.

34 — Which fixed the production levies in the sugar sector for marketing years 2002/2003, 2003/2004, 2004/2005, 2005/2006 (OJ 2009 L 321, p. 1).

35 — Paragraph 3 of the operative part.

58. Lastly, the judgment in *Irimie*,[36] after acknowledging that Article 110 TFEU precluded national legislation providing for a pollution tax to be levied on the import of a car from another Member State, took the same line as the previous judgments[37] and, after reproducing paragraph 205 of the judgment in *Test Claimants in the FII Group Litigation*,[38] confirmed that 'the principle of the obligation of Member States to repay with interest amounts of tax levied in breach of EU law follows from that law'.[39]

59. Therefore, the case-law of the Court has enshrined a principle of EU law pursuant to which the right to repayment of sums unduly paid, because they were paid under provisions contrary to EU law, applies not only to the sums unduly paid but also to interest thereon from the date of the undue payment. The judgments cited above have a common element: the existence of a payment obligation derived from a provision of national law (*Irimie*)[40] or a provision of EU law (*Zuckerfabrik Jülich and Others*),[41] which was later declared inapplicable or invalid on the grounds that it infringed EU law.

60. From that perspective, reimbursement of the principal and of the interest, without any distinction being made between the two items, reflects the primacy of EU law which (other than in exceptional cases and subject always to certain temporal limitations) does not permit the effects of provisions that are contrary to it to remain untouched once those provisions have been declared invalid or inapplicable by a judgment of the Court of Justice. In particular, where acts of the Union are concerned, the first paragraph of Article 264 TFEU provides that, if an action for annulment is well founded, the contested act is to be declared to be void. It may be inferred from that proposition, as confirmed *a contrario* by the second paragraph of that article, that, in principle, the 'effects of the act which [the Court] has declared void' cannot continue in existence.

61. This is the point in the discussion where attention turns to Article 266 TFEU, on which Wortmann relies as the basis for its claim, in so far as that article requires the EU institution whose act has been declared void (in this case, Regulation No 1472/2006, which was the subject of the judgment in *Brosmann*) to take 'the necessary measures to comply with the judgment'.

62. In the Commission's submission, Wortmann is not entitled to rely on a judgment given in proceedings to which it was not a party, especially since the judgment which declared void Regulation No 1472/2006 did so 'in so far as it relates to' the applicant undertakings. The plea could, hypothetically, be admissible if Wortmann wished to enter an appearance at the enforcement stage of the judgment against the EU institution which adopted that regulation. However, the plea is not admissible as regards the ability of that undertaking to invoke the judgment in *Brosmann* against the national authorities, for Wortmann has a close connection with Regulation No 1472/2006 and with the proceedings which led to the annulment of that regulation, in that it was an importer of the footwear exported by Brosmann and Seasonable and on which the antidumping duty, which it was required to pay, was levied.

63. It is precisely because of its status as a directly affected economic operator which is entitled to benefit from the annulment of Regulation 1472/2006 that the German customs authority readily reimbursed to Wortmann, following the *Brosmann* judgment, the sum paid by Wortmann in respect of antidumping duties under that regulation. The reason it did not do likewise in relation to the

36 — Judgment of 18 April 2013, *Irimie*, C-565/11, EU:C:2013:250.

37 — Ibid., paragraph 28. It reiterated, in that connection, that the 'loss depends, inter alia, on the duration of the unavailability of the sum unduly levied in breach of EU law and thus occurs, in principle, during the period between the date of the undue payment of the tax at issue and the date of repayment thereof.'

38 — Judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774.

39 — Judgment in *Irimie*, C-565/11, EU:C:2013:250, paragraph 22.

40 — Judgment in *Irimie*, C-565/11, EU:C:2013:250.

41 — Judgment in *Zuckerfabrik Jülich and Others*, C-113/10, C-147/10 and C-234/10, EU:C:2012:591.

interest on that undue payment was, according to the German customs authorities, simply because Article 241 of the Customs Code precluded it. However, I must stress, the German customs authorities correctly, albeit partially, drew the consequences [42] derived from the annulment of Regulation No 1472/2006 and agreed to the reimbursement sought by Wortmann.

64. In that same context, Article 266 TFEU is a useful legislative criterion for guiding the actions of national authorities (and the courts of the Member States) where sums wrongly received by them originate from the collection of the Union's own resources. A number of the judgments examined (*Littlewoods Retail and Others* and *Zuckerfabrik Jülich and Others*) [43] were concerned specifically with some of those resources (VAT and a sugar levy).

