1. **Declares void the Commission's decision of 9 July 1982, addressed to the Federal Republic of Germany, establishing that the repayment of import duties in the applicant's case is not justified;**

2. **Dismisses the remainder of the application;**

3. **Orders the Commission to pay the costs.**

Galmot Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 15 December 1983.

J. A. Pompe
Deputy Registrar

Y. Galmot
President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 27 OCTOBER 1983 [1]

Mr President,
Members of the Court,

1. The Court is asked to adjudicate in an action brought by Papierfabrik Schoellershammer Heinrich August Schoeller & Söhne GmbH & Co. KG [hereinafter referred to as "Schoellershammer"] on 21 October 1982 for (a) a declaration that the Commission's decision of 9 July 1982 relating to proceedings under Article 13 of Regulation (EEC) No 1430/79 regarding the repayment of import duties is void and (b) a declaration that the repayment of those import duties is justified in the circumstances of the case.

The facts are as follows. To enable it to meet an order which exceeded its production capacity, the applicant imported five consignments of drawing paper from Switzerland, entering them for free circulation at the Düren Customs Office and paying the appropriate duty of DM 24 703.96 (between 5 and 15 October 1981. However, the goods were not intended for domestic consumption; they remained on Community customs territory for the time required for new labels to be affixed and for them to be loaded into containers belonging to the shipping company which was to transport them to Japan (between 6 and 21 October 1981). By application dated 9 November 1981

1 — Translated from the Italian.

under Council Regulation (EEC) No 1430/79 of 2 July 1979 (Official Journal 1979, L 175, p. 1), the applicant applied to the German customs authorities for repayment of the duties which it had paid. It pointed out that it had erroneously entered the goods for free circulation and pleaded, by way of excuse, on the one hand the special circumstances of the case (importation and immediate re-exportation) which differed from the procedures with which it was familiar and, on the other hand, the disruption which the employment of new staff who were not yet fully competent had caused in its dispatch department.

The repayment was, however, refused by the Aachen office, because — according to its decision — the export of the goods did not take place under costums supervision. Schoellershammer then asked for the repayment to be granted to it on equitable grounds (2 December 1981). By a letter dated 8 April 1982 the German Minister of Finance invited the Commission to examine the application under the procedure provided for in Commission Regulation (EEC) No 1575/80 of 20 June 1980 (Official Journal 1980, L 161, p. 13) and in particular in Articles 4 to 7 thereof, which require consultation of national experts meeting within the framework of the Committee on Duty-Free Arrangements. By a majority, with only the German delegation abstaining, that committee held that no repayment was justified. By a decision dated 9 July 1982, notified to the German Government on 19 July 1982, the Commission adopted that view and on that basis the customs office rejected Schoellershammer's application (24 August 1982).

Hence Schoellershammer's recourse to administrative and judicial remedies. It first lodged an objection with the Oberfinanzdirektion Köln [Principal Revenue Office, Cologne] (on 17 September 1982) and then brought an action before this Court. Having been informed of that action, the Oberfinanzdirektion, in accordance with Paragraph 363 (1) of the Abgabenordnung [Fiscal Code], suspended the proceedings, pending the Court's decision.

2. I have no doubt as to the admissibility of the application. Although it is not the addressee of the decision, Schoellershammer is directly and individually concerned by it (second paragraph of Article 173 of the EEC Treaty): individually, because the decision refers to the particular situation in which it finds itself and presupposes that the Commission knew of it; directly, because the decision of the customs office which rejected the applicant's claim was in no way discretionary. That is proved by Article 6 (2) of Regulation No 1575/80, which provides that the national authority is to decide upon the application for repayment "on the basis of the Commission's decision" (cf. the judgments of 13. 5. 1971 in Joined Cases 41 to 44/70, *NV International Fruit Company* v *Commission*, [1971] ECR 411; 23. 11. 1971 in Case 62/70, *Bock* v *Commission*, [1971] ECR 897 and 6. 3. 1979 in Case 92/78, *Simmenthal* v *Commission*, [1979] ECR 777).

3. The applicant puts forward three complaints: infringement of an essential procedural requirement, infringement of the Treaty and of rules relating to its application and misuse of powers.

The first submission is unacceptable. Schoellershammer contends that the Commission did not observe the time-limit laid down for the notification of its decision to the German Government. What time-limit? According to the

provisions of Articles 5 and 6 of Regulation No 1575/80, taken together, the Commission is bound to decide within three months of the date of receipt of the application forwarded to it by the national authorities. The decision must then be notified to the Member State concerned "as soon as possible and in any event within 30 days" of the expiry of the period specified for taking the decision.

It appears from the documents before the Court that the application was sent to the Commission by a letter dated 8 April 1982, that the decision was adopted on the following 9 July and that it was notified to the Federal Republic of Germany 10 days later, that is to say well within the limits imposed by Regulation No 1575/80.

