

JUDGMENT OF THE COURT
22 October 1987

In Case 314/85

REFERENCE to the Court under [Article 267 TFEU] by the Finanzgericht (Finance Court) Hamburg for a preliminary ruling in the proceedings pending before that court between

Foto-Frost, Ammersbek,

and

Hauptzollamt Lübeck-Ost,

on the interpretation of [Article 267 TFEU], Article 5 (2) of Council Regulation No 1697/79 (EEC) of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (Official Journal 1979, L 197, p. 1), on the interpretation of the Protocol of 25 March 1957 on German internal trade and connected problems, and on the validity of a Commission decision addressed on 6 May 1983 to the Federal Republic of Germany finding that the post-clearance recovery of import duties must be effected in a particular case,

THE COURT,

composed of: Lord Mackenzie Stuart, President, G. Bosco, J. C. Moitinho de Almeida and G. C. Rodriguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General : G. F. Mancini

Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

Foto-Frost, the plaintiff in the main proceedings, by H. Heemann, Rechtsanwalt, Hamburg, assisted by H. Frost, expert,

the Government of the Federal Republic of Germany, by M. Seidel, acting as Agent,

the Commission of the European [Union], by J. Sack, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing as supplemented further to the hearing on 16 December 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 19 May 1987,

gives the following

Judgment

- 1 By an order of 29 August 1985, which was received at the Court on 18 October 1985, the Finanzgericht (Finance Court) Hamburg referred to the Court for a preliminary ruling under [Article 267 TFEU] several questions concerning the interpretation of [Article 267 TFEU], Article 5 (2) of Council Regulation No 1697/79 on 24 July 1979 on the post-clearance recovery of import duties or export duties (Official Journal 1979, L 197, p. 1) and the Protocol of 25 March 1957 on German internal trade and connected problems, and the validity of a Commission decision addressed on 6 May 1983 to the Federal Republic of Germany finding that the post-clearance recovery of import duties must be effected in a particular case.
- 2 Those questions were raised in proceedings brought by Firma Foto-Frost, Ammersbek (Federal Republic of Germany), an importer, exporter and wholesaler of photographic goods, for the annulment of a notice issued by the Hauptzollamt (Principal Customs Office) Lübeck-Ost for the post-clearance recovery of import duties following a Commission decision addressed to the Federal Republic of Germany on 6 May 1983 in which it was held that it was not permissible to waive the recovery of import duties in the case in question.
- 3 The operation to which the recovery of duties related were Foto-Frost's importation into the Federal Republic of Germany and release for free circulation there of prismatic binoculars originating in the German Democratic Republic. Foto-Frost purchased the binoculars from traders in Denmark and the United Kingdom, which dispatched them to it under the [Union] external transit procedure from customs warehouses in Denmark and the Netherlands.
- 4 The competent customs offices initially allowed the goods to enter free of duty on the ground that they originated in the German Democratic Republic. Following a check, Hauptzollamt Lübeck-Ost, the principal customs office, considered that customs duty was due under the German customs legislation. However, it took the view that it was not appropriate to effect the post-clearance recovery of the duty on the ground that Foto-Frost fulfilled the requirements set out in Article 5 (2) of Council Regulation No 1697/79, which provides that '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'. According to the order requesting a preliminary ruling the Hauptzollamt took the view that Foto-Frost had completed the customs declaration correctly and could not have been expected to detect the error in so far as other customs offices had considered that previous similar operations did not give rise to the payment of duty.

- 5 Since the amount of the duty involved was greater than 2 000 ECU, under Commission Regulation No 1573/80 of 20 June 1980 laying down provisions for the implementation of Article 5 (2) of the aforementioned Council Regulation No 1697/79 (Official Journal 1980, L 161, p. 1) the Hauptzollamt itself was not empowered to take the decision not to effect post-clearance recovery. Consequently, at the Hauptzollamt's request, the Federal Minister for Finance requested the Commission to decide under Article 6 of the aforesaid Regulation No 1573/80 whether the post-clearance recovery of the duty in question could be waived.
- 6 On 6 May 1983 the Commission¹ addressed to the Federal Republic of Germany a decision to the effect that it could not. The grounds given for the decision were that 'the customs offices concerned did not themselves make an error in the application of the provisions governing inter-German trade but merely accepted as correct, without immediate question, the information given on the declarations presented by the importer; ... this practice in no way prevents those authorities from subsequently making a correction in respect of charges, this possibility being expressly provided for in Article 10 of Council Directive 79/695/EEC of 24 July 1979 on the harmonization of procedures for the release of goods for free circulation' (Official Journal 1979, L 205, p. 19). It further considered that 'the importer was in a position to consider the circumstances of the import operations in question in the light of the provisions governing inter-German trade, the application of which he was claiming; ... he could thus detect any error in implementing these provisions; ... it has been established that he did not comply with all the provisions laid down by the rules in force as regards the customs declarations'.
- 7 Following that decision the Hauptzollamt issued the notice for the post-clearance recovery of duty which Foto-Frost is contesting in the main proceedings.

