OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 16 May 1989 *

Mr President,
Members of the Court,

1. The Finanzgericht (Finance Court) München has referred to the Court a question which seeks, in substance, to determine the effects that an error made by the national authorities regarding the application of Community law has on traders acting in good faith.

2. The facts are as follows. Between 30 January and 5 March 1983, Friedrich Binder GmbH & Co. KG (hereinafter referred to as 'Binder') imported 12 consignments of frozen Morello cherries from Yugoslavia. The German customs authority, the Hauptzollamt (Principal Customs Office) Bad Reichenhall, fixed the customs duty at the preferential rate of 10.4% shown in the German *Gebrauchszolltarif* (customs tariff manual) and applicable from 1 January 1983.

3. That rate, however, was the rate contained in a proposal for a regulation presented by the Commission to the Council on 16 July 1982. The rate actually applicable was 13%, laid down in Council Regulation (EEC) No 1272/80 of 22 May 1980 on the conclusion of the Interim Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia on trade and trade cooperation. [1] The proposal for a regulation presented by the Commission was never adopted. By an order of 9 March 1983, the German Finance Minister corrected the rate of duty applicable from 1 January 1983 by fixing it again at 13%. The German authorities issued three final notices on 28 and 29 March and 13 June 1983 requiring the post-clearance payment of customs duties representing the amount unpaid.

4. In response to an objection by Binder, the Federal Republic of Germany requested the Commission, by a letter communicated on 5 July 1985, to decide whether there was justification for waiving post-clearance recovery of the import duties, in accordance with Article 6 of Commission Regulation (EEC) No 1573/80. [2] Article 5(2) of Council Regulation (EEC) No 1697/79 [3] 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', provided that that person acted in good faith and the customs declaration was in order.

* Original language: French.

1 — OJ L 130, 27.5.1980, p. 1.

2 — Commission Regulation (EEC) No 1573/80 of 20 June 1980 laying down provisions for the implementation of Article 5(2) of Council Regulation (EEC) No 1697/79 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 (OJ L 161, 26.6.1980, p. 1).

3 — 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 (OJ L 197, 3.8.1979, p. 1).

5. By Decision 8/85 of 5 November 1985 (hereinafter referred to as 'the decision'), the Commission declared that post-clearance recovery should be effected.

6. The Finanzgericht München, to which Binder appealed against the rejection of its objection by the customs authorities, has asked the Court to rule on the validity of that decision.

7. The parties in the main proceedings have not submitted observations to the Court. It is, however, clear from the order for reference that the validity of the Commission's decision is contested on the ground both of a breach of the principle of the protection of legitimate expectations and of a failure to observe Article 5(2) of Regulation No 1697/79. The two points will be dealt with in turn.

8. I have already had occasion, in *Padovani* v *Amministrazione delle finanze dello Stato,*[4] to express my views on the application of the principle of the protection of legitimate expectations in cases of error on the part of national authorities. I pointed out that in its judgment in *Hauptzollamt Krefeld* v *Maizena*[5] the Court declared that

'a practice of a Member State which does not conform to Community rules may never give rise to legal situations protected by Community law'.[6]

9. But, as I stated on that occasion, I was of the opinion that the scope of that judgment should be determined with regard to the previous decisions in which the Court acknowledged the existence of the principles of legal certainty and the protection of legitimate expectations in the Community legal order.[7] By definition, those principles are aimed at protecting situations which are unlawful from a strictly legal point of view, in order to maintain a balance between equity and the rule of law. To refuse to apply those principles to an error of the authorities would be to deprive them to a large extent of their effects.

10. The Commission contends that to confirm the existence of legitimate expectations in the *Gebrauchszolltarif,* which has a purely declaratory status, would mean calling into question the primacy of Community law, since only regulations published in the *Official Journal of the European Communities* have legal force.

11. On this point I should like to refer to the Opinion expressed by Mr Advocate General Reischl in *Amylum* v *Council,*[8] in which he stated that a published proposal

'under the case-law of both the Court of Justice and national courts may . . . be regarded as a factor relevant to the question of the protection of legitimate expectation'.[9]

But a published proposal has no binding force and, while it may, apparently, produce

4 — Case 210/87 *Padovani* v *Amministrazione dello finanze dello Stato* [1988] ECR 6177, Opinion at p. 6194.

5 — Case 5/82 *Hauptzollamt Krefeld* v *Maizena GmbH* [1982] ECR 4601.

6 — Paragraph 22.

7 — Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019.

8 — Case 108/81 *Amylum* v *Council* [1982] ECR 3107.

9 — p. 3149.

some effects such as those pointed out by Mr Reischl, it nevertheless does not have legal force in the strict sense of the term. The *Gebrauchszolltarif*, as I have stated, has purely declaratory status. Therefore, contrary to what the Commission claims, the mere fact that information in that manual is taken into consideration when determining whether or not a trader may have legitimate expectation does not have the effect of conferring legal force on it, or on any published proposal, or of thereby contravening the principle of the primacy of Community law.

