On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants to pay the costs.**

Mackenzie Stuart Bosco Koopmans

Delivered in open court in Luxembourg on 13 November 1984.

For the Registrar

H. A. Rühl

Principal Administrator

G. Bosco

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 17 MAY 1984 [1]

Mr President,
Members of the Court,

1. The Court is called upon to rule on two parallel actions brought by Netherlands undertakings seeking to have the decisions by which the Commission found that remission of customs duties was not justified declared void. The central issue of both disputes is the interpretation of Article 13 of Council Regulation No 1430/79 of 2 July 1979 (Official Journal L 175, p. 1) which has already been considered by

1 — Translated from the Italian.

this Court, most recently in the judgment of 15 December 1983 in Case 283/82, *Schoellershammer* v *Commission* [1983] ECR 4219). The problem in the present case is to clarify one aspect of that provision, namely, to decide whether the case of a customs agent who obtains exemption from duty in good faith on the basis of documents furnished by his clients and which subsequently prove to be false is one of the special and atypical cases in which the aforementioned regulation authorizes a remission.

Both companies, Van Gend & Loos of Utrecht and Expeditiebedrijf Wim Bosman BV of 's-Heerenberg, in the Netherlands, act for their clients as customs agents. In that capacity, they declared the importation of some consignments of textile products to the Netherlands authorities and presented certificates showing that they were of Egyptian, Moroccan and Turkish origin. Because of their origin, the goods benefited from a preferential rate of duty and, in certain cases, were admitted duty-free. After a long inquiry, however, the authorities established that many of the certificates were false and therefore ordered the two undertakings to pay the outstanding duties. Van Gend & Loos and Bosman then applied to the Netherlands Minister for Finance to be exonerated from payment and the Minister, in his turn, in accordance with the procedure laid down in Commission Regulation No 1575/80 of 20 June 1980 (Official Journal L 161, p. 13), referred the matter to the Commission. The latter decided that the remissions applied for were not justified. On 30 May and 10 October 1983, the two undertakings brought separate actions seeking declarations that the Commission's decisions, both dated 10 January 1983, were void.

2. Two sources of Community law must be considered in the present case: Council Regulation No 1430/79 on the repayment or remission of import or export duties, and Commission Regulation No 1575/80 implementing the provisions of the former.

According to Regulation No 1430/79, reimbursement of or exoneration may be obtained from duties levied on:

(a) goods in respect of which a customs debt has either not arisen or has been settled other than by payment or prescription, or which "exceeds . . . the amount lawfully payable" (Article 2 (1));

(b) goods which were entered in error for free circulation instead of being placed under another customs regime (Article 3 (1));

(c) goods refused by the importer because they are defective or do not comply with the terms of the contract pursuant to which they were imported into the territory of the Community, provided that they are re-exported or destroyed (Articles 5 and 6);

(d) goods in one of the situations provided for in Article 10, as long as the importer intends to re-export or destroy them (Articles 10 and 11);

(e) goods in *other* situations, different from the standard ones set out in Article 10 because they are the result of *special* circumstances "in which no negligence or deception may be attributed to the person concerned" (Article 13).

As I have said, it is the last category which is of interest in the present case. A special procedure for deciding which cases come into that category is provided for in Article 9 (2) and (3) of Regulation No 1798/75, but since the relevant implementing measures have not yet been adopted, the procedure laid down in Regulation No 1575/80 is used. That consists of four phases. The person concerned must, within a certain time, lodge with the customs office concerned an application supported by sufficient evidence to warrant further consideration (Articles 2 and 3); the Committee on Duty-Free Arrangements examines the application and expresses an opinion which the Commission must take into account in deciding whether or not "the situation under consideration justifies repayment or remission" (Article 5, first paragraph); finally, the national authorities decide whether to grant or reject the application "on the basis of the Commission's decision" (Article 6 (2)).

