

JUDGMENT OF THE COURT (Third Chamber)

27 June 1991 *

In Case C-348/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Fiscal Aduaneiro [Customs Court], Oporto, for a preliminary ruling in the proceedings pending before that court between

Mecanarte — Metalúrgica da Lagoa Lda

and

Chefe do Serviço da Conferência Final da Alfândega (Head of the Customs Final Verification Department), **Oporto**,

on the interpretation and validity of Article 5(2) of Council Regulation No 1697/79 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 (Official Journal 1979 L 197, p. 1) and the interpretation of Article 4 of Commission Regulation (EEC) No 1573/80 of 20 June 1980 which lays down provisions for the implementation of Article 5(2) of Regulation No 1697/79 (Official Journal 1979 L 161, p. 1),

THE COURT (Third Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, G. Grévisse and M. Zuleeg, Judges,

Advocate General: G. Tesauro,
Registrar: J. A. Pompe, Deputy Registrar,

* Language of the case: Portuguese

after considering the written observations submitted on behalf of:

- Mecanarte, by Ricardo Garção and Adriano Garção of the Oporto Bar,
- the Portuguese Ministério Público, by Isabel Aguiar, representative of the Ministério Público at the Tribunal Fiscal Aduaneiro, Oporto,
- the Portuguese Government, by Luis Inês Fernandes, Director of Legal Affairs in the Directorate General for the European Communities, and Maria Luisa Duarte, Consultant to the Legal Affairs Department in the same Directorate, acting as Agents,
- the Council of the European Communities, by Bjarne Hoff-Neilsen, Head of Division, and Amadeu Lopes-Sabino, Principal Administrator in the Legal Department of the Council, acting as Agents;
- the Commission of the European Communities, by Jörn Sack and Herculano Lima, Commission Legal Advisers, acting as Agents.

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff in the main proceedings, the Council of the European Communities and the Commission of the European Communities at the hearing on 12 December 1990,

after hearing the Opinion of the Advocate General at the sitting on 6 February 1991,

gives the following

Judgment

- 1 By order of 16 October 1989, which was received at the Court Registry on 14 November 1989, Tribunal Fiscal Aduaneiro, Oporto, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty eight questions on the interpretation and validity 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 be 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) and the interpretation of Article 4 of Commission Regulation (EEC) No 1573/80 of 20 June 1980 which lays down provisions for the implementation of Article 5(2) of Regulation No 1697/79 (Official Journal 1980 L 161, p. 1).
- 2 The questions were raised in proceedings brought by Mecnarte — Metalúrgica da Lagoa Lda ('Mecnarte') for the annulment of the notice of post-clearance recovery of customs duties issued by the Oporto Customs Office.
- 3 Mecnarte imported into Portugal a consignment of 42 sets of hot-rolled steel sheets purchased from its supplier in the Federal Republic of Germany, Schmolz & Bickenbach, and, for the purpose of putting the goods into circulation, submitted to the Portuguese customs authorities a certificate (form EUR 1 No D 790072) issued in Düsseldorf on 18 February 1986, indicating that the goods had originated in the Federal Republic of Germany.
- 4 The Portuguese customs authorities, considering that the goods were declared as coming from the Federal Republic of Germany, classified them under tariff headings 73 13 230 100 j and 73 13 260 000 t of the Common Customs Tariff and exempted them from import customs duties.
- 5 By letter of 29 March 1988, the Düsseldorf customs supervisory office informed the Portuguese Directorate General for Customs that certificate EUR 1 No D 790072 had been declared invalid on the ground that it had been

improperly issued by Schmolz & Bickenbach and that the steel sheet products described in the certificate had come from the German Democratic Republic, not from the Federal Republic of Germany.

- 6 After receiving that information, the Oporto customs office proceeded, through its Serviço da Conferência Final, to effect post-clearance recovery of duties from Mecanarte in the sum of ESC 3 611 599.
- 7 Mecanarte instituted proceedings before the Tribunal Fiscal Aduaneiro, Oporto, for the annulment of the notice of assessment, which had been confirmed by a decision of the Oporto Director of Customs which at the same time rejected Mecanarte's request that the file be forwarded to the Commission of the European Communities so that the latter might decide to waive post-clearance recovery of the duties in question.
- 8 Having doubts regarding the interpretation and validity of Article 5(2) of Council Regulation No 1697/79 and the interpretation of Article 4 of Commission Regulation No 1573/80, the Tribunal Fiscal Aduaneiro, Oporto, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:
 - (a) Do the words "the competent authorities *may* refrain from taking action" at the beginning of the first subparagraph of Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 confer on those authorities a discretionary power or a power combined with a duty?
 - (b) If it confers a discretionary power in the field of taxation, will this part of the rule be invalid on the ground that it breaches the principles of taxation in accordance with the law, equality of traders, non-discrimination and the prohibition of arbitrary action (Articles 7 and 28 of the EEC Treaty and Article 4 of the ECSC Treaty)?
 - (c) For the purposes of Article 5(2), must "error" be understood as referring only to errors of calculation or copying, or as including errors attributable to the person liable for payment?

