

OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 6 February 1991 *

*Mr President,
Members of the Court,*

Germany. Accordingly they were imported free of customs duties under the Community customs procedure.

1. The questions with which these proceedings are concerned relate to the interpretation and validity of Article 5(2) of Council Regulation No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not be required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties,¹ and to the interpretation of Article 4 of Commission Regulation No 1573/80 of 20 June 1980,² which lays down provisions for the implementation of Article 5(2) of Regulation No 1697/79.

Referring you to the Report for the Hearing for matters of detail, I will briefly summarize the facts underlying the dispute in the main proceedings.

2. Mecanarte — Metalúrgica da Lagoa Lda ('Mecanarte') imported into Portugal a consignment of 42 bundles of hot-rolled steel sheets which it had purchased from its supplier in the Federal Republic of Germany and, for the purpose of putting the goods into circulation, produced a certificate issued by the competent authorities in Düsseldorf indicating that the goods had originated in the Federal Republic of

After receiving a report from the competent German authorities that the certificate produced was invalid, since the goods covered by it had originated in the German Democratic Republic, the Portuguese customs authorities proceeded to effect post-clearance recovery of duties payable on the goods in question.

Mecanarte, relying on the applicable Community legislation, challenged the legality of the decision to recover the duties before the Tribunal Fiscal Aduaneiro, Oporto; that court referred to the Court of Justice for a preliminary ruling eight questions which I shall summarize and consolidate as follows:

Whether Article 5(2) of Regulation No 1697/79 grants the competent authorities a discretion whether or not to effect post-clearance recovery; and if so, whether such a provision is valid in the light of the fundamental principles laid down in the Treaty (first and second questions);

In relation to Article 5(2): whether the word 'error' refers only to mere calculation or copying errors or also to errors caused by

* Original language Italian

1 — OJ 1979 L 197, p. 1.

2 — OJ 1980 L 161, p. 1.

the person liable; whether 'competent authorities' responsible for the error must be taken to mean only the authorities responsible for recovery or also the authorities in the exporting State; and whether a person liable who in good faith provides inaccurate or incomplete information has nevertheless satisfied 'all the provisions laid down by the rules in force as far as his customs declaration is concerned' (third, fourth and fifth questions);

by the competent authorities not to proceed with post-clearance recovery of the duties payable subject to the fulfilment of three cumulative conditions: namely, the duties 'were not collected as a result of an error made by the competent authorities themselves, which could not reasonably have been detected by the person liable, the latter for his part 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'.

Whether, pursuant to Article 4 of Regulation No 1573/80, the Commission is competent to adopt only decisions not to proceed with the recovery of amounts of ECU 2 000 or above, or whether it may also adopt decisions to proceed with recovery; and whether, in cases where a person liable submits a reasoned request for reversal of a decision to effect recovery adopted by the national authorities, it is for the latter or for the Commission to give a decision on such a request (sixth and eighth questions);

The Court of Justice has consistently held that that provision 'must be interpreted as meaning that if all those requirements are fulfilled the person liable is entitled to the waiver of the recovery of the duty in question'.³

That dictum of course implies that the decision of the competent authorities is bindingly linked to fulfilment of the conditions prescribed for non-recovery; once it is established that those conditions are fulfilled, the national authorities are required to waive recovery.

Finally, whether, in view of the fact that the Portuguese constitution provides for the primacy of international law over domestic law, the incompatibility with Community law of a national provision renders the latter unconstitutional, with the result that an immediate reference for a preliminary ruling is unnecessary (seventh question).

It follows from the foregoing that the question concerning the validity of the provision in question is devoid of purpose. Since it does not confer any discretionary power on the competent authorities, but rather a power combined with a duty, it does not conflict with any of the fundamental principles safeguarded by the Treaty, such as non-discrimination.

3. With respect to the first question, it must be observed at the outset that Article 5(2) of Regulation No 1697/79 makes any decision

3 — Judgment in Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 22; see also Case 378/87 *Top Hit* [1989] ECR 1359, paragraph 18, and Case 161/88 *Binder* [1989] ECR 2415, paragraph 17.

4. In the third, fourth and fifth questions, the national court asks, essentially, for clarification as to the conditions which must be satisfied if recovery is to be waived pursuant to Article 5(2) of Regulation No 1697/79.

Indeed, as far as fulfilment of those conditions is concerned, nothing more can be expected than the information that the declarant can reasonably have at his disposal or obtain.

The questions in fact seek to determine:

what meaning is to be attributed to the term 'error' made by the competent authorities;

who the 'competent authorities' are;

and whether a person liable who, in good faith, provides incorrect or incomplete information has nevertheless satisfied 'all the provisions laid down by the rules in force as far as his customs declaration is concerned'.

Taking a systematic approach and having regard to the subject-matter of the dispute, I shall examine the last point first.

Since good faith and compliance with the applicable provisions are two distinct conditions which must be examined separately, let me say immediately that the condition of observance of all the provisions in force concerning the customs declaration must be deemed to have been met by the person liable even where, in good faith, he has provided the competent authorities with incorrect or incomplete information.