3. Before the Court the Commission pleaded that both actions were inadmissible on two grounds: the contested measure did not directly affect the legal position of the applicants and the actions were brought out of time. It should be borne in mind that Article 173 of the EEC Treaty allows any natural or legal person to institute proceedings challenging measures adopted by the Commission or the Council, but that possibility is subject to two conditions: in the first place, the contested measure must be a decision addressed to that person, or in the case of a regulation or a decision addressed to another person, must be of direct and individual concern to the person bringing the action; in the second place, not more than two months must have elapsed from the date of publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, from the day on which it came to the knowledge of the latter.

With regard to the first ground, the Commission acknowledges that its measures are of *individual* concern to the applicants. It could not do otherwise since it adopted them on the application of the latter, forwarded by the national authorities. The Commission denies however that the two decisions *directly* concern Van Gend & Loos and Bosman. Such decisions are addressed to the Member States. It is in fact to the Member States that undertakings apply for remissions and it is the Member States which grant or reject such applications.

That argument is interesting but it encounters an insurmountable obstacle in the form of the aforementioned Article 6 of Regulation No 1575/80. As I have said, that article provides that the national authorities are to decide whether to grant or reject the application for repayment or remission "on the basis of the Commission's decision". It seems to me that it must be deduced from that that, in the final phase of the procedure, the national authorities have no discretion and, therefore, no power of decision. The power is entirely in the hands of the Commission. Its decisions thus directly affect the legal situation of private individuals. Moreover, the case-law of this Court also points in that direction. Let me mention in this context the judgment of 13 May 1971 in Joined Cases 41 to 44/70, *Fruit Company* v *Commission* ([1971] ECR 411); that of 23 November 1971 in Case 62/70, *Bock* v *Commission* ([1971] ECR 897); and that of 6 March 1979 in Case 92/78, *Simmenthal* v *Commission* ([1979] ECR 777).

With regard to the second ground of inadmissibility, the Commission distinguishes between Van Gend & Loos and Bosman. It states that the decision

concerning the former was notified to the Netherlands Government on 11 January 1983 and, because it is unreasonable to suppose that the Government took more than two months to transmit it to Van Gend & Los, the four months and more which passed between that date and the date on which the action was brought (30 May) raise the presumption that the latter is out of time. However, the Commission is wrong in that presumption. Van Gend & Loos has in fact produced the letter in which the Minister for Finance informed it of the decision and that letter is dated 30 March 1983.

In the case of Bosman, on the other hand, the Commission relies on the applicant's own statements. According to the latter, it says, the Netherlands administration, in two identical disputes, behaved so differently as to inform Van Gend & Loos on 30 March and Bosman on 10 August. What is more, the former was informed by a ministerial letter and the latter by a junior official (the Inspector of Customs and Excise at Lobith). In the Commission's view that is so scarcely credible as to raise the presumption that the action was brought out of time. The Commission may well be right. However, its opinion is only a suspicion and suspicion is not enough from which to deduce that an action is inadmissible. It recognizes this itself, moreover, when it states that purely "for the moment", it considers the date of 10 August "to be correct" (see statement of defence of 15. 11. 1983).

4. As regards the substance, the applicants contend that the contested decisions:

(a) do not state the grounds on which they were based or, at least, do not adequately state them;

(b) were adopted on the basis of criteria which are not very clear and are therefore contrary to Article 13, according to which repayment or remission can only be granted in precise and predetermined cases;

(c) contain no detailed information on the procedure followed, particularly as regards the opinion expressed by the committee of experts, thus making it impossible to exercise judicial review of that aspect of the decision;

(d) do not take account of the fact that the negligent conduct of the national authorities helped to induce the applicants into error;

(e) were adopted without allowing the parties concerned to intervene before they were adopted and to present their own defence;

(f) were taken on the basis of a procedure which did not respect the time-limits laid down in Articles 5 and 6 of Regulation No 1575/80; and

(g) do not take account of the exceptional situation beyond the control of the applicants which justifies the application for remission.

Let us begin with the objection raised at (a). It is stated that the two decisions do not state the grounds on which they were taken, or at least, the reasons advanced for refusing to grant the remission are obscure or plainly incomprehensible. In particular, they do not take account of the circumstances pleaded by the applicants as evidence of their good faith when they made the declarations which proved to be untrue,

namely, the fraud of which they were victim when their clients supplied them with false certificates and the fact that they had no means of discovering that the certificates were in fact false since the documents in question had been issued by non-member countries.