65. The administration of own resources (which include antidumping duties) [44] follows a scheme whereby the administrative authorities of the Member States are responsible for calculation and collection of own resources and the sums received are shared with the Union. The State therefore acts as an instrument of the EU institutions. That factor creates a special link between the national authorities and the judgment annulling the antidumping regulation and bolsters the requirement that the national court must take into account the case-law of the Court of Justice on that subject and the criteria for enforcement derived from Article 266 TFEU.

66. The specific act implementing antidumping duties, adopted by the national authorities, simply complies with Regulation No 1472/2006: following the annulment of that regulation as the legislative basis, the customs authorities are required to take the 'necessary measures' to deprive of effect the assessment derived thereon, with all the applicable consequences. Those consequences include the reimbursement of the antidumping duties wrongly paid and payment of interest thereon from the time of settlement of the amount levied. That is the only way of reinstating the situation which would have occurred if the act implementing the regulation, and later annulled, had never been adopted. Given that reinstatement of that situation took place after a long period of time, during which Wortmann was unable to use the sums of money it had wrongly paid, the payment of interest compensated for the unavailability of that portion of its assets.

67. In short, the invalidity of Regulation No 1472/2006 gives rise to the obligation to reimburse the antidumping duties paid by Wortmann and to increase that sum with interest. That is the only way of completely counteracting the effects of the customs assessment notice issued by the German authorities and eliminating *ex tunc* all its effects. That was the decision of the Court in the judgment in *Zuckerfabrik Jülich and Others*, [45] a case to which the present case bears a striking resemblance.

42 — In the judgment of 1 June 2006, *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, C-442/03 P and C-471/03 P, EU:C:2006:356, the Court held that the judgment annulling a Commission decision 'led retroactively to the disappearance of [that] decision … with regard to all persons. An annulling judgment of that nature thus has authority *erga omnes*, which gives it the force of *res judicata* with absolute effect'. Although the facts of that case were not the same as those of this case, that assertion is consistent with Article 264 TFEU.

43 — Judgments of 19 July 2012, *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, and of 27 September 2012, *Zuckerfabrik Jülich and Others*, C-113/10, C-147/10 and C-234/10, EU:C:2012:591.

44 — The EU's general budget for 2016 (OJ 2016 L 48, p. 1) includes, under the title 'Own resources' (p. 36), Chapter 12, concerning 'Customs duties and other duties referred to in Article 2(1)(a) of Decision 2007/436/EC, Euratom', which, in addition to the duties referred to in the Common Customs Tariff, comprises 'other duties established or to be established by the institutions of the European Union in respect of trade with third countries'.

45 — Judgment of 27 September 2012, *Zuckerfabrik Jülich and Others*, C-113/10, C-147/10 and C-234/10, EU:C:2012:591.

68. Moreover, in accordance with the judgment in *Zuckerfabrik Jülich and Others*,[46] that 'entitlement of individuals' is unconnected to the fact that there may be no procedure by means of which Member States (which are obliged to reimburse the principal and interest) may reclaim the amount of the interest, by way of recourse, from the EU institutions which adopted the annulled regulation.[47] In accordance with that criterion, I fail to see why an individual who has already suffered a significant financial loss as a result of an antidumping duty assessment notice which was subsequently declared invalid should have to bring two actions, seeking, first, direct reimbursement of the principal from the national authorities, and, second, as the Commission appears to suggest, relying on Article 340 TFEU to claim interest based on the non-contractual liability of the EU institutions.

69. Nor, in my view, are there any persuasive arguments for concluding that the *dies a quo* for the calculation of interest must be the date on which the *Brosmann* judgment was given or, as a last resort, the date on which the claim for interest was brought before the courts. As regards the latter view, in *Irimie*,[48] the Court held that EU law '[precludes] a national system … which limits the interest granted on repayment of a tax levied in breach of EU law to that accruing from the day following the date of the claim for repayment of that tax'.

70. The reason for that ruling was that, if the opposite rule had been accepted, the taxpayer would have been deprived of compensation commensurate with the loss suffered as a result of payment of the tax that was contrary to EU law, a loss which 'depends … on the duration of the unavailability of the sum unduly levied in breach of EU law … during the period between the date of the undue payment of the tax at issue and the date of repayment thereof'.[49] In my opinion, those considerations are applicable, *mutatis mutandis*, to interest accruing in the event of reimbursement of customs duties levied under an antidumping regulation which the Court has declared to be incompatible with EU law. In such cases, the payment obligation is derived directly from EU law, that is, *ipso jure*, without the accrual of interest being linked to the specific demand to pay interest ancillary to the principal debt.