4. The second and third complaints relate to the central problem of the case, namely the legal basis for the repayment of import duties. It is not therefore possible to examine those complaints without recalling, at least in outline, the rules governing repayments at the material time.

According to Article 10 (1) of the EEC Treaty, the release of goods from non-member countries into free circulation in the Community involves the collection of import duties. In order to unify the rules on repayments contained in the customs legislation of the Member States, the Council adopted Regulation No 1430/79. Inspired by the general principles governing the recovery of money paid by mistake, that regulation deals first with circumstances where no customs debt existed or where the amount charged exceeded the amount lawfully due; it then provides for a series of exceptions to the rule that the entry of goods for free circulation is irreversible.

Those exceptions are motivated by the need to protect persons who pay customs duties in good faith and they refer to two further sets of circumstances. The first concerns goods erroneously entered for free circulation which were in fact intended to be placed under a customs regime not involving the collection of import duties. The payer is entitled to recover the duty provided that (i) the goods satisfy the requirements of the customs regime for which they were intended, (ii) they are immediately entered for that regime and (iii) any use of the goods has not contravened the conditions of the customs regime under which they should have been placed (Articles 3 and 4).

The second case is of an entirely different nature: the goods in free circulation must be in a special situation which did not arise by reason of negligence or deception on the part of the declarant but is such as to prevent their use for the purposes for which they were entered. The regulation gives some examples of such situations. The most typical case, however, is that of goods rejected by the importer as being defective or not complying with the terms of the contract. To obtain repayment, the declarant must destroy the goods or re-export them from the Community, each operation being carried out under customs supervision (Articles 5 to 9).

It is obvious that, although they are numerous, those cases do not exhaust the range of specific situations in which a claim for repayment may be justified. Hence the inclusion of a residual provision. Repayment may be made, states Article 13, in "special circumstances in which no negligence or deception may be attributed to the person concerned".

5. Let me return to the arguments referred to in paragraph 4. In reliance on

those arguments the applicant maintains that the Commission did not give consideration sufficiently to the special features of the case and was thus led to apply Regulation No 1430 incorrectly. The Commission contests those arguments and reaches the contrary conclusion.

The relevant provisions are contained, on the one hand, in Articles 3 and 4 and, on the other hand, in Article 13. According to Schoellershammer, the present circumstances fall outside the scope of Articles 3 and 4 because, if for no other reason, the application of those provisions presupposes the possibility of entering the goods for the regime for which they were really intended, which in the present case was impossible since the goods had already been re-exported. It was therefore necessary, says Schoellershammer, to ascertain whether the requirements of Article 13, which is a general clause under which repayments are granted on equitable grounds, were satisfied. In other words, the Commission should have asked itself: (a) whether the exceptional nature of the case, both objectively (importation and immediate re-exportation) and subjectively (inexperience of the employee in the dispatch department), gave rise to the "special circumstances" envisaged by the article; and (b) whether there had been negligence or deception attributable to the declarant.

As I have said, the Commission takes quite the opposite view. In its opinion, the facts under review can only be governed by Articles 3 and 4. Those provisions deal with the case of goods entered in error for free circulation and make no distinction between an error arising from confusion between the different procedures and an error arising, as in Schoellershammer's case, from inadequate knowledge of the regulation. The latter — infringement of procedural rules due to an oversight — is in fact the more common occurrence. To disregard those considerations and to deny that those two articles are applicable to the present case and to similar cases might lead to all kinds of abuses (a point also made by some of the experts on the Committee on Duty-Free Arrangements).

As for Article 13, the Commission considers that the residual nature of that provision makes it irrelevant to the present case. The fact that it refers only to situations not envisaged by the other provisions is shown above all by the amendments made to it by Council Regulation (EEC) No 1672/82 of 24 June 1982 (Official Journal 1982, L 186, p. 1). In its present version, in fact, it expressly allows repayment in the case of "failure . . . to comply with procedural requirements", provided that certain conditions are satisfied. From that it is inferred that that contingency (precisely because Articles 3 and 4 already provided for it) was not covered by the former version; and that inference is confirmed by the second recital in the preamble to the new regulation, which shows that in 1982 the legislature wished to depart from the previous practice in that respect.

According to the Commission, it is not therefore true that it carried out an inadequate investigation, misusing its powers and infringing the regulation: in particular, the inapplicability of Article 13 to the present case relieved it of the obligation to establish whether Schoellershammer had been negligent or deceitful.

6. The arguments put forward by the Commission relating to Article 13 (that is to say, the original version thereof, since the present version entered into force

after the facts of this case occurred and governs the repayment of duties entered in the accounts on or after 1 July 1982) do not entirely convince me. By that I mean that I do not believe that Article 13 deals only with situations other than those envisaged in the preceding articles.

