

JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 5 FEBRUARY 1981 ¹

Joszeſ Horvath
v Hauptzollamt Hamburg-Jonas
(preliminary ruling requested
by the Finanzgericht Hamburg)

“Value for customs purposes — Smuggled goods”

Case 50/80

Common Customs Tariff — Customs duties — Application to drugs which have been smuggled in and destroyed as soon as discovered — Not permissible — Prosecution of offences — Powers of Member States

Ad valorem customs duty cannot be determined for goods which are of such a kind that they may not be put into circulation in any Member State but must on the contrary be seized and taken out of circulation by the competent authorities as soon as they are discovered.

Accordingly, the introduction of the Common Customs Tariff no longer

leaves a Member State the power to apply customs duties to drugs which have been smuggled in and destroyed as soon as they were discovered but it does leave it full freedom to take criminal proceedings in respect of offences committed, with all the attendant consequences, including fines.

In Case 50/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Hamburg for a preliminary ruling in the action pending before that court between

JOSZEŒ HORVATH, Hamburg,

and

¹ — Language of the Case: German.

HAUPTZOLLAMT [Principal Customs Office] HAMBURG-JONAS,

on the interpretation of, first, the provisions of the EEC Treaty relating to the customs union and Article 7 of the EEC Treaty and, secondly, of Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (Official Journal, English Special Edition 1968 (I), p. 170), and also of Regulation (EEC) No 375/69 of the Commission of 27 February 1969 on the declaration of particulars relating to the value of goods for customs purposes (Official Journal, English Special Edition 1969 (I), p. 63), Regulation (EEC) No 603/72 of the Commission of 24 March 1972 on the buyer to be taken into consideration when determining the value of goods for customs purposes (Official Journal, English Special Edition 1972 (I), p. 156) and Regulation (EEC) No 1343/75 of the Commission of 26 May 1975 on the furnishing of documents for the determination of value for customs purposes (Official Journal 1975, L 137, p. 18),

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: F. Capotorti

Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

July 1977 Jozsef Horvath, the plaintiff in the main action, was sentenced to five years' imprisonment for dealing in drugs in substantial quantities and evading tax by means of smuggling.

I — Facts and written procedure

1. By a final judgment of the Landgericht [Regional Court] Hamburg of 18

According to the findings of the Landgericht, Mr Horvath, who resides in Hamburg, bought in Amsterdam on

14 February 1977 four small packets each containing about 1 ounce (111 grams) of heroin and attempted to bring them into German territory without declaring them to the customs office. At the time of the customs check at the Nordhorn frontier crossing-point he managed to rid himself of the heroin and was able to continue his journey to Hamburg. Subsequently the heroin was found at the frontier crossing-point.

By a notice of assessment of 29 March 1978, the Hauptzollamt Hamburg-Jonas, the defendant in the main action, claimed payment of DM 1 296 from the plaintiff as a person liable to pay customs duty pursuant to Article 57 (1) and (3) of the Zollgesetz [Customs Law]. In doing so the Hauptzollamt valued the heroin for customs purposes at the price paid by the plaintiff for it in Amsterdam, namely DM 9 000. Heroin falls within sub-heading 29.42 A II of the Common Customs Tariff (rate of duty 13.6%).

The Hauptzollamt by a decision of 8 May 1978 overruled the objection lodged by the plaintiff in the main action. Subsequently Mr Horvath brought an action before the Finanzgericht Hamburg.

2. The gravamen of the plaintiff's case in the main action before the Finanzgericht is that he did not smuggle in any heroin. The Hauptzollamt regards the facts as proved and considers that a preliminary ruling on the determination of the value for customs purposes of smuggled goods should be obtained from the Court of Justice.