12. The Commission also contends that an acceptance of Binder's claims would lead to an undermining of the unity and uniform application of Community law, the need for which was stressed by the Court in its judgments in *Racke* v *Hauptzollamt Mainz* [10] and *Decker* v *Hauptzollamt Landau*, [11] by creating discrimination against traders in other Member States charged the correct rate of duty.

13. Quite apart from the fact that there does not seem to have been any economic discrimination inasmuch as Binder, which had proceeded on the basis of the incorrect tariff, can no longer pass on to its customers the import duties collected by post-clearance recovery, the Commission's argument disregards the fact that the situation here is highly unusual — I might even say pathological — and stems from an error, which the Commission itself admits is extremely rare, on the part of national authorities.

14. In fact the Commission appears, implicitly, to be asking the Court to rule that the principle of the protection of legitimate expectations may be relied on only with regard to a text emanating from a Community institution and not with regard to a text issued by national authorities, even if it relates to a piece of Community legislation. In other words, the Commission seems to consider it possible for its own errors to be taken into consideration but not for the same approach to be adopted with regard to errors made by national authorities.

15. It is true that in *Salerno* v *Commission and Council* the Court declared that

'a resolution of the Parliament is not binding and cannot give rise to the legitimate expectation that the institutions will comply with it'. [12]

But in its judgment of 5 October 1988 in Case 129/87 *Decker (née Fingruth)* v *Caisse de pension des employés privés* [13] the Court acknowledged that a joint practice of a Community institution and a national authority could arouse legitimate expectations in a Community official. If legitimate expectations may be relied upon with regard to an administrative practice followed by both a national authority and a Community institution, I find it difficult to see why that should not be the case with regard to a national text, even one with purely declaratory status, whose purpose is to inform the public of the provisions of Community law.

10 — Case 98/78 *Firma A. Racke* v *Hauptzollamt Mainz* [1979] ECR 69.

11 — Case 99/78 *Weingut Gustav Decker KG* v *Hauptzollamt Landau* [1979] ECR 101.

12 — Joined Cases 87 and 130/77, 22/83, 9 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523, paragraph 59.

13 — Case 129/87 *Decker (née Fingruth)* v *Caisse de pension des employés privés* [1988] ECR 6121, paragraph 15.

16. I am not, of course, suggesting that the Court should declare that, by virtue of the principle of protection of legitimate expectations, no errors made by national authorities in the application of the Common Customs Tariff can ever give rise to post-clearance recovery. I am merely proposing that it should be declared that such a principle is applicable in such circumstances. It must then be determined whether, in the circumstances of the case, Binder is entitled to challenge the Commission's decision in reliance on the principle of the protection of legitimate expectations.

17. Let us now consider Article 5 of Regulation No 1697/79. That article, it will be remembered, refers to 'an error . . . which could not reasonably have been detected by the person liable'.

18. In order to refute Binder's claims the Commission relies in that regard on the judgment in *Van Gend & Loos* v *Commission*,[14] which concerns the 'comparable' (according to the Commission) provisions of Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties.[15] The first paragraph of that article provides that 'import duties may be repaid or remitted in situations resulting from special circumstances in which no negligence or deception may be attributed to the person concerned'. The Court declared, in that case, that

'even if Article 13 of Regulation No 1430/79 can be interpreted as being identical in meaning to the concept of *force majeure*, recognition of a case of *force majeure* none the less presupposes that the external cause relied upon has irresistible and inevitable consequences to the point of making it objectively impossible for the persons concerned to fulfil their obligations. In this case, since the applicants are competent professionals, the fact of having been furnished with invalid certificates of origin cannot be regarded as an unforeseeable and inevitable circumstance which occurred in spite of the exercise of all due care. A customs agent, by the very nature of his functions, renders himself liable both for the payment of import duty and for the validity of the documents which he presents to the customs authorities'.[16]

19. However, I am not sure that the concepts contained in Article 13 of Regulation No 1430/79 and Article 5 of Regulation No 1697/79 are identical, as the Commission suggests. The first regulation concerns all those cases where, for whatever reason, customs duties *which have been paid or are 'payable'* are to be repaid or remitted. And it lists the reasons which give grounds for such repayment or remission, including *inter alia* cases where the amount of the customs debt has been fixed at a level higher than that lawfully due, where goods are refused by the importer because they are defective or do not comply with the terms of the contract, where there has been an error on the part of the consignor and

14 — Joined Cases 98 and 230/83 *Van Gend & Loos NV and Another* v *Commission* [1984] ECR 3763.