- (d) Does it refer only to errors committed by the authorities responsible for post-clearance recovery or also to errors committed by the authorities of the country from which the goods were exported, if that country is a member of the European Communities?
 - (e) Where the person liable for payment supplies the customs authorities, in good faith, with inaccurate or incomplete information — concerning the origin of the goods, for example — will “all the provisions laid down by the rules in force as far as his customs declaration is concerned” nevertheless be observed, as required by Article 5(2) *in fine*?
 - (f) Does the power conferred on the Commission by Article 4 of Commission Regulation (EEC) No 1573/80 of 20 June 1980 as regards amounts greater than ECU 2 000 cover all decisions (whether to collect or not to collect duty) or solely decisions not to collect duty?
 - (g) In a constitutional system such as the Portuguese one, which lays down the principle of the primacy of international law over domestic law, does the infringement of secondary Community law by domestic law constitute a case of unconstitutionality which makes it unnecessary to make an immediate reference for a preliminary ruling for the interpretation of Community law?
 - (h) Assuming that the decision to recover duty is to be taken by the national customs authorities, where the person liable for payment submits a reasoned request for a decision to waive recovery, must that request be assessed by the Commission, in order for it to decide whether or not to recover duty, or may it be decided upon by the national customs authorities themselves?
- 9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

10 The present case is essentially concerned with two provisions:

Article 5(2) of Council Regulation No 1697/79 of 24 July 1979, which provides:

‘the competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which 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 having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned’,

and Article 4 of Commission Regulation No 1573/80 of 20 June 1980, which provides that:

‘where the competent authority of the Member State in which the error was committed is not able to ascertain by its own means whether all the conditions set out in Article 5(2) of the basic regulation are fulfilled, or where the amount of duties involved is equal to or greater than ECU 2000, it shall request the Commission to take a decision on the case, submitting to it all the necessary background information’.

The first and second questions

11 The first and second questions seek to ascertain whether Article 5(2) of Regulation No 1697/79 grants the competent authorities a discretionary power to proceed with or waive the post-clearance recovery of customs duties and, if so, whether that provision is valid in the light of the fundamental principles laid down in the Treaty.

- 12 With respect to the first question, the Court has consistently held that Article 5(2) of Regulation No 1697/79 must be interpreted as meaning that if all the conditions laid down by that provision are fulfilled the person liable is entitled to the waiver of the recovery of the duty in question (see the judgments in Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 22, Case 378/87 *Top Hit* [1989] ECR 1359, paragraph 18 and Case 161/88 *Binder* [1989] ECR 2415, paragraph 16).
- 13 If the person liable is so entitled, the competent national authorities are required not to effect post-clearance recovery, otherwise that entitlement would be worthless.
- 14 It must therefore be stated in reply to the first question that the first part of Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 must be interpreted as meaning that it confers on the competent national authorities a non-discretionary power as regards the decision not to carry out post-clearance recovery of import duties when the conditions laid down in Article 5(2) have been fulfilled.
- 15 The national court submitted the second question only in the event that according to the answer to the first question Article 5(2) of Regulation No 1697/79 confers a discretionary power on the national authorities.
- 16 In view of the answer given to the first question, the second question has become devoid of purpose.

The third and fourth questions

- 17 By its third and fourth questions, which it is appropriate to consider together, the national court asks the Court of Justice to explain what is meant by expression

‘error made by the competent authorities themselves which could not reasonably have been detected by the person liable’ in Article 5(2) of Regulation No 1697/79.

18 Those questions raise three distinct problems:

- whether the word ‘error’ refers only to calculation or copying errors;
- whether ‘competent authorities’ must be taken to mean only the authorities responsible for post-clearance recovery or also the national authorities of the Member State exporting the goods;
- whether the errors referred to in Article 5(2) of Regulation No 1697/79 are all errors committed by the competent authorities or only those imputable to them.

19 As a preliminary point, it must be observed that Article 5(2) of Regulation No 1697/79 is intended to protect the legitimate expectation of the person liable that all the information and criteria on which the decision to recover or not to recover customs duties is based are correct.

20 It follows, first, that the notion of error is not limited to mere calculation or copying errors but includes any kind of error which vitiates the decision in question, such as, in particular, the misinterpretation or misapplication of the applicable rules of law.

21 In that regard, the reference to errors of calculation or copying in the preamble to Regulation No 1697/79 must be regarded as merely providing an example, which

does not exhaust all possible cases of error to be taken into account for the purposes of Article 5(2) of Regulation No 1697/79.

- 22 It follows, in the second place, that, since there is no precise and exhaustive definition of the 'competent authorities' provided in Regulation No 1697/79, or in Regulation No 1573/80, which was adopted in implementation of the first-mentioned regulation and was in force at the material time, any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and which may thus cause the person liable to entertain legitimate expectations, must be regarded as a 'competent authority' within the meaning of Article 5(2) of Regulation No 1697/79. This applies in particular to the customs authorities of the exporting Member State which deal with the customs declaration.
- 23 It follows, in the third place, that the legitimate expectations of the person liable attract the protection provided for in Article 5(2) of Regulation No 1697/79 only if it was the competent authorities 'themselves' which created the basis for the expectations of the person liable. Thus, only errors attributable to acts of the competent authorities which could not reasonably have been detected by the person liable create entitlement to the waiver of post-clearance recovery of customs duties.
- 24 That condition cannot be regarded as fulfilled where the competent authorities have been led into error, in particular as to the origin of the goods, by incorrect declarations by the person liable whose validity they do not have to check or assess. In such circumstances, the Court has consistently held that it is the person liable who must bear the risks arising from a commercial document which is found to be false when subsequently checked (judgment in Joined Cases 98 and 230/83 *Van Gend en Loos* [1984] ECR 3763, paragraph 20).
- 25 On the other hand, if the declarations of the person liable are incorrect solely because of inaccurate information furnished by the competent authorities which is

binding on those authorities, Article 5(1) of Regulation No 1697/79 precludes the post-clearance recovery of import and export duties.

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- 26 It follows that it must be stated in reply to the third and fourth questions that the errors referred to in Article 5(2) of Regulation No 1697/79 comprise all errors of interpretation or application of the provisions on import duties and export duties which could not reasonably have been detected by the person liable, in so far as they are the consequence of acts of either the authorities responsible for post-clearance recovery or the authorities of the exporting Member State, which excludes errors caused by incorrect declarations by the person liable, except in cases where their incorrectness is merely the consequence of incorrect information given by the competent authorities which is binding upon them.

The fifth question

- 27 The fifth question seeks to determine, essentially, whether a person liable who in good faith provides the customs authorities with incorrect or incomplete information nevertheless satisfies all the provisions laid down by the rules in force as far as the customs declaration is concerned, within the meaning of the last part of the first subparagraph of Article 5(2) of Regulation No 1697/79.
- 28 As the Court held in paragraphs 22 and 26 of its judgment in *Top Hit*, cited above, in order to comply with the provisions laid down by the rules in force concerning his customs declaration, the person making the declaration must supply the customs authorities with all the necessary information provided for by the Community rules and the national rules, supplementing or transposing those rules, if necessary, according to the customs treatment requested for the goods in question.
- 29 That obligation may not, however, go beyond production of the information and documents that the person liable may reasonably possess or obtain. It follows that if an economic agent produces in good faith information which, although incorrect

or incomplete, is the only information which he can reasonably possess or obtain and therefore include in the customs declaration, the requirement of compliance with the provisions in force concerning the customs declaration must be considered to have been fulfilled.

- 30 It must therefore be stated in reply to the fifth question that the last part of the first subparagraph of Article 5(2) of Regulation No 1697/79 must be interpreted as meaning that it applies to circumstances in which the person liable has fulfilled all the requirements laid down by both the Community rules on customs declarations and any national rules which supplement or implement them, even if he supplied, in good faith, incorrect or incomplete information to the competent national authorities, provided that that information is the only information which he could reasonably have knowledge of or obtain.

The sixth question

- 31 By its sixth question, the national court seeks essentially to determine whether, pursuant to Article 4 of Regulation No 1573/80, the Commission is empowered only to decide upon the waiver of post-clearance recovery of customs duties or whether its power extends to decisions to effect recovery where the amount of uncollected duties is ECU 2 000 or more.
- 32 As is already clear from the judgment of the Court in Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535 (paragraphs 12 and 13), the power of decision conferred on the Commission by Article 4 of Regulation No 1573/80 relates only to cases in which the competent national authorities are convinced that the conditions of Article 5(2) of Regulation No 1697/79 are fulfilled and therefore do not consider that they must effect post-clearance recovery.
- 33 As the Court made clear in the same judgment, that interpretation is in conformity with the purpose of Regulation No 1697/79, which is to ensure the uniform

application of Community law. That is likely to be jeopardized in cases where an application to waive post-clearance recovery is allowed, since the assessment which a Member State may make in taking a favourable decision is likely, in actual fact, owing to the probable absence of any appeal, to escape any review by means of which the uniform application of the conditions laid down in the Community legislation may be ensured. On the other hand, that is not the case where the national authorities proceed to effect recovery, whatever the amount in issue. 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.

- 34 It must therefore be stated in reply to the sixth question that the power conferred on the Commission by Article 4 of Commission Regulation (EEC) No 1573/80 covers only decisions to refrain from carrying out post-clearance recovery where the amount of the duties involved is equal to or greater than ECU 2 000.

The eighth question

- 35 By its eighth question, which is closely linked with the sixth question and should therefore be considered at this point, the national court inquires whether, when the decision on recovery is a matter for the national authorities and the person liable submits a reasoned request for a waiver of recovery, that request must be forwarded to the Commission or whether it is for the national authorities themselves to give a decision on it.
- 36 As the Court held in its judgment in *Deutsche Fernsprecher*, cited above, it is for the national authorities to recover import and export duties, whatever the amount in issue. In view of the purpose of Regulation No 1573/80 which, as the Court made clear in the same judgment, is to ensure the uniform application of Community

law, it is also for the national authorities to give a decision on a reasoned request for a decision to waive recovery made by a person liable. There is no obligation to refer the matter to the Commission, as stated in paragraph 34 above, except where the national authorities decide upon non-recovery and where the amount involved is ECU 2 000 or more.

- 37 It must therefore be stated in reply to the eighth question that when the person liable submits a request that action for post-clearance recovery of import duties or export duties should not be taken, it is for the national authorities to take a decision on that request and it is not incumbent upon them to refer the case for consideration by the Commission unless they intend not to recover an amount of duties equal to or greater than ECU 2 000.

The seventh question

- 38 In its seventh question, the Tribunal Fiscal Aduaneiro raises problems of a procedural nature concerning the application of Article 177 of the EEC Treaty.

- 39 It is apparent from the grounds of its order for reference that the national court takes the view that the two provisions of the Portuguese rules applicable to the present case are not only contrary to Community law but are also unconstitutional on functional and substantive grounds since they were adopted in the exercise of administrative functions and not in the exercise of legislative functions, the latter in this case being the prerogative of the national Assembly of the Portuguese Republic, and since they are contrary to the principle of the primacy of international law over domestic law.

- 40 Accordingly, the Tribunal Fiscal Aduaneiro inquires, first, whether, having found the national provisions at issue to be unconstitutional, it has jurisdiction to seek a preliminary ruling, since a finding of unconstitutionality of a rule of domestic law

is subject, by virtue of Article 280(3) of the Portuguese Constitution, to an appeal to the Portuguese Constitutional Court and consequently only that court may seek a preliminary ruling in such cases, and, secondly, whether a reference for a preliminary ruling might not be superfluous since any defects of a national provision can be remedied within the national legal system.

- 41 The seventh question thus raises two distinct problems concerning the conditions for the application of Article 177 of the EEC Treaty:

the first is whether a national court which finds that a domestic provision is unconstitutional is deprived of the power to refer to the Court of Justice questions concerning the interpretation or validity of Community law by reason of the fact that such a finding is subject to a mandatory reference to the Constitutional Court;

the second is whether the national court may dispense with a reference for a preliminary ruling where the national legal order provides means of remedying defects in a domestic provision.

- 42 As regards the first problem, it must be borne in mind that Article 177 of the EEC Treaty grants the Court of Justice jurisdiction to give preliminary rulings both on the interpretation of the Treaties and the acts of Community institutions and on the validity of such acts. The second paragraph of that article provides that national courts may refer questions to the Court and the third paragraph provides that they must do so if there is no judicial remedy against their decisions under national law.

- 43 The essential purpose of the jurisdiction conferred on the Court of Justice by Article 177 is to ensure that Community law is applied uniformly by the national courts. For this purpose Article 177 provides the national courts with a means of

overcoming difficulties which may arise from the requirement of giving full effect to Community law within the judicial systems of the Member States.