The provision to which this objection refers is to be found in Article 190 of the EEC Treaty ("... decisions of the Council and of the Commission shall state the reasons on which they are based ..."). This Court has interpreted that provision as meaning that the executive must indicate, in a clear and consistent way, the principal circumstances of fact and considerations of law on which its decision is based. Nothing prevents it, however, from doing so summarily and it is not obliged to take a position on all the arguments advanced by the parties (see the judgment of 4. 7. 1963 in Case 24/62, *Federal Republic of Germany* v *Commission* [1963] ECR 63, and, more recently, that of 29. 10. 1980 in Joined Cases 209 to 215 and 218/78, *Van Landewyck and Others* v *Commission* [1980] ECR 3125).

Let us examine the grounds for the contested decision in the light of those principles. Those grounds are contained in three recitals in the preamble. The first of these sets out the facts. It states that as a result of investigations carried out after the customs certificates had been presented to the relevant offices, those certificates were found to be false and therefore that the goods to which they related could no longer have the benefit of a preferential rate of duty. It also notes that the applicants allege that they made their declarations without knowing or suspecting that the documents indicating the origin of the goods were false (in absolute good faith, therefore), and in fact, they were led into that situation by the fact that the national authorities did not inform them of their suspicions as to the authenticity of the certificates. The second recital states that a group consisting of experts from all the member countries met in the context of the Committee on Duty-free Arrangements and examined the two cases at the sittings of 26 November and 8 December 1982.

The third recital contains the actual grounds for the decisions. It begins by stating that when a customs agent operates in his own name, as was the case here, he is directly liable for the payment of import duties. It makes clear that the fact that the customs agent was unaware that the certificates of origin were false at the time he submitted them does not constitute a "special circumstance" within the meaning of Article 13. It also makes clear that the good faith of the agent is not sufficient to justify the grant of a remission and that it is precisely such a "circumstance" which is necessary. It points out finally that to accept an application for remission in a case such as the present one would have the effect of rendering ineffective the system of carrying out subsequent checks.

It appears to me that those grounds indicate both the essential aspects of the case and the arguments relied on as a basis for the decision. They thus fully correspond to the requirements laid down in this court's case-law. The applicants criticize the grounds stated from two points of view:

(a) the special circumstances pleaded by them (namely the fact that they did not know, nor could they have known, that the documents were false) were not mentioned; and

(b) the argument that granting the remission would undermine investigations carried out after the event is contradictory.

It can be objected to the first of those arguments that it would be unfounded even if it was true. I have in fact just cited two judgments according to which the Commission is *not* required to take a position on *all* of the defences put forward by the party concerned. It is thus undeniable that in the present case, the Commission has in no way failed to take into account the facts advanced by the applicants. It has done something which is very different and, in my opinion, perfectly reasonable. It has stated that even if the good faith of the applicants was proved that fact is not sufficient to bring the case within the scope of the concept of "special circumstances", that is, the second of the two conditions to which Article 13 makes remission subject.

I find the second argument unconvincing both because the Commission's argument is valid (how can it be denied that granting a remission to anyone who makes use of false certificates because they were presented in good faith would make investigations after the event largely meaningless?), and above all, because that argument was put forward *ad colorandum.* It does not occupy a decisive place in the scheme of the decision.

5. The complaint alleging an infringement of Article 13 of Regulation No 1430 is closely linked to the first complaint. In the view of the applicants, that article provides that repayment or remission will only be granted in a certain number of clear and predefined cases. In the present case, that prior definition has not been made. There are in fact no general rules which define those cases, nor do the grounds for the contested decisions indicate the general criteria on the basis of which the remission was refused. That submission must also be rejected.

In paragraph 2, I have already pointed out that the rules to be applied in granting the repayments and exonerations provided for in the first paragraph of Article 13 have not yet been adopted, in spite of the fact that the second paragraph of the same provision expressly provides for their adoption and states that this should be done in accordance with the procedure laid down in Article 9 of Regulation No 1798/75 of the Council of 10 July 1975 (Official Journal L 184, p. 1). It follows that in no case could the contested decisions have referred to predefined cases laid down by general and abstract rules.