15 — OJ L 175, 12.7.1979, p. 1

16 — Joined Cases 98 and 230/83, cited above, paragraph 16

finally — the case covered by Article 13 — 'in situations resulting from special circumstances in which no negligence or deception may be attributed to the person concerned'. This in fact adds a further ground for repayment or remission of the customs debt and the article, quite reasonably, excludes repayment or remission in the event of any deception attributable to the person concerned, that is to say bad faith, or negligence, meaning carelessness or recklessness. It would appear that the judgment in *Van Gend & Loos*, which did not rule explicitly on whether those provisions are identical in meaning to the concept of *force majeure*, merely applied that negligence proviso, and observed that a customs agent who, by the very nature of his functions, renders himself liable for the validity of the documents which he presents to the customs authorities should have checked that the certificates of origin with which he had been furnished were valid.

20. The scheme of Regulation No 1697/79 is quite different. That regulation does not involve the repayment or remission of customs duties but the very opposite — their post-clearance recovery. It does not specify the causes of the failure to charge duty. Article 1 merely refers in general to 'import duties or export duties . . . for which, for whatever reason, payment has not been required of the person liable for payment'. And Article 5 lays down three limits to recovery:

(i) no action whatever may be taken for recovery when the amount charged was lower than the amount legally due and was calculated on the basis of information given by the competent authorities themselves which is binding on them;

(ii) again, no action may be taken when the amount charged was calculated on the basis of provisions of a general nature subsequently invalidated by a court decision; this provision, like the first, appears in paragraph (1) of the article;

(iii) the competent authorities may refrain from taking action for post-clearance recovery in the event of an error which could not reasonably have been detected by the person liable: this is contained in Article 5(2), which is in issue in the present case.

21. Commission Regulation (EEC) No 1573/80 of 20 June 1980, which concerns the implementation of Article 5(2), cited above, lays down the circumstances in which the competent authority of the Member State is to request the Commission to take a decision. The Court has already had occasion to rule that 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'. [17]

22. Before considering the application of Article 5(2) in the present case, I consider it necessary to draw the Court's attention to the provisions of paragraph (1) of that article. It is true that the question to be determined relates to the validity of the Commission's decision solely with regard to paragraph (2), but it must nevertheless be asked whether the Commission must not include among the factors to be taken into consideration when adopting its decision an

17 — Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199, paragraph 22.

initial verification that the legal requirements for post-clearance recovery are fulfilled, and therefore the verification that the provisions of Article 5(1) are not applicable in the relevant case. If the error comprises all the features set out in paragraph (1) — that is to say, if it emanates from the competent authorities and appears in information binding upon them — there is an absolute bar to post-clearance recovery. And it would be difficult to understand how, in such an event, the Commission could be entitled to determine whether or not there was cause to recover the customs duty in the light of the requirements set out in paragraph (2). Ordinary logic requires that, before considering whether action should be taken for post-clearance recovery, the Commission should verify whether the legal requirements for that recovery are fulfilled. If that requirement were not acknowledged, the Commission could decide to take action for post-clearance recovery in cases where such recovery was prohibited by Article 5(1).

23. The Court will be called upon to provide an explicit answer to such difficulties, for in Case 80/89, which is very similar to the present case, the Finanzgericht Hamburg has referred another question to the Court relating to the possible application of Article 5(1).

24. Sooner or later, therefore, the Court will have to state what is meant by the words 'information given by the competent authorities themselves which is binding on them'.

25. It is well known that a person liable for customs duty may ask the authorities for their opinion on certain aspects of the rules governing the goods which he wishes to declare. But legal writers took the view that advice given in such circumstances by the customs authorities had no legal significance and was only a point of information not binding on the authorities.[18] By referring to 'information given by the competent authorities themselves which is binding on them', was Article 5(1) intended to exclude the advice given by customs authorities which legal writers have hitherto regarded as not binding on the administration, or was it, on the contrary, intended to mean that such advice was henceforth to be binding on customs authorities, thus making any post-clearance recovery impossible?

26. In my view, only the second interpretation can be accepted. It must be observed that Article 5(1) provides for two cases in which the possibility of post-clearance recovery is excluded: either where the error stems from 'information' given by the competent authority itself (first indent), or where it arises out of 'provisions of a general nature subsequently invalidated by a court decision' (second indent). If the Community legislature had wished to include in the concept of 'information' provisions of a general nature such as administrative instructions or regulatory texts, it would also have used in the first indent the expression 'provisions of a general nature', which appears in the second indent. Article 5(1), which is merely an application of the principle of the protection of legitimate expectations, is therefore to be understood as meaning that such expectations may be based either on an individual piece of information given by the customs authorities to a person making a customs declaration or to any other trader concerned or on a text of a general nature subsequently declared invalid by a court of

18 — Claude J. Berr & Henri Tremeau, 'Le droit douanier', *Régime des opérations de commerce international en France et dans la CEE*, 2nd edition, No 252, p. 177.