8 Foto-Frost applied to the Finanzgericht Hamburg for an order suspending the operation of that notice. The Finanzgericht allowed the application on the ground that the operations in question appeared to fall within the ambit of German internal trade and were therefore exempt from customs duty under the Protocol on German internal trade

9 Foto-Frost then applied to the Finanzgericht Hamburg for the annulment of the notice for the post-clearance recovery of duty. The Finanzgericht took the view that the validity of the Commission's decision of 6 May 1983 was doubtful on the ground that all the requirements set out in Article 5 (2) of Council Regulation No 1697/79 for refraining from taking action for the post-clearance recovery of duty were fulfilled. Since the contested notice was based on the Commission's decision, the Finanzgericht considered that it could not annul it unless the [Union] decision was itself invalid. The Finanzgericht therefore referred the following four questions to the Court for a preliminary ruling:

- '(1) Can the national court review the validity of a decision adopted by the Commission pursuant to Article 6 of Commission Regulation (EEC) No 1573/80 of 20 June 1980 (Official Journal L 161, p. 1) on whether the post-clearance recovery of import duties should be waived pursuant to Article 5 (2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 (Official Journal L 197, p. 1), which decision held that there was no justification for waiving the recovery of the import duties, and can it, if appropriate, hold in proceedings challenging such a decision that recovery of the duties should be waived ?
- (2) If the national court cannot review the validity of the Commission's decision, is the Commission's decision of 6 May 1983 (ECR 3/83) valid?
- (3) If the national court can review the validity of the Commission's decision, is Article 5 (2) of Regulation No 1697/79 to be interpreted as conferring a power to adopt a discretionary decision, which may be reviewed by the court only as regards abuses of that discretion (and if so, which abuses?) without any possibility of substituting its own discretion, or does it confer the power to adopt a measure of equitable relief, which is fully subject to review by the court?

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

10 Reference is made to the Report for the Hearing for a fuller description of the facts and of the applicable provisions of [Union] law and for an account of the observations submitted by Foto-Frost, Hauptzollamt Lubeck-Ost, the Government of the Federal Republic of Germany and the Commission.

The first question

- 11 In its first question the Finanzgericht asks whether it itself is competent to declare invalid a Commission decision such as the decision of 6 May 1983. It casts doubt on the validity of that decision on the ground that all the requirements laid down by Article 5 (2) of Regulation No 1697/79 for taking no action for the post-clearance recovery of duty seem to be fulfilled in this case. However, it considers that in view of the division of jurisdiction between the Court of Justice and the national courts set out in [Article 267 TFEU] only the Court of Justice is competent to declare invalid acts of the [Union] institutions.
- 12 [Article 267 TFEU] confers on the Court jurisdiction to give preliminary rulings on the interpretation of the Treaty and of acts of the [Union] institutions and on the validity of such acts. The second paragraph of that article provides that national

courts may refer such questions to the Court and the third paragraph of that article puts them under an obligation to do so where there is no judicial remedy under national law against their decisions.

- 13 In enabling national courts, against those decisions where there is a judicial remedy under national law, to refer to the Court for a preliminary ruling questions on interpretation or validity, [Article 267 TFEU] did not settle the question whether those courts themselves may declare that acts of [Union] institutions are invalid.
- 14 Those courts may consider the validity of a [Union] act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the [Union] measure.
- 15 On the other hand, those courts do not have the power to declare acts of the [Union] institutions invalid. As the Court emphasized in the judgment of 13 May 1981 in Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze* [1981] ECR 1191, the main purpose of the powers accorded to the Court by [Article 267 TFEU] is to ensure that [Union] law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a [Union] act is in question. Divergences between courts in the Member States as to the validity of [Union] acts would be liable to place in jeopardy the very unity of the [Union] legal order and detract from the fundamental requirement of legal certainty.
- 16 The same conclusion is dictated by consideration of the necessary coherence of the system of judicial protection established by the Treaty. In that regard it must be observed that requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the [Union] institutions. As the Court pointed out in its judgment of 23 April 1986 in Case 294/83 *Parti écologiste 'les Verts' v European Parliament* [1986] ECR 1339, 'in [Articles 263 and 277 TFEU], on the one hand, and in [Article 267 TFEU], on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'.

17 Since [Article 263 TFEU] gives the Court exclusive jurisdiction to declare void an act of a [Union] institution, the coherence of the system requires that where the validity of a [Union] act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.