The argument to the effect that the aforementioned decisions do not indicate the general criteria on which the decision to grant or refuse the remission is based remains to be dealt with. However, that argument also does not stand up to close scrutiny. According to Article 13 and to the implementing Regulation No 1575/80, it is in fact for the Commission, after hearing the opinion of a group of experts, to decide *case by case* if there are special circumstances which justify granting the remission. In the present case, that procedure has been scrupulously followed, and, thanks to the clarity with which the grounds are set out, the decisions to which that procedure gave rise can be subjected to effective judicial review.

6. Also with regard to the grounds for the two decisions, the applicants point out that they do not refer to the opinion of the Committee on Duty-Free Arrangements. They contend that this makes it difficult to ascertain whether the Commission has complied with Article 5 of Regulation No 1575 and

Article 190 of the EEC Treaty. This third argument is wholly unfounded.

I have already said that, according to Article 5, the Commission must consult "a group of experts composed of representatives of all Member States meeting within the framework of the Committee on Duty-Free Arrangements". Article 190 provides that "... decisions ... shall refer to any ... opinions which were required to be obtained ...". It is true therefore that the contested decisions must mention that intermediate phase of the procedure. It is not true to say however that they do not do so, because the second recital expressly states that the group of experts had examined the case on two occasions. I admit that it is not added that the group also expressed an opinion, but it is pure sophistry to rely upon that slight and surely involuntary omission as a ground for declaring the two measures void.

7. The fourth submission refers to the conduct of the Netherlands authorities. It is said that when the documents were presented, the authorities did not verify the certificates of origin of the goods and, by so acting, caused the applicants to come to the reasonable conclusion that those documents were authentic. The fact that once they had ascertained that the declarations were false, those same authorities demanded payment of the duties is in conflict with the principle of legitimate expectations.

I am not convinced by that argument. According to Council Directive 79/695 of 24 July 1979 (Official Journal L 205, p. 19), which harmonizes the procedures for the release of goods for free circulation, the requirements which customs declarations must meet in order to be accepted by the relevant offices are exclusively formal in character (Article 6). It can thus be deduced that the acceptance of such declarations is not subject to checks intended to verify the authenticity of the documents presented. That is not all, however. According to Article 10 of the same regulation, acceptance does not prevent investigations being carried out subsequently and, as is obvious, it does not place any limits on the consequences that such investigations may have on the amount of the import duties to be paid.

Thus, it is clear from the Community sources that when customs offices accept declarations, they are not in any way raising a presumption as to the authenticity of the certificates of origin. In fact, it could not be otherwise in view of the large number of operations carried out each day by the offices and the necessity, dictated by obvious commercial requirements, to deal with them rapidly, and if account is taken of the fact that it is quite impossible for them to check systematically the authenticity of documents at the time when they are submitted. Thus, in point of fact, it is not clear how the simple acceptance of certificates could be regarded by professionals, who are certainly aware of the conditions under which the offices carry out their duties, as any kind of guarantee of the authenticity or validity of those certificates.

8. The fifth submission pleads infringement of the rights of the defence. The applicants state that the procedure followed by the Commission in considering the case for a remission and the way in which it decided upon it gave them no opportunity to intervene for the purpose of defending their position.

Once again, I disagree. As I have already said in paragraph 2, the first phase of the procedure laid down in Regulation No 1575 allows the person concerned to put forward any and all arguments in support of its request in the documents submitted to the national authorities. There is no doubt that that was done in the present case. Moreover, the applicant's arguments are to be found in the documents which the authorities put at the disposal of the Committee on Duty-Free Arrangements and the Commission. I refer in this connection to paragraphs 16 and 17 of the judgment of 17 March 1983 in Case 294/81, *Control Data* v *Commission* ([1983] ECR 911).