By an order of 15 January 1980 the Finanzgericht stayed the proceedings and referred to the Court the following questions:

- "1. Are the provisions of Regulation (EEC) No 803/68 of the Council of 27 June 1968 and of Regulation (EEC) No 603/72 of the Commission of 24 March 1972 to be interpreted as meaning that, with the exception of those provisions which require goods subject to customs control to be formally presented, they also apply directly to the valuation for customs purposes of goods smuggled into the customs territory of the Community?
2. Are the provisions of Regulation (EEC) No 803/68 of the Council, especially Articles 1, 2, 4, 6, 7 and 8 thereof, to be interpreted as meaning that the value for customs purposes of the goods smuggled into the customs territory of the Community is fixed with reference to the time and place of their introduction into the customs territory of the Community, even if according to the national substantive legal provisions from time to time applicable the liability to the customs arises at another time and is payable by a person other than the first buyer residing in Community territory?
3. Are the provisions of Regulation (EEC) No 375/69 of the Commission of 27 February 1969 and of Regulation (EEC) No 1343/75 of the Commission of 26 May 1975 to be interpreted as meaning that they apply also in the event of goods being smuggled into the customs territory of the Community with the attendant condition that any buyer subsequent to the first residing in that territory who is found to be in possession of the smuggled goods has to supply particulars of the price which he has paid so that the price paid by that person is the relevant value for customs purposes, or do the competent national authorities have

to take the purchase price paid by the first buyer residing in Community territory as the basis of the value of the smuggled goods for customs purposes in accordance with the rules laid down in Articles 1, 2, 4, 6, 7 and 9 of Regulation (EEC) No 803/68?"

3. According to the grounds of the order making the reference the Finanzgericht is of the opinion that Community law contains no provisions dealing with the question whether in cases of smuggled goods there is any liability to pay customs duty and, if so, who is liable. Therefore on these points German customs law is to be applied.

The first subparagraph of Article 57 (1) of the Zollgesetz provides that liability to pay customs duty arises *inter alia* when goods subject to customs control are withheld from such control for the first time. This occurs in particular when the imported goods are not presented to the competent customs authorities. According to Article 57 (2) of the Zollgesetz, a person liable to pay customs duty includes any person who:

- for the first time withholds goods subject to customs control from such control; or
- takes delivery of or acquires goods after the liability to pay customs duty has arisen but before it has been discharged and knows or ought to know that the goods in question are subject to customs control.

The Finanzgericht takes the view that on the strength of the findings of the Landgericht the plaintiff in the main action, having regard to the above-mentioned provisions, has become liable to pay customs duty, because when he reached the frontier crossing-point at Nordhorn he did not present the heroin to the German customs officers.

4. The Finanzgericht then points out that the questions have been submitted

for a preliminary ruling because it is uncertain what rules are to be followed for the purpose of valuing goods for customs purposes in cases in which the liability to pay customs duty arises in accordance with the above-mentioned rules. In the grounds of the order making the reference it explains the different views and practices on this point in the Federal Republic of Germany.

The Finanzgericht Hamburg is of the opinion that the provisions of Regulations (EEC) Nos 803/68 and 603/72 and of Regulations Nos 375/69 and 1343/75 are applicable to the extent to which they do not pre-suppose that the goods under customs control are correctly cleared through customs. But in the case of smuggled goods, where proper documents relating to the purchase price and to the customs declarations are not usually available, the normal price at the stage of the first presumed buyer resident in the Community must be determined, if necessary by estimation.

The decisive time to take into consideration in order to determine the "normal price" at the place of entry into the customs territory of the Community is the date at which the liability to customs duty arises under national law. Having regard to the fact that heroin is disposed of rapidly it may be supposed that in this case the situation at the date when the heroin was imported into the Federal Republic of Germany had not altered compared with the situation existing at the date when it was imported into Amsterdam from non-member countries.

Consequently on the basis of the Finanzgericht's understanding the presumed margin of profit of the first buyer resident on Community territory would have to be deducted from the price of DM 9 000 paid by the plaintiff as the subsequent purchaser. The Finanzgericht has in earlier decisions taken a price for heroin of DM 60 per gram.

As against that, according to a recent judgment of the Finanzgericht Rheinland-Pfalz, the "normal price" to be taken as the criterion for value for customs purposes is to be determined with reference to the black-market price at the place of introduction into the Federal Republic of Germany. This would be the price which the smuggler paid abroad, in this case in Amsterdam.

When the German customs authorities determine the value for customs purposes of goods such as those in this case they usually take the price which the person liable to pay customs duty paid his suppliers. This practice has resulted in the value for customs purposes varying considerably according to whether it is a question of the ultimate consumer, who pays the top price, or of a small or large-scale dealer.