71. For similar reasons, I do not believe either that the *dies a quo* for the calculation of interest must coincide, in this case, with the date of the judgment in *Brosmann* (2 February 2012). It is true that, in the particular circumstances of the case in *Commission* v *IPK International*,[50] the Court ruled that default interest should be paid as 'a measure giving effect to a judgment annulling a measure, for the

46 — Paragraph 3, *in fine*, of the operative part of that judgment states: 'A national court cannot use its discretion to refuse payment of interest on the sums levied by a Member State on the basis of an invalid regulation on the ground that that Member State cannot reclaim the corresponding interest on the European Union's own resources'.

47 — The issue of whether the German authorities could, in turn, bring proceedings against the EU institutions to recover the amount which they must reimburse to those who paid antidumping duties under the annulled regulation, raised by the Italian Government in its observations, is outside the scope of the reference for a preliminary ruling.

48 — Judgment of 18 April 2013, *Irimie*, C-565/11, EU:C:2013:250.

49 — Ibid., paragraph 28.

50 — Judgment of 12 February 2015, *Commission* v *IPK International*, C-336/13 P, EU:C:2015:83. The dispute arose as a result of a decision of the Commission to cancel certain financial assistance granted to IPK, as a result of which that company no longer received certain sums of money and was required to repay the sums received together with interest. When the decision was annulled, the Commission paid the sums owed and those reimbursed by IPK, increased by 'compensatory interest' for the period prior to the date of the annulling judgment.

purposes of the first paragraph of Article 266 TFEU'[51], and that that is not the nature of 'the grant of compensatory interest … under the second paragraph of Article 266 TFEU, which refers to Article 340 TFEU',[52] in that it is designed to compensate at a standard rate for the loss of enjoyment of the monies owed and to encourage the debtor to comply with that judgment as soon as possible'.[53]

72. I believe that the judgment in *Commission* v *IPK International* (C-336/13 P, EU:C:2015:83) must be read in the light of the specific features of that dispute, without it being possible to infer from it a reversal of the case-law of the Court which I have cited above.[54] Therefore, the principle continues to exist according to which, where sums are wrongly paid to national authorities (in this case, the customs authorities) on the basis of invalid or inapplicable provisions, in accordance with EU law, those who paid those sums are entitled to obtain reimbursement of the sums wrongly levied and interest on those sums from the date of payment.

73. As regards the remaining objections put forward in relation to the reimbursement obligation, which extends to interest accruing as a result of the unavailability of the sums of money levied, suffice it to say that it has not been established that there has been any unjust enrichment of the party who paid the antidumping duties (Wortmann) as a result of passing on the amount levied to third parties. Furthermore, that fact was not even relied on, as far as the principal debt is concerned, by the German customs authorities, which readily reimbursed to Wortmann the sum paid. Nor could that objection be relied on to refuse payment of interest which is due, in short, because the payer was unable to access the sums of money paid while those sums were wrongly — in objective terms — retained by the authorities.

## V – Conclusion

74. In the light of the foregoing considerations, I suggest that the Court reply as follows to the questions referred for a preliminary ruling by the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany):

The obligation of the customs authorities to reimburse sums wrongly paid by an importer in respect of antidumping duties imposed by a regulation which has been declared invalid by the Court of Justice extends to the payment of interest on those sums, which accrues from the date on which those sums were paid.

51 — Ibid., paragraph 30.

52 — Ibid., paragraph 37.

53 — Judgment of 12 February 2015, *Commission* v *IPK International*, C-336/13 P, EU:C:2015:83, paragraph 30. At paragraphs 37 and 38, the Court explained why it concluded that the interest accrued in that case was default interest and not compensatory interest, adding that 'that category of [compensatory] interest is designed to compensate for the time that passes before the judicial assessment of the amount of damage, irrespective of any delay attributable to the debtor.' That reasoning is clearer if it is supplemented by point 92 of the Opinion of Advocate General Bot [*Commission* v *IPK International* (C-336/13 P, EU:C:2014:2170)]: 'By virtue of the *ex tunc* effect of the annulment, the Commission was therefore required to pay a principal sum which was certain, ascertained and due and composed of the sums to be paid or repaid to IPK. IPK's claim therefore attracted default interest payable, in relation to the sum to be paid, from the date of the claim made by IPK and, in relation to the sum to be repaid, from the date of its payment by IPK to the Commission.'

54 — See point 46 et seq. above.