18 It must also be emphasized that the Court of Justice is in the best position to decide on the validity of [Union] acts. Under Article 20 of the Protocol on the Statute of the Court of Justice of the E[U], [Union] institutions whose acts are challenged are entitled to participate in the proceedings in order to defend the validity of the acts in question. Furthermore, under the second paragraph of Article 21 of that Protocol the Court may require the Member States and institutions which are not participating in the proceedings to supply all information which it considers necessary for the purposes of the case before it.

19 It should be added that the rule that national courts may not themselves declare [Union] acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures; however, that case is not referred to in the national court's question.

20 The answer to the first question must therefore be that the national courts have no jurisdiction themselves to declare that acts of [Union] institutions are invalid.

The second question

21 The second and third questions assume that the operations in question are in fact liable to customs duties. In its second question the Finanzgericht is seeking to ascertain, in the event that the Court alone has jurisdiction to review the validity of the Commission decision, whether that decision is valid.

- 22 It must be observed that Article 5 (2) of Regulation No 1697/79 lays down three specific requirements which must be fulfilled before the competent authorities may waive the post-clearance recovery of duties. 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.
- 23 It now falls to be considered whether the three requirements set out in Article 5 (2) of Regulation No 1697/79 are fulfilled in this case. The Court has the power to verify the existence of the facts on which a [Union] act is based and the legal inferences which the [Union] institution has drawn therefrom where, in the context of a request for a preliminary ruling, they are alleged to be incorrect.
- 24 The first requirement contained in Article 5 (2) is that the failure to collect the duty must have been the result of an error made by the competent authorities themselves. In that regard, the Commission's argument to the effect that the customs authorities did not make an error themselves but merely made the initial assumption that the particulars given in Foto-Frost's declaration were correct, as they were entitled to do under Article 10 of Council Directive 79/695/EEC, must be rejected. According to the latter provision, where duty has been calculated on the basis of non-verified particulars given in the customs declaration, the declaration may be subjected to subsequent verification and the amount of duty calculated rectified. In this case, as the Commission itself acknowledged in its observations and in answering a question put to it by the Court, Foto-Frost's declaration contained all the factual particulars needed in order to apply the relevant rules, and those particulars were correct. In those circumstances, the post-clearance check carried out by the German customs authorities failed to disclose any new fact. Therefore, it was in fact as a result of an error made by the customs authorities themselves in initially applying the relevant rules that duty was not charged when the goods were imported.
- 25 The second requirement is that the person liable must have acted in good faith or, in other words, that he could not have detected the error made by the competent authorities. In that connection, it is observed that the specialist judges of the Finanzgericht Hamburg expressed the view in their order of 22 September 1983 suspending the operation of the amendment notice that it was very doubtful whether duty was payable on operations of the type at issue. The Finanzgericht considered that such operations appeared to fall within the ambit of German internal trade and were therefore exempt from customs duty under the Protocol on such trade. However, it

observed that the situation was uncertain as regards the case-law of both the Court of Justice and the national courts. In those circumstances, it cannot reasonably be considered that Foto-Frost, a commercial undertaking, could have detected the error made by the customs authorities. Moreover, it had even less reason to suspect that an error had been made, since previous similar operations have been granted exemption from duty.

- 26 The third requirement is that the person liable must have observed all the provisions laid down by the rules in force as far as his customs declaration is concerned. As to that point, it must be observed that, in answering a question put to it by the Court, the Commission itself admitted, contrary to what is stated in its decision of 6 May 1983, that Foto-Frost had completed its customs declaration correctly. Moreover, there is nothing in the documents before the Court to suggest that that was not the case.
- 27 It follows from the foregoing that all the requirements laid down in Article 5 (2) of Regulation No 1697/79 were fulfilled in this case and therefore Foto-Frost was entitled to the waiver of the post-clearance recovery of the duty in question.
- 28 Accordingly, the decision addressed to the Federal Republic of Germany on 6 May 1983 in which the Commission stated that post-clearance recovery of import duties must be carried out in a particular case is invalid.

The third question

- 29 The Finanzgericht asks whether, in the event that it itself is competent to declare the Commission's decision invalid, the application of Article 5 (2) of Regulation No 1697/79 depends on a discretionary decision which the national court may review only as regards abuses of that discretion ('Ermessensfehler') or on a measure of equitable relief, which is fully subject to review by that court?
- 30 In view of the answers given to the first and second questions, the third question does not call for a reply.

The fourth question

- 31 The fourth question is put to the Court in the event that it does not emerge from the answers to the first questions that Foto-Frost is entitled to the waiver of post-clearance recovery. The Finanzgericht asks whether in that case the operations in question fall within the ambit of German internal trade within the meaning of the Protocol on German internal trade, which would mean, in its view, that they are exempt from customs duty.
- 32 In view of the answer given to the second question, the fourth question does not call for a reply.

Costs

- 33 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European [Union], which have 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to questions submitted to it by the Finanzgericht, Hamburg, by order of 29 August 1985, hereby rules:

