REPORT FOR THE HEARING
in Case C-273/90 *

I — Facts and procedure

Legal background to the dispute

1. The conditions under which the competent authorities are to undertake the post-clearance recovery of import duties or export duties which have not been required of the person liable are laid down by Council Regulation (EEC) No 1697/79 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). In accordance with Article 2 of that regulation, where the competent authorities find that all or part of the amount of import duties or export duties legally due on goods entered for a customs procedure involving the obligation to pay such duties has not been required of the person liable for payment, they are to take action to recover the duties not collected. However, such action may not be taken after the expiry of a period of three years from the date of entry in the accounts of the amount originally required of the person liable for payment or, where there is no entry in the accounts, from the date on which the customs debt relating to the goods in question was incurred.

Action for recovery is commenced by the person concerned being notified of the amount of import or export duties for which he is liable. Article 3 of Regulation No 1697/79 is worded as follows:

'When the competent authorities find that it is following an act that could give rise to criminal court proceedings that the competent authorities were unable to determine the exact amount of the import duties or export duties legally due on the goods in question, the period laid down in Article 2 shall not apply.

Under these circumstances, the competent authorities shall take action for recovery in accordance with the provisions in force in this respect in the Member States.'

2. In 1983, the German customs authorities carried out an inspection at the premises of the company Meico-Fell at Tröse/Weinheim in the Federal Republic of Germany (hereinafter referred to as 'Meico-Fell'). In the course of that inspection it was discovered that Meico-Fell had sent raw racoon skins to a firm in Canada for dressing and had re-imported them after dressing in December 1980, declaring them as duty-free raw skins of other animals under tariff heading 4301 500 00. As a result, there was an underpayment of customs duty totalling

* Language of the case: German.

DM 2 764.85. By a notice of post-clearance recovery of 24 May 1984, the customs authorities of the Hauptzollamt (Principal Customs Office) Darmstadt demanded payment of the sum underpaid.

3. Following an unsuccessful administrative appeal, Meico-Fell brought proceedings before the Hessisches Finanzgericht (Finance Court, Hesse). Considering that the proceedings posed problems of interpretation of Community law, the Hessisches Finanzgericht, by order of 28 August 1990, decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following question:

'Is Article 3 of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not 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) to be interpreted as meaning that "an act that could give rise to criminal court proceedings" refers only to an act specifically covered by the criminal law of the Member State concerned, or does it extend to any infringement of tax provisions carrying a longer period of limitation?'

4. According to the court referring the question, when the notice of post-clearance recovery was issued on 24 May 1984, the three-year period mentioned in Article 2 of Regulation No 1697/79 had expired. In German law, tax evasion constitutes an act that could give rise to criminal court proceedings whereas negligence in the matter of tax declarations (or customs declarations), which is involved in the present case, constitutes only an administrative irregularity (*Ordnungswidrigkeit*), although Paragraph 169 of the Abgabenordnung (General Regulation on Taxation) also provides for a limitation period of five years in the case of such an irregularity. The Hessisches Finanzgericht was consequently in doubt on the question whether Article 3 of Regulation No 1697/79 must be interpreted as meaning that the expression 'an act that could give rise to criminal court proceedings' covers all acts in respect of which limitation operates in national law only at the end of a longer period of limitation or whether the exceptions to the general rule on limitation are to be confined to conduct actually constituting acts liable to criminal court proceedings.

II — Procedure before the Court

5. The order of the Hessisches Finanzgericht was registered at the Court on 11 September 1990.

6. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice (EEC), written observations were lodged on behalf of

Meico-Fell, by Wolfgang Wirth, Rechtsanwalt, Frankfurt;

the Commission of the European Communities, by René Barents, a member of its Legal Service, acting as Agent, assisted

by Roberto Hayder, an official of the Federal Ministry of Economic Affairs of the Federal Republic of Germany.

7. 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.

8. By decision of 24 April 1991, adopted pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Sixth Chamber.

III — Summary of the written observations submitted to the Court

9. *Meico-Fell* states first of all that most German writers on customs law interpret Articles 2 and 3 of Regulation No 1697/79 as meaning that acts that could give rise to criminal court proceedings within the meaning of those two provisions comprise all fiscal infringements, including administrative fiscal infringements (*Steuerordnungswidrigkeiten*), in particular the negligent underpayment of tax as defined in Paragraph 378 of the Abgabenordnung. That proposition is based on the fact that Community law does not make any distinction between *Straftat* (criminal offence) and *Ordnungswidrigkeit* (administrative irregularity). Other writers, however, take the view that, for reasons of policy, administrative irregularities are deliberately kept separate from the field of criminal offences in Germany and that Regulation No 1697/79 is not applicable to administrative irregularities within the meaning of German law. In Article 3 of Regulation No 1697/79 the Community legislature left it to the national legislatures of the Member States to determine when a criminal offence is committed and consequently, for the purposes of Article 3 of that regulation, account should be taken of the definitions of the concept of criminal offence which apply in Germany. The derogation provided for in Article 3 of Regulation No 1697/79 is not therefore applicable to administrative irregularities within the meaning of German law (see Kruse, *Zölle, Verbrauchssteuern, Europäisches Marktordnungsrecht*, pp. 127-128, with further references).

10. Meico-Fell then states that the system of post-clearance recovery should be uniform throughout Community territory. Such uniformity should include uniform rules on limitation. The regulation refers only to conduct which is *unlawful* under the national provisions in force and takes no account of the identity of the person who committed the unlawful act. The normal limitation period is the three-year period laid down in Article 2 of Regulation No 1697/79. The exception to that limitation period allowed by Article 3 of that regulation applies only to particularly serious acts liable to criminal court proceedings. It follows from the wording of the first paragraph of Article 3 that, as regards the question of the definition of the act subject to criminal court proceedings, it refers to the respective national legislation of the Member States. In Germany, the legislature has drawn a clear distinction between a criminal offence and an administrative irregularity. The wording of the first paragraph of Article 3 thus presupposes differences in national law and makes clear that the limitation period should be extended only for the most serious cases.

Since the German legislature distinguishes between a criminal offence and an administrative irregularity, the interpretation of Article 3 of Regulation No 1697/79 should also take account of this difference.

11. The *Commission* refers first of all to the wording of Article 3(2) of Regulation No 1697/79. It considers that this provision indicates that only those acts which, under the legal system of the Member State whose customs authorities demand post-clearance recovery, may be classified as genuine criminal offences, that is to say offences covered by the provisions of criminal law in the narrow sense. Thus, acts liable to administrative penalties under German law, of the kind which also exist in other Member States, are not covered. A comparison of the English, French and Italian versions of Article 3 of Regulation No 1697/79 confirms this impression. The English version runs 'an act that could give rise to criminal court proceedings'; the French version runs 'acte passible de poursuites judiciaires répressives', whilst the Italian text runs 'atto passibile di un'azione giudiziaria repressiva'. All those language versions appear to have in view an act which in substance is subject to criminal law or an act which is punishable in criminal proceedings. If the wording of Article 3 of Regulation No 1697/79 were to be taken as referring to the criminal law of the Member States, the question referred for a preliminary ruling would receive a clear answer. However, owing to the differences in criminal offences in the field of revenue law in the Member States, this could lead to different results in the application of Regulation No 1697/79, depending on the Member State in which the duties are to be recovered. The Commission cites in this regard the judgment of the Court of Justice in Case 327/82 *Ekro* [1984] ECR 107.

12. The Commission then examines the situation which Regulation No 1697/79 was intended to remedy. One of the cornerstones of that regulation is the principle laid down in Article 2 that action to recover duties should take place in all those situations in which responsibility for non-collection lay with the person liable for payment of duties. This may even be the case when the non-collection was due to an error on the part of the customs authorities which the person liable ought to have noticed. Thus, the area of responsibility of the person liable may be defined very widely since it covers the case of an objective error in the customs declaration. However, an exception to that principle is possible if the reason for the non-collection lay in the sphere of responsibility of the customs authorities.

For reasons concerning the protection of legitimate expectation, post-clearance recovery had to be limited to three years. However, upon the expiry of the three-year period, the right to protection of the person liable for payment may no longer be relied upon once a proper determination of the duty owed is not possible 'following an act that could give rise to criminal court proceedings'. In this case, however, the person liable for payment does not entirely lose his right to rely on the principle of the protection of legitimate expectation. An action for post-clearance recovery is then governed by the relevant provisions in force in the Member State. In such circumstances, the person liable for payment must expect the limitation period to be longer.

13. The Commission goes on to state that an objective criterion for distinguishing those cases in which the protection of expectation based on the three-year limitation period is forfeited must be found. Given the wide scope of application of the

basic principle of the first subparagraph of Article 2(1), the only reasonable objective criterion is whether the original incorrect determination is attributable to the person liable for payment. In the case of an error committed by the authorities which the person liable for payment or his staff did not notice when they could have noticed it and this circumstance does not involve a breach of any rule, the three-year limitation period should apply. Where, however, the person liable for payment ought to have noticed the error made by the customs authorities, there is objective justification for reducing the protection afforded to that person's expectations. Upon this interpretation, the concept of 'an act that could give rise to criminal court proceedings' has a scope covering more than criminal offences provided for in the legal systems of the Member States and thus goes beyond the literal meaning of the rule.

14. The Commission concludes by stating that it is for the Court of Justice to lay down objective criteria for ensuring the uniform application of the concept of 'an act that could give rise to criminal court proceedings'. Answering the question whether an actual infringement of a rule is covered by that concept is a matter for the national court. Moreover, the limitation period to be observed upon the actual application of the first paragraph of Article 3 of the regulation follows from the reference to the provisions of the Member States. The question as to which limitation period should be applied instead of the three-year period does not arise in Community law.

15. The Commission proposes to answer the question submitted for a preliminary ruling as follows:

'Article 3 of Council Regulation (EEC) No 1697/79 of 24 July 1979 is to be interpreted as meaning that "an act that could give rise to criminal court proceedings" refers not only to an act specifically covered by the criminal law of a Member State but also to culpable infringements of provisions concerning customs declarations which are intended to ensure that the person liable for payment observes a duty to exercise care.'

G. F. Mancini
Judge-Rapporteur