9. The sixth submission concerns the failure to observe the time-limits laid down in the second paragraph of Article 5 and in Article 6 of Regulation No 1575. I would point out that, according to the first of those rules, the Commission must take a decision on the application for repayment or remission within three months of the date on which the State concerned forwarded it to it. Article 6 provides that "the Member State concerned shall be notified of the decision ... as soon as possible and in any event within thirty days of the expiry" of the three month period referred to above. The applicants state that the Commission has complied with neither one nor the other of those time-limits, but the outcome of the proceedings contradicts this.

In both cases, in fact, the application for a remission prepared by the Netherlands authorities was received by the Commission on 11 October 1982, whilst the decision was taken on 10 January 1983 (within the time-limits laid down in Article 5, therefore) and notified to the Netherlands on 11 January (that is, in accordance with Article 6). In any event, I do not believe that even if things had happened differently, the decisions should be regarded as invalid. Without pretending to exhaust the question, I would point out that failure to observe a time-limit laid down in an administrative procedure can only invalidate the act which is the final step in that procedure in so far as it prevents it from fulfilling the function for which it was set up. That was not the case as regards the two time-limits in question here. The latter serve only to indicate the normal speed with which the procedure should be carried out. They are not therefore "peremptory" but merely "regulatory".

10. The seventh and final submission alleges infringement of Community rules in regard to *force majeure*. This submission is based on two facts:

(a) the exceptional cases provided for in the first paragraph of Article 13 of Regulation No 1430 are all, in substance, within the scope of the extenuating circumstance of *force majeure*, and

(b) in Community law, *force majeure* does not mean that it is objectively and absolutely impossible to follow a certain course of conduct.

As is shown by the judgment of the Court of 17 December 1970 in Case 11/70, *Internationale Handelsgesellschaft* ([1970] ECR 1125), *force majeure* extends to the case where abnormal and unforeseeable circumstances prevent the person concerned from following certain rules of conduct. The applicants state that it is beyond question that they could not, by behaving with ordinary care, discover that the documents supplied by their clients were false. They were thus victims of *force majeure*, and for that reason their actions cannot be criticized and neither can the legitimacy of their application for a remission.

That argument is more developed than the others but it, too, encounters a number of insuperable objections. The first of these derives from the case-law of the Court. In a recent case dealing with *force majeure*, the Court defined it as an "external cause" which has "consequences which are inexorable . . . to the point of making it objectively impossible for the persons concerned to comply with their obligations" (judgment of 18. 3. 1980 in Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 31, 39, 83 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 140). It appears to me that that concept is much more strict than the one advanced by the applicants. However, even if it is admitted that the two coincide, I cannot accept that for professionals like Van Gend & Loos and Bosman, being supplied with false customs certificates is, as they put it themselves, an "abnormal and unforeseeable" circumstance. The fact is that such a risk is inseparably linked to the profession of customs agent, account is taken of it in the fixing of fees and the sacrifices it entails are justified on the basis of the well-known maxim *cuius commoda eius et incommoda.*

The agents' obligation to pay import duties even when they have produced in good faith certificates of origin provided by their clients which prove to be false is further, and I believe not irrelevantly, confirmed by the political inacceptability of the contrary proposition. If that obligation did not in fact exist, if the national authorities were unable to collect such duties, the risk referred to above would be unjustifiably transferred from the professional category concerned to society as a whole. The applicants are aware of that. However, they try to make the idea of such a transfer less disagreeable by contending that it is a necessary condition of the exercise of the profession of customs agent. They argue that if they were not so protected, agents would be obliged either to charge much higher fees, or to operate as direct agents for their clients. The latter would have the effect of transferring liability for payment of duties to their clients; the result in either case would be that intra-Community trade would be noticeably hampered. However, that analysis is tendentious. It says nothing about the fact that the risk of being supplied with false documents is a professional risk and that, for that very reason, agents' fees are already calculated so as to take account of it.

11. For all the foregoing reasons, I propose that the Court dismiss the applications brought by Van Gend & Loos and Expeditiebedrijf Wim Bosman BV against the Commission by instruments lodged at the Court Registry on 30 May and 11 October 1983 respectively.

The applicants having failed in their submissions, they should be ordered to pay the costs.