law. Legitimate expectations may not, however, in the absence of any finding of invalidity, be founded on a text of general scope which is contrary to provisions having force of law. To decide otherwise would be to overturn the hierarchy of legal rules. This is, in fact, the solution adopted in German law, since in a judgment of the Bundesfinanzhof (Federal Finance Court) [19] it has been held that a taxpayer may not plead that he has relied on provisions of a decree of the Federal Finance Minister which was contrary to provisions of a legislative nature. In that court's view, the contrary solution would make it possible to revoke legislative provisions by means of a general administrative decree. Legitimate expectations can therefore be protected only in the context of a *specific* legal relationship between the competent administrative authority and the person liable.

27. If, therefore, the first indent of Article 5(1) is to be interpreted as referring only to *particular* information given by customs authorities to a particular trader, that provision would be deprived of any useful effect if such information were not binding on the customs authorities since, in that event, the provision would no longer be applicable and would in a way be deprived of all its substance. Professor Berr expresses the same view when, in his commentary on Article 5 of Regulation No 1697/79, he refers explicitly to his remarks on requests for advice from persons making customs declarations. [20]

28. Be that as it may, the *Gebrauchszolltarif* cannot, as I have stated, be regarded as information given by the competent authority because of its general nature and because of the fact that it does not refer to the individual situation of a particular trader. The first indent of Article 5(1) is not, therefore, the basis on which the Court must assess the effect that the *Gebrauchszolltarif* and the error contained therein have on the outcome of this case.

29. It is now necessary to consider whether, by virtue of Article 5(2) of Regulation No 1697/79, the Commission was justified in ordering the post-clearance recovery, that is to say whether in fact Binder could reasonably have detected the error involved. Opposing arguments have been advanced on either side.

30. On the one hand, it is pointed out in the order for reference that the *Official Journal of the European Communities* is expensive to obtain and is not always available in customs offices, that it is sometimes difficult to determine which Community regulation is applicable, that everyone always relies on the *Gebrauchszolltarif* published by the Federal Finance Ministry, that tariff regulations are usually published in January or February with retroactive effect from 1 January of the current year, and finally that proposals presented by the Commission are, in general, adopted by the Council.

19 — Judgment of 18 March 1986, VII R 55/83 BFHE 146, 294.

20 — Claude J. Berr & Henri Tremeau, 'Le droit douanier', cited above, No 313-1, p. 205.

31. The Commission, on the other hand, maintains that the *Gebrauchszolltarif* is purely declaratory in character, as the commentary on the manual itself indicates [21] and that any trader who consults only the manual must accept the risk that it may be at odds with the texts published in the *Official Journal of the European Communities*.

32. I have already stated my opinion on the question whether the principle of the protection of legitimate expectations may be applied here without in any way calling into question the primacy of Community law.

33. I do not, however, consider that the arguments advanced by the national court with regard to the cost and difficulty of obtaining the *Official Journal of the European Communities* are relevant. In any event, such arguments have no weight in national proceedings where, as a general rule, there is a presumption that the law is known to all once it has been duly published.

34. Furthermore, Article 5(2) of Regulation No 1697/79 is undeniably an exception to the principle *nemo censetur ignorare legem* and to the principle of the primacy of Community law. The exception must therefore be interpreted restrictively.

35. In that regard, I consider that, as the Court hinted in its judgment in *Van Gend & Loos* in connection with Regulation No 1430/79, the nature of the business carried on by the person liable is one of the most important criteria to be borne in mind when determining whether the error could reasonably have been detected. It is up to the trader habitually importing a given type of product, whether as a customs agent or as an import-export company, to acquaint himself with the rates of duty in force in the relevant field, either through regular reading of the *Official Journal of the European Communities* or from the information distributed by the trade and professional organization in his sector. He may, of course, risk not taking such precautions but he must then bear all the consequences. The situation would be quite different, on the other hand, in the case of an undertaking which occasionally imports such goods but whose usual commercial activity is not arranged for importing them.

36. Finally, there is nothing to prevent a trader from asking the customs authorities beforehand what the tariff heading for the goods he intends to import will be and thus obtaining advice from those authorities which, as we have seen, is binding on the administration under Article 5(1) and, even if it contains any errors, will protect him from action for post-clearance recovery.

37. I am therefore of the opinion that Binder could reasonably have detected the error in question.

21 — *Kommentar Zollrecht*, paragraph 21, point 44, p 17.

38. I therefore propose that the Court should answer the question as follows:

Consideration of the question submitted to the Court by the Finanzgericht München has disclosed no factor of such a kind as to affect the validity of Decision No 8/85 of 5 November 1985 addressed to the Federal Republic of Germany, in which the Commission found that action must be taken for the post-clearance recovery of import duties in a particular case.