5. As regards the term 'competent authorities', it must first be pointed out that, if the literal wording of Article 5(2) is relied on, it must be concluded that only an error committed by the actual authorities responsible for recovery can be taken into account. The Commission contends, however, that the term is to be interpreted as meaning that an error on the part of the State exporting the goods is also to be taken into consideration, and it refers in that regard to Article 2 of Regulation No 2380/89,⁴ which replaced Regulation No 1573/80, in which it is expressly stated that the competent authorities may also be those in the Member State where the error was noticed.

The fact that that clarification does not appear among the provisions of Regulation No 1573/80, which was in force at the material time but was not introduced until the new regulation was adopted, does not appear to me to be decisive; I concur with the Commission's view that it did not change the scope or meaning of Article 5(2) but merely confirmed it.

Furthermore, there is no doubt that the very purpose of the provision would be undermined if it were interpreted restrictively. A restrictive interpretation would in fact lead to discriminatory treatment, since the same error would be taken into account

⁴ — OJ 1989 L 225, p. 30.

if committed by the national authorities responsible for collecting, or not collecting, the duty but would be disregarded if the same authorities merely noticed it on effecting post-clearance recovery, it being found that the error had been made by the authorities of the exporting Member State.

6. Finally, we come to the meaning to be attributed to the term 'error' on the part of the competent authorities.

First it must be pointed out that cases of error cannot be limited to mere calculation or copying errors but extend to all types of error made by the competent authorities, and thus also to errors concerning the interpretation and application of the rules applicable to each case.

Conversely, where the error is caused — and it is immaterial whether in good or bad faith — by the person liable himself or by third parties, in other words where the competent authorities have been led into error, it does not seem to me, in principle, that in such circumstances the error can be relied on for the purpose of waiving recovery.

In the case with which these proceedings are concerned, the certificates of origin for the imported goods, produced by Mecanarte and issued by the competent authorities of the exporting Member State, were later found to be invalid.

An error of that kind is not imputable to the national authorities — neither the Germans

nor the Portuguese — since they are not required to check the accuracy of the information or the authenticity of the documents produced by the person liable when they receive them. It is undisputed that customs authorities are empowered to carry out any subsequent verification, as expressly indicated in Article 10 of Council Directive 79/695 of 24 July 1979 on the harmonization of procedures for the release of goods for free circulation.⁵

That is confirmed by the judgment in *Van Gend en Loos* of 13 November 1984,⁶ concerning the remission of import duties, in which the legality was challenged of a refusal to grant a remission on the ground, inter alia, that the national authorities had failed to verify the authenticity of certificates of origin — which were subsequently found to be false — and had thus caused the agents concerned to entertain legitimate expectations. The Court stated that 'the role of [the customs] officers in regard to the initial acceptance of declarations in no way prevents the customs authorities of the Member States from subsequently checking their veracity, nor does it prevent effect being given to the consequences of those checks, as is clear in particular from Article 10(2) of Regulation No 79/695'; and, as I have said, that directive is applicable to the present case.

From the foregoing observations it is therefore clear that there was no error attributable to the competent authorities within the meaning of Article 5(2) of Regulation No 1697/79. It follows that one of the three preconditions for the person liable to be entitled to a waiver of recovery in his case was not fulfilled.

5 — OJ 1979 L 205, p. 19.

6 — Joined Cases 98 and 280/83 *Van Gend en Loos* [1984] ECR 3763, paragraph 20.

7. The sixth and eighth questions concern the scope of the Commission's powers under Article 4 of Regulation No 1573/80 and in particular whether it is competent to adopt all decisions either to effect or to waive recovery, where amounts of ECU 2 000 or more are involved, or only decisions to waive recovery.

Whilst the literal wording of the article contains nothing to give the impression that the Commission's competence is limited to decisions waiving recovery, it should none the less be noted that it is current practice in the Member States to refer to the Commission regarding only those decisions (needless to say when the amount of duties to be recovered is equal to or exceeds ECU 2 000).

That practice is in conformity with an interpretation of the provision in question which derives from the very purpose of the power of decision conferred on the Commission; and it was to that effect that the Court of Justice gave judgment recently.⁷ The Court stated that Article 4 did not cover a case in which the competent authorities were persuaded that the terms of Article 5(2) of Regulation No 1697/79 were not fulfilled and therefore considered themselves bound to effect recovery — the object being, as the court itself stated, having regard in particular to the purpose of the provision in question, to ensure 'the uniform application of Community law', an aim which calls for review by the Commission only in the case of decisions not to effect post-clearance recovery.

Conversely, when the national authorities proceed to effect post-clearance recovery, that requirement lapses. The Court stated in that connection, in the same judgment, that 'it is then open to the person concerned to challenge such a decision before the national courts. As a result, it will then be possible for the uniformity of Community law to be ensured by the Court of Justice through the preliminary ruling procedure'.