The administration finds that it has no choice but to accept this view in cases where the person liable to pay the duty cannot supply any particulars of the price paid by the previous buyer. By virtue of Article 21 of the Allgemeine Zollordnung [General Customs Order] the price paid by the previous buyer can be taken as a criterion only if the previous buyer himself supplies the necessary particulars. Where goods have passed through several hands on Community territory only the price paid by the subsequent buyer must therefore be taken and this rules out an estimated price.

On the other hand the Finanzgericht itself takes the view that an estimate of the value for customs purposes must be made on the basis of the price paid by the first buyer resident on Community territory.

The German customs authorities sometimes refer to the values of drugs for customs purposes published by the customs valuation branch of the Oberfinanzdirektion Köln [Principal Finance

Office, Cologne], which are based on information from the Bundeskriminalamt [Federal Criminal Investigation Office].

The Finanzgericht states that, although the customs authorities have used values for customs purposes ranging from DM 80 to DM 300 per gram for heroin and from DM 2.25 to DM 3.50 per gram for hashish, it has itself valued hashish for customs purposes at between DM 625 per kilogram and DM 0.85 per gram.

5. The order making the reference was registered at the Court Registry on 6 February 1980.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the Commission of the European Communities, represented by Manfred Beschel, a member of its Legal Department, acting as Agent.

In view of the information given in the order making the reference on the practice of the customs authorities and certain judgments in the Federal Republic of Germany concerning the assessment of the value for customs purposes of smuggled goods, the Court requested the Commission to furnish it with particulars of the existence and scope of such practices and decisions in the other Member States.

By a letter of 23 June 1980 the Commission informed the Court that according to the information which it had obtained:

- (a) in the eight other Member States of the Community illegally imported drugs are seized and in general destroyed immediately. In that event a value for customs purposes is not calculated and no customs duty is charged. Only provisions of national

criminal law are applied. This explains the absence of any national case-law relating to the problem raised in this case;

- (b) in France and Belgium drugs which have been seized are by way of exception sold to the pharmaceutical industry. In the case of those goods the value for customs purposes is calculated on the basis of the purchase price paid by that industry. That price is much lower than the black-market price. There is no case-law bearing on this particular case.

6. After this information had been supplied to it the Finanzgericht Hamburg, by an order of 8 July 1980, supplemented and amended the questions referred to the Court for a preliminary ruling by its order of 15 January 1980 by the following additional paragraphs:

“1. Are the provisions of the EEC Treaty on the customs union (Article 9 (1) and Articles 12 to 29) to be interpreted as meaning that a Member State is not entitled to charge customs duty on unlawfully imported drugs which have subsequently been destroyed when all the other Member States do not charge customs duty on drugs which have been unlawfully imported but seized and destroyed? Might the charging of customs duty in one Member State alone also infringe Article 7 of the EEC Treaty?

- 2. The questions previously referred to the Court in the order of 15 January 1980 are raised only in the event of the Federal Republic of Germany being entitled to charge customs duty on drugs which have been smuggled in and destroyed.”

According to the grounds of the order of 8 July 1980 the national court is inclined to the view that it is incompatible with the fundamental idea of the customs union for one Member State to charge, in accordance with the provisions of its domestic law, customs duty on illegally imported drugs which have been subsequently destroyed when the other Member States merely prosecute persons responsible for the illegal importation of drugs under the criminal law.

In any case it is pointless to charge customs duty on unlawfully imported goods which are subsequently destroyed when, as is well known, only a fraction of the amount of customs duty charged can be recovered because the person liable to pay such duty has no significant assets.

7. The new order making the reference was registered at the Court Registry on 11 July 1980.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the Commission of the European Communities, represented by Manfred Beschel, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of written observations submitted to the Court

Questions submitted by the order of 15 January 1980

In regard to the *first question*, the Commission observes at the outset that

when the Community legislature adopted Community provisions on value for customs purposes it had in mind primarily imports resulting from normal commercial transactions. On this point it draws attention to Article 5 (a) of Regulation No 803/68 which mentions "goods declared for direct home use" and to Article 1 of Regulation No 375/69 which presupposes that importers participate actively in the normal procedure for determining value for customs purposes. It is not easy to fulfil such conditions when the goods in question have been smuggled in.