A number of factors lead me to that conclusion. The first is the expression which is at the heart of the rule. To say that it applies in "special circumstances" does not mean that its scope is defined by reference to the circumstances envisaged by the other provisions. Then it should be noted that the article appears at the end of Title I, which contains the rules for "repayment or remission of import duties". It seems to me that that confirms the impression created by a literal interpretation: namely, that Article 13, rather than being just a residual provision, is an equitable or, better still, "catch-all" provision on the basis of which may be assessed cases which, although perhaps provided for elsewhere in so far as they are typical, have become anomalous as a result of unforeseeable circumstances or unusual events. Finally, what is even more significant is the preparatory work for Regulation No 1430/79: when submitting the draft thereof to the Council, the Commission stated that Article 14 (subsequently 13) was to deal with "specific situations justifying measures inspired by equitable considerations".

Now, as we know, the Commission relies on the changes made to Article 13 by Regulation No 1672/82. Let us examine them closely. Apart from the procedural rules in the second paragraph, the old text confined itself as I have already pointed out, to allowing for the possibility of repayment "in situations resulting from special circumstances in which no negligence or deception may be attributed to the person concerned". The new version consists of three paragraphs. The first provides that repayments may be effected in the same situations (that is to say resulting from special circumstances, etc.), but — and this is the point — in so far as they are "other than those referred to in Sections A to D". The meaning of that addition is obvious: the rule is now *clearly residual;* that is, it applies only to circumstances which are *not* governed by the rest of the regulation.

The second paragraph seems to change course. A refund, it says, may be granted even "in cases where [it] could not be granted under Sections B to D because of the failure of the person concerned to comply with procedural requirements". Does that constitute a return to the "catch-all" approach of the old Article 13? Perhaps. In any case, a return qualified by too many precautions to be really significant. In addition to the existing condition regarding the absence of negligence or deception, the legislature in 1982 required that it be established whether the "other conditions required for repayment" mentioned in Sections B, C and D were satisfied; and, as if that were not enough, paragraph (3) provides that "The repayment or remission may be made subject to special conditions".

At this point, the picture seems to me clear. The new Article 13 retains very little of the old: cautious, rigid, restricted to specific circumstances, it is perhaps doubtful whether it can be defined as a general provision. And, if that is the case, the Commission's view ceases to be

valid. It is in fact overturned. In other words, the fact that non-compliance with procedural requirements is now explicitly included among the circumstances enabling a repayment to be made does not imply that such non-compliance was not covered by the previous text. If anything it leads to the opposite conclusion: pursuing its intention to limit the scope of the provision, in 1982 the legislature merely redefined and circumscribed a hypothesis which, from the equitable viewpoint of the previous legislature, could be brought within the extremely broad expression "special circumstances".

The Commission's view, it is true, is supported by a textual argument: the second recital in the preamble to Regulation No 1672/82 states that the 1979 Regulation "does not ... provide for ... repayment" where procedural requirements have not been observed. But does that invalidate my reading of the old Article 13? Certainly not. I will explain myself. The second recital would have the meaning attributed to it by the Commission if the new rule was interpretative and if, in addition, it was wider in scope than the old one. However, that is not the case. As I have said, by comparison with the old provision, its approach is legalistic and its scope is limited: to apply it retroactively, even if only for the purpose of interpretation, is therefore impossible. The old maxim *odiosa sunt restringenda* is still relevant.

7. From the foregoing it follows that, of the two complaints referred to in paragraph 4, one has a valid basis: not the allegation of misuse of powers, which is not borne out by the facts since the defendant only erred in interpreting certain rules, but the submission that Regulation No 1430/79 was infringed. The decision of 9 July 1982 is therefore vitiated. Schollershammer, however, seeks more than a declaration to that effect. It claims that in addition the Court should find that repayment was justified in the circumstances and bases its argument on the fact that the Commission waived its right to exercise its discretionary power of appraisal when it concluded that it did not have to apply Article 13.

That claim is groundless. In proceedings regarding the legality of a measure the Court may only declare the measure void; and it is quite obvious that the refusal to make a repayment cannot, as the applicant claims, be regarded as a penalty, so as to constitute a matter with regard to which the Court has unlimited jurisdiction (Article 172 of the Treaty).

8. For all the reasons set out above I propose that the Court should uphold in part the action brought on 21 October 1982 by Papierfabrik Schoellershammer against the Commission and should declare void the decision of 9 July 1982 relating to proceedings under Article 13 of Council Regulation (EEC) No 1430/79 on the repayment of import duties. However, I suggest that the claim for a declaration that such a repayment is justified in the circumstances of the present case should be dismissed. I suggest in addition that the defendant, having been unsuccessful, should be ordered to pay the costs.