Those dicta of the Court thus facilitate a comprehensive answer to the questions on this problem submitted by the national court: the competent authorities must refer the matter to the Commission for consideration only when they decide to waive recovery. Similarly, even when a reasoned request for reversal of the national authorities' decision to proceed with recovery is made, the competent authorities are under no obligation to pass the case on to the Commission since in such cases the uniform application of Community law can be guaranteed by the national courts, a reference being made, if necessary, to the Court of Justice for a preliminary ruling.

8. That brings us to the seventh question submitted by the national court: whether in a constitutional system like that of Portugal, which provides for the primacy of international law over domestic law, the incompatibility of a domestic provision with Community law renders that provision unconstitutional, so that the court is not required immediately to seek a preliminary ruling on the interpretation of Community law.

That question was prompted by the finding by the national court of a 'manifest conflict

⁷ — Case C-64/89 *Hauptzollamt Gießen v Deutsche Fernsprecher GmbH* [1990] ECR I-2535, paragraphs 12 and 13.

between Portuguese customs law and Community customs law', in that the former grants to the national authorities the power to take decisions concerning 'recovery whereas the latter confers that power on the Commission. In those circumstances, which are at variance with the principle of *primacy* enshrined in the Portuguese constitution, the national court considers that is under an obligation to seek a ruling as to the constitutionality of the provision from the Portuguese Constitutional Court, and that only that court is empowered to make a reference for a preliminary ruling, a situation that might be contrary to the third paragraph of Article 177 of the Treaty.

In fact, I am in some doubt as to the relevance of the question and the appropriateness of its wording; and — why conceal the fact — as to the existence of any 'manifest conflict' of the relevant national provision with the Community rules at issue. Nevertheless, I agree with the Commission that in any event the problem raised by the Portuguese court deserves an answer from the Court of Justice, which should in fact reflect the terms of the problem rather than those of the question as formulated.

In the first place, I should point out that it is not for the Court to decide whether a conflict between a Community provision and a national provision is in breach of constitutional law: it is undisputed that the problem is an eminently domestic one. It is more appropriate to confirm the now accepted view that under no circumstances can the need for the national court to initiate a procedure to investigate the constitutionality of the domestic provision

justify any delay in applying a Community provision which has direct effect and therefore, by virtue of the primacy of Community law, in setting aside the national provision that is regarded as incompatible.

I refer in that connection to the well-known judgment in *Simmenthal*,⁸ in which the Court stated that 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Commission law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law'.

That means, to leave the matter clear beyond doubt, that a national provision or practice which defers the application of a Community provision pending the outcome of an investigation into the constitutionality of the allegedly unlawful domestic provision is incompatible with Community law.

So far, therefore, the problem of a reference to the Court for a preliminary ruling under Article 177 does not even arise, since the position is that the national court, as an ordinary court applying Community law,

8 — Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, paragraph 22.

has itself found a 'manifest conflict' between a national provision and a Community provision, without its being necessary for any preliminary ruling to be given by the Court of Justice. I would add, at this stage, that such a situation is likely to arise, as far as courts of last instance are concerned, only when, as the Court made clear in its judgment in *CILFIT*,⁹ 'the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community'.

However, the position is entirely different where the court is not convinced that there is a conflict but entertains doubts in that respect, in that it is uncertain as to the interpretation of the Community provision. It is to such cases, and only to such cases, that Article 177 relates in granting to the national court the power — and if it is a court of last instance placing it under an obligation — to seek a preliminary ruling from the Court of Justice. In such cases, of course, the principle of *primacy* will apply only if it appears from the Court's interpretation that the national provision is unlawful, but not when that provision is shown to be in harmony with Community law.

9. In the light of the foregoing considerations, I conclude by suggesting that the Court reply as follows to the questions referred to it by the Tribunal Fiscal Aduaneiro, Oporto:

- '(a) Article 5(2) of Council Regulation No 1697/79 must be interpreted as meaning that the national authorities are granted a power of decision that is circumscribed by reference to fulfilment of the preconditions for the waiver of recovery.
- (b) The term "error" in Article 5(2) of Regulation No 1697/79 covers all types of errors made by the competent authorities, with the exception of those that they commit as a result of incorrect statements made, even in good faith, by the person liable; for the purposes of that provision, the "competent authorities" responsible for the error are both the authorities responsible for recovery and those in the Member State exporting the goods; the requirement of fulfilment of all the provisions in force regarding the customs declaration must be regarded as fulfilled even when the person liable provides the competent authorities with incorrect or incomplete information, provided that he does so in good faith.

⁹ — Case 106/77 *CILFIT v Italian Ministry of Health* [1982] ECR 3415, paragraph 21.

- (c) Pursuant to Article 4 of Commission Regulation No 1573/80, the national authorities are required to refer to the Commission only decisions not to proceed with the recovery of amounts of or exceeding ECU 2000; even where the person liable makes a reasoned request for reversal of the decision taken by the competent authorities, there is no obligation for the case to be brought before the Commission.
- (d) The national court is under an obligation to ensure the full and immediate application of Community provisions which have direct effect, if necessary setting aside any national provision, even in the field of constitutional law, which makes application of the Community provision conditional upon the outcome of a domestic procedure for the review of constitutionality.'