However, the Commission shares the prevailing opinion of the German academic lawyers and practitioners that the Community provisions on value for customs purposes, at least in principle, also apply to smuggled goods (cf. the case-law quoted by the court making the reference and Zepf, "Wertverzollung" 3. Auflage, 18. Ergänzungslieferung, February 1979, Anmerkung A 1 zu Par. 57, 58 des deutschen Zollgesetzes).

In this respect the Commission stresses that the purpose of Regulation No 803/68 is to provide objective and uniform criteria for determining value for customs purposes with a view to applying the Common Customs Tariff. In order to apply the regulations on value for customs purposes it is therefore necessary and sufficient for the goods in question to be included in the nomenclature of the Common Customs Tariff. In this respect it is immaterial that trade in the product in question is subject to restrictions or absolutely prohibited under domestic law. Pure heroin in fact falls within tariff heading 29.42 A II.

However, illegal imports are bound to make the application of conventional customs procedures, for example in relation to customs clearance, impossible.

Consequently the Commission is of the opinion that the provisions relating to value for customs purposes cannot be applied in so far as the latter is more especially linked to normal customs treatment.

Subject to this reservation the first question may be answered in the affirmative.

The *Commission* points out that the aim of the *second question*, which presupposes an affirmative answer to the first, is to clarify the area in which Community provisions and German law impinge on one another, as mentioned by the Finanzgericht concerning the factors of time and place to be taken into consideration in order to determine value for customs purposes according to the principle of the "normal price" (Article 1 (1) of Regulation No 803/68).

As far as concerns the time to be taken the Community provisions have this in common, that their application presupposes that the goods in question are lawfully cleared through customs. The same applies not only to the general rules set out in Articles 1 (1) and 5 of Regulation No 803/68 but also to the special provisions of Article 10 of the same regulation and the implementing measures based on that article.

Since in this case the requirement of a lawful clearance is not fulfilled Community rules determining the decisive time for fixing the value for customs purposes cannot be applied.

Furthermore the Commission stresses that Council Directive 68/312/EEC of 30 July 1968 which lays down rules *inter alia* on customs treatment of goods (Official Journal, English Special Edition

1968 (II), p. 416) does not cover illegal imports into Community territory. That subject was not covered until later by Council Directive 79/623/EEC of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt (Official Journal 1979, L 179, p. 31). However, this latter directive is subsequent to the facts of this case and only reveals the existence of a lacuna in the legislation (cf. the fourth recital) at the time when the illegal imports in question were effected in this case.

In these circumstances, as far as concerns the time to be taken for determining value for customs purposes, Community law does not preclude a solution based on German domestic law.

The Commission then gives an account of the provisions set forth in Articles 1 (2), 6, 7 and 8 of Regulation No 803/68 which refer to the "place" to be taken for determining value for customs purposes.

It emphasizes that the Community legislature has not taken "the place of introduction into the customs territory of the Community" as the decisive criterion as such. In fact the place of introduction serves mainly as a reference point for apportioning delivery costs, that is to say more particularly for the purpose of calculating transport costs. This view is confirmed by the Customs Valuation Committee of Brussels and the Customs Co-operation Council.

In any case whether the goods concerned have been imported in the proper manner or smuggled in is not a material factor when interpreting the factor of "place" to be taken into consideration.

It follows that, if the price paid for smuggled goods is compared with their "normal price" on the black market of a non-member country, the latter may be used as a basis for determining value for customs purposes, it being understood that transport costs have to be included in that price in accordance with the applicable Community provisions.

As far as concerns the *third question* submitted by the Finanzgericht the Commission considers that Regulations Nos 375/69 and 1343/75 which lay down provisions governing the procedure for furnishing the customs authorities with information and which presuppose that the importer takes the initiative cannot apply directly to cases such as this.

However, it points out that the customs authorities may invoke Article 14a of Regulation No 803/68 in order to require from any subsequent purchaser having his place of business on Community territory other than the first purchaser, found in possession of smuggled goods, the information necessary for determining value for customs purposes. It is for the responsible customs authorities to decide whether the price paid by that subsequent purchaser may be regarded as the "normal price" within the meaning of Regulation No 803/68.