- 44 The effectiveness of the system established by Article 177 of the EEC Treaty requires that the national courts have the widest possible powers to refer questions to the Court of Justice if they consider that a case pending before them raises issues requiring an interpretation or an appraisal of the validity of provisions of Community law whose determination is necessary for the resolution of the dispute brought before them.
- 45 Moreover, the effectiveness of Community law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by Community law from exercising the right conferred on it by Article 177 of the EEC Treaty to refer to the Court of Justice questions concerning the interpretation or validity of Community law in order to enable it to decide whether or not a provision of domestic law was compatible with Community law.
- 46 It must therefore be stated in reply to the first limb of the seventh question that a national court which in a case concerning Community law declares a provision of national law unconstitutional does not lose the right or escape the obligation under Article 177 of the EEC Treaty to refer questions to the Court of Justice on the interpretation or validity of Community law by reason of the fact that such a declaration is subject to a mandatory reference to the constitutional court.
- 47 As regards the second problem, it need merely be pointed out that the Court has consistently held, with respect to the allocation of judicial functions as between the national courts and the Court of Justice under Article 177 of the Treaty, that national courts have a discretion as to whether a decision on a point of Community law is necessary to enable them to give judgment (see in particular the judgment in Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 10).

48 It must be made clear in this regard that the discretion enjoyed by the national court under the second paragraph of Article 177 of the EEC Treaty includes a discretion to decide at what stage of the procedure it is appropriate to refer a question to the Court for a preliminary ruling.

49 Thus, it must be stated in reply to the second limb of the seventh question that it is for the national court, pursuant to the second paragraph of Article 177 of the EEC Treaty, to decide whether the questions of law raised by the case before it are relevant, whether a preliminary ruling is necessary for it to be able to give judgment and at which stage of the proceedings a question must be referred to the Court of Justice for a preliminary ruling.

Costs

50 The costs incurred by the Portuguese Government, the Portuguese Ministério Público, the Council of the European Communities and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in reply to the questions submitted to it by the Tribunal Fiscal Aduaneiro, Oporto, by order of 16 October 1989, hereby rules:

- (1) The first part 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 must be interpreted as meaning that it confers on the competent national authorities a non-discretionary power as regards the decision not to carry out post-

clearance recovery of import duties when the conditions laid down in Article 5(2) have been fulfilled.

- (2) The errors referred to in Article 5(2) of Regulation No 1697/79 comprise all errors of interpretation or application of the provisions on import duties and export duties which could not reasonably have been detected by the person liable, in so far as they are the consequence of acts of either the authorities responsible for the post-clearance recovery or the authorities of the exporting Member State, which excludes errors caused by incorrect declarations by the person liable, except in cases where their incorrectness is merely the consequence of incorrect information given by the competent authorities which is binding upon them.
- (3) The last part of the first subparagraph of Article 5(2) of Regulation No 1697/79 must be interpreted as meaning that it applies to circumstances in which the person liable has fulfilled all the requirements laid down by both the Community rules on customs declarations and any national rules which supplement or implement them, even if he supplied, in good faith, incorrect or incomplete information to the competent national authorities, provided that that information is the only information which he could reasonably have knowledge of or obtain.
- (4) The power conferred on the Commission by Article 4 of Commission Regulation (EEC) No 1573/80 of 20 June 1980 laying down provisions for the implementation of Article 5(2) of Regulation No 1697/79 covers only decisions to refrain from carrying out post-clearance recovery where the amount of the duties involved is equal to or greater than ECU 2 000, even where a person liable has submitted a reasoned request directed against a decision to recover duties taken by the competent national authorities.
- (5) When the person liable submits a request that action for post-clearance recovery of import duties or export duties should not be taken, it is for the national authorities to take a decision on that request and it is not incumbent upon them to refer the case for consideration by the Commission unless they intend not to recover an amount of duties equal to or greater than ECU 2 000.
- (6) A national court which in a case concerning Community law declares a provision of national law unconstitutional does not lose the right or escape the obligation under Article 177 of the EEC Treaty to refer questions to the Court of Justice on the interpretation or validity of Community law by reason of the fact that such a declaration is subject to a mandatory reference to the constitutional court. It is for the national court, pursuant to the second paragraph of

Article 177 of the EEC Treaty, to decide whether the questions of law raised by the case before it are relevant, whether a preliminary ruling is necessary for it to be able to give judgment and at which stage of the proceedings a question must be referred to the Court for a preliminary ruling.

Moitinho de Almeida

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Delivered in open court in Luxembourg on 27 June 1991.

J.-G. Giraud
Registrar

J. C. Moitinho de Almeida
President of the Third Chamber