The supplementary question referred to the Court by the order of 8 July 1980

The Commission takes the view that the fresh question referred to the Court by the Finanzgericht must be answered in the negative.

As far as concerns the concept of the "customs union" and especially its external aspect, the Commission points

out that the uniform customs treatment of imports from non-member countries, intended by the Treaty, has certainly not been attained merely by the adoption of the Common Customs Tariff. In fact such uniform treatment requires a uniform interpretation of the Common Customs Tariff nomenclature and the standardization of the various substantive and formal provisions of the laws of the Member States respecting customs matters. The Commission refers to the most recent "Multiannual programme for the attainment of the customs union" (Official Journal 1979, C 84, p. 2) in order to give an indication of the large number of measures which still have to be implemented.

The matters which the Community legislature has so far regulated only imperfectly include, in particular, illegal imports. In that field, as in that of customs procedural requirements, national legal provisions apply to a large extent. Thus Community criteria for calculating when liability to pay customs duties arises did not exist prior to Council Directive 79/623/EEC of 25 June 1979.

But, in the opinion of the Commission, the issue in this case is the disparity in the customs treatment of smuggled goods which have been seized and destroyed in the Federal Republic of Germany, on the one hand, and in the other Member States, on the other hand, which stems from the fact that under the national provisions relating to the procedure for customs clearance liability to pay customs duty does not arise at the same time.

Although it is true that in so far as goods from non-member countries cannot be admitted to commercial circulation in the customs territory of the Community without having paid the customs duty provided for the Common Customs Tariff sets an outer limit to national laws, nevertheless that tariff does not prevent national law on customs procedures from fixing an earlier date as the date of importation and from making liability to pay customs duty, calculated on the basis of the Common Customs Tariff, run from that date.

The Commission states that with the exception of the Federal Republic of Germany the rules governing customs procedures in all the Member States are primarily directed towards the Common Customs Tariff's function of protecting trade. According to that concept, liability to pay customs duty runs only from the moment when goods from a non-member country are allowed into commercial circulation in the customs territory of the Community. Consequently customs duty is not charged on smuggled goods seized by the customs authorities if the goods are officially destroyed. Conversely smuggled goods are subject to customs duty in the same way as any other goods where they are introduced — after payment, if appropriate, of a customs penalty — into commercial circulation in the customs territory by the importer himself or by the customs authority, if the goods are confiscated.

On the other hand German law on customs procedures is directed more

towards the Common Customs Tariff's function as an instrument for raising public funds. Consequently the provisions of German law relating to liability to pay customs duty are based on a point of view prompted by formal rules of fiscal law. According to that view, liability to pay customs duty arises at the moment when the goods to be imported are declared to the customs authorities. In the case of illegal imports liability to pay is deemed to arise at the moment when the goods should have been declared if they had not been smuggled. In principle the ultimate fate of the goods is not to be taken into consideration. Such a set of rules brings out very clearly the independent nature of rules of customs procedures.

According to the Commission, both types of procedural rules on the time when liability to pay customs duty arises come within the framework of the Common Customs Tariff. Therefore, having regard to the state of Community law at the time of the events giving rise to this case, it is necessary to accept the disparity in the customs treatment of smuggled goods which have been seized and destroyed. The differences which have been revealed concern only a marginal proportion of imports and do not substantially affect the functioning of the customs union.

The Commission notes that Council Directive 79/623/EEC of 25 June 1979 aims to prevent, as from 1 January 1982, unequal customs treatment based on differing national provisions relating to customs debt. At the present time however the concept of a customs union, as defined in Article 9 and in related provisions of the Treaty, does not permit the conclusion that a Member State is required to refrain from charging customs duty in cases such as the present.

As far as concerns the possible incompatibility of German practice with Article 7 of the Treaty, the Commission points out first that in this case there is no question of any "discrimination on grounds of nationality", since neither the

nationality of the smuggler nor the origin of the smuggled goods have been the cause of the unequal treatment. Therefore the question referred to the Court must be understood as being concerned with the problem which, having regard to the general principle of equality, is raised by the unequal treatment. In this connexion the Commission refers to the judgment of the Court of 3 June 1980 in Case 135/79 *Gedelfi Großseinkauf GmbH & Co v Hauptzollamt Hamburg-Jonas* [1980] ECR 1713 in which the Court held that widely differing taxation of goods at the external frontiers of the Community was unacceptable and gave an interpretation of the relevant Community provisions in accordance with the Treaty and on the lines of equal treatment of all importers.

But this dispute concerns a case in which, as a result of a lacuna in Community law, national customs procedural requirements give rise to unequal treatment in the different Member States.

However, given that a smuggler may not plead that he is entitled to be tried under the criminal law which, in customs matters, is the least severe of the Community, irrespective of the place where the events with which he is charged occurred, so also he may not claim to be entitled to suffer, in other fields of customs legislation which have not been harmonized, only the consequences which are least serious for him. The Commission is therefore of the opinion that there can be no question of a breach of the general principle of equality either.

III — Oral procedure

At the sitting on 16 October 1980 the Commission of the European Communities, represented for the purpose of the oral procedure by Manfred Beschel, a member of its Legal Department, acting as Agent, presented oral argument.

The Advocate General delivered his opinion at the sitting on 27 November 1980.

Decision

- 1 By an order of 15 January 1980, which was received at the Court on 6 February 1980, the Finanzgericht Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions relating to the determination of the value for customs purposes of goods which have been smuggled into the customs territory of the Community.
- 2 By an order of 8 July 1980, which was received at the Court on 11 July 1980 and which supplemented and amended the order of 15 January 1980, the Finanzgericht referred to the Court for a preliminary ruling a further question worded as follows:

“Are the provisions of the EEC Treaty on the customs union (Article 9 (1) and Articles 12 to 29) to be interpreted as meaning that a Member State is not entitled to charge customs duty on unlawfully imported drugs which have subsequently been destroyed when all the other Member States do not charge customs duty on drugs which have been unlawfully imported but seized and destroyed? Might the charging of customs duty in one Member State alone also infringe Article 7 of the EEC Treaty?”
- 3 The national court has pointed out that an affirmative answer to the fourth question would make it unnecessary to consider the other three questions. Accordingly, the Court will first consider the fourth question.
- 4 The main proceedings are concerned with determining the customs duty chargeable on a quantity of heroin purchased on the black market in Amsterdam and discovered when it was being taken across the Netherlands-German frontier. The heroin was seized and destroyed and the smuggler was sentenced by a German criminal court to five years' imprisonment for illegal dealing in heroin and smuggling. Subsequently the German customs authorities claimed payment from him of the sum of DM 1 296 by way of customs duty on the smuggled goods.
- 5 In its first order of 15 January 1980 the Finanzgericht referred to German legislation, case-law and administrative practice relating to the determination

of value for customs purposes of smuggled imported drugs, especially in regard to the time when liability to pay customs duty arises. It questioned whether, and if so, to what extent, Community regulations on the determination of value for customs purposes, in particular Regulation No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (Official Journal, English Special Edition 1968 (I), p. 170), apply.

- 6 In its second order of 8 July 1980 the Finanzgericht reacted to the information which the Commission had supplied to the Court at its request and which was to the effect that in the eight Member States other than the Federal Republic of Germany illegally imported drugs are seized and, as a rule, immediately destroyed without any customs duty being charged. However, in some Member States drugs which have been seized are occasionally sold to the pharmaceutical industry at a price corresponding to that which the industry usually pays for the drug in question; in such a case the value for customs purposes is calculated on that price.

- 7 In the grounds of the second order the national court expresses doubts as to whether it is compatible with the fundamental concept of a customs union for one Member State to charge customs duty on smuggled drugs which have subsequently been destroyed when the other Member States merely prosecute persons smuggling drugs under the criminal law.

- 8 The Commission has submitted that Community provisions on value for customs purposes apply to any goods referred to in the Common Customs Tariff. Since heroin must be classified under tariff subheading 29.42 A II as an "other" alkaloid of the opium group, its value for customs purposes should in principle be determined in accordance with Community law irrespective of whether it has been imported legally or illegally. To the extent to which there are still lacunae in Community law — as at the date in question in this case in regard to the time when liability to pay customs duty arises — the domestic law of the importing Member State applies.

- 9 It is important to stress at the outset that the fourth question referred to the Court by the national court is not concerned simply with the case of the illegal importation of any product but concerns the smuggling of a harmful substance intended for an unlawful use, which was destroyed as soon as it was discovered.
- 10 It should next be remembered that a product such as heroin is not seized and destroyed only because the importer has not complied with customs formalities but primarily because it is a narcotic whose harmfulness is recognized and whose importation and marketing is prohibited in all the Member States except in trade which is strictly controlled and limited to authorized use for pharmaceutical and medical purposes.
- 11 Although in these circumstances the Common Customs Tariff includes such a product amongst its classifications for the purpose of fixing the applicable rate of customs duty — 13.6% in the case of subheading 29.42 A II — it can only apply to imports of the product which are intended for an authorized use. Indeed, *ad valorem* customs duty cannot be determined for goods which are of such a kind that they may not be put into circulation in any Member State but must on the contrary be seized and taken out of circulation by the competent authorities as soon as they are discovered.
- 12 It should be noted in this connexion that all the provisions of Regulation (EEC) No 803/68 of the Council on the valuation of goods for customs purposes are based on the assumption that the imported goods are capable of being put on the market and absorbed into commercial circulation.
- 13 Furthermore, since Article 18 of the EEC Treaty indicates that the setting-up of the Common Customs Tariff is seen as a contribution to the development of international trade and the lowering of barriers to trade, it cannot relate to the importation of narcotics which are intended for unlawful use and are withdrawn from circulation as soon as they are discovered.
- 14 This interpretation of the Common Customs Tariff is confirmed by the practice followed by the customs authorities of eight Member States. The same conception also underlies Articles 10 and 11 of Council Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or

export duties (Official Journal 1979, L 175, p. 1) which provide that import duties must be repaid or remitted where goods subject to payment of such duties are destroyed under the supervision of the competent authorities.

- 15 It follows from the foregoing that the introduction of the Common Customs Tariff no longer leaves a Member State the power to apply customs duties to drugs which have been smuggled in and destroyed as soon as they were discovered but does leave it full freedom to take criminal proceedings in respect of offences committed, with all the attendant consequences, including fines.
- 16 In the light of this answer it is unnecessary to reply to the first three questions.

Costs

- 17 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Finanzgericht Hamburg by orders of 15 January and 8 July 1980, hereby rules:

The introduction of the Common Customs Tariff no longer leaves a Member State the power to apply customs duties to drugs which have been smuggled in and destroyed as soon as they were discovered but does

leave it full freedom to take criminal proceedings in respect of offences committed, with all the attendant consequences, including fines.

Koopmans

O'Keeffe

Bosco

Delivered in open court in Luxembourg on 5 February 1981.

A. Van Houtte

Registrar

T. Koopmans

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI
DELIVERED ON 27 NOVEMBER 1980 ¹

*Mr President,
Members of the Court,*

1. The reference for a preliminary ruling in relation to which the present opinion is delivered concerns the customs provisions applicable to a smuggled narcotic substance which cannot be lawfully traded and which is liable to be confiscated and destroyed by national authorities. The substance is in fact heroin. The issue is whether Community law permits the charging of customs duties on goods of that nature and, if so, under which rules and according to which criteria the value for customs purposes must be determined.

In March 1978 Jozsef Horvath, who had been sentenced by the Landgericht [Regional Court] Hamburg to five years' imprisonment for dealing in heroin and smuggling, received a demand from the German customs authorities for payment of DM 1 296 by way of duty on the smuggled heroin. Mr Horvath's objection to that demand was dismissed by the Hauptzollamt Hamburg-Jonas and he then commenced proceedings in the Finanzgericht [Finance Court] Hamburg. In the course of those proceedings that court submitted the following questions to the Court of Justice by order of 15 January 1980:

"1. Are the provisions of Regulation (EEC) No 803/68 of the Council of 27 June 1968 and of Regulation

Let me give a brief summary of the facts.

¹ — Translated from the Italian.