OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 8 March 1990 *

Mr President,
Members of the Court,

1. Before the competent German courts, Deutsche Fernsprecher GmbH is challenging the validity of the post-clearance recovery of import duties amounting to DM 27 114.70 on certain items of telephone equipment which were subject to outward processing.

2. Article 5(2) 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) 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 declarations is concerned.'

3. 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 (Official Journal 1980, L 161, p. 1) contains *inter alia* the following two provisions:

'*Article 2*

Where the competent authority of the Member State in which the error was committed which resulted in insufficient duty being collected *is able to ascertain* by its own means *that* all the *conditions* referred to in Article 5(2) of the basic regulation are fulfilled, it shall decide *not* to take action for the post-clearance collection of the uncollected duties, *provided that the amount of the duties involved is less than ECU 2 000.* [1]

Article 4

Where the competent authority of the Member State in which the error was committed is not able to ascertain by its own means whether all the conditions set out in Article 5(2) of the basic regulation are fulfilled, *or where the amount of the duties involved is equal to or greater than ECU 2 000*, it shall request the Commission to take a decision on the case, submitting to it all the necessary background information.'

4. In the light of those provisions, the Bundesfinanzhof referred to the Court for a

* Original language: French.

1 — In the case of all passages in italics the emphasis is added by me.

preliminary ruling the two questions which I shall now examine in turn.

I — The first question

5. The first question is worded as follows:

'Is the relevant Community law, in particular Article 4 of Commission Regulation (EEC) No 1573/80 of 20 June 1980, to be interpreted as meaning that, in the event of post-clearance recovery of customs duty of an amount equal to or greater than ECU 2 000, it is not necessary to request the Commission to take a decision on the waiver of post-clearance recovery where the competent authority of the Member State in which the error resulting in the non-collection of duty was committed takes the view that the conditions set out in Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 are not fulfilled?'

6. Owing to the terms in which the provisions in question are couched, my initial reaction was to propose that a negative reply should be given to that question and that the Court should rule that, even in the situation referred to, the competent authority of a Member State must request the Commission to take a decision.

7. In fact, Article 4 very clearly conveys the impression that it is contrasting two situations: on the one hand, a situation in which the competent authority is not able to satisfy itself that all the conditions laid down in Article 5(2) of the basic regulation are fulfilled, and, on the other, a situation in which the amount in question is greater than ECU 2 000, whatever view, moreover, the authority may have formed with regard to the conditions laid down in Article 5(2).

8. That impression is further reinforced by the wording of the third recital in the preamble to the Commission Regulation, which is in the following terms:

'Whereas in cases where the competent authorities of the Member States are unable to ascertain by their own means that all the conditions stipulated in Article 5(2) of Regulation (EEC) No 1697/79 are fulfilled, and *in any event* where the duties which have not been collected total ECU 2 000 or more, *the action to be taken* by the said authorities should be subject to a decision by the Commission after consultation with a group of experts composed of representatives of all Member States.'

9. Certainly, the German language version of this recital is different from the other language versions, inasmuch as the second part thereof is not introduced by words such as 'und *in allen Fällen*, wenn der Betrag ... 2 000 ECU oder mehr beträgt', which would better accord with the expressions used in the other versions, namely 'og under alle omstændigheder hvis', 'et, dans tous les cas, lorsque', 'e in tutti casi qualora', 'en, in elk geval, wanneer'.[2]

10. But is not the contrast, to be found in the German language version as well, between the first part of that recital and the second, and the use of the expression 'the action to be taken by the said authorities should be subject to a decision by the Commission' indicative of the fact that the obligation to request the Commission to take a decision arises whenever the amount

2 — I have deliberately contrasted only the official Community language versions at the time when the regulation was adopted.

in issue is greater than ECU 2 000? If the legislature had wished, in the second part of the sentence, simply to refer to a situation in which the competent authorities are able to ascertain by their own means that the conditions stipulated in Article 5(2) are fulfilled, it would have been easy for it, instead of using the wording 'and in any event' to have stated 'and when they are in a position to do so, but the amount is equal to or greater than ECU 2 000.'

11. The Commission argues that there is no obligation to request it to take a decision where the competent authority is persuaded that the conditions of Article 5(2) are not fulfilled and points out that the practice of national customs authorities is to that effect. Moreover, it concedes in its written observations (p. 5 of the French version) that

'the wording of Regulation No 1573/80 does not necessarily dictate'

the interpretation contended for by it. The Commission adds that:

'Thus, the third recital of that regulation seems rather to be opposed to the practice generally followed.'

12. As against that practice, one may also point to the summary of the scope of Regulation No 1573/80 contained in the first recital in the preamble to Regulation (EEC) No 2380/89[3] of 2 August 1989, which replaced Regulation No 1573/80. There it is stated as follows:

'Whereas Commission Regulation (EEC) No 1573/80, as amended by Regulation (EEC) No 946/83, laid down provisions for the implementation of Article 5(2) of Regulation (EEC) No 1697/79; whereas those provisions consist mainly of procedural rules specifying the circumstances in which the competent authorities of the Member State may decide for themselves whether or not to take action for post-clearance recovery and the circumstances in which such decision must be taken by the Commission; whereas *a Commission decision is always required where the duties in question total ECU 2 000 or more.*'

13. The last part of that recital also gives the impression that, at the time when it adopted the former regulation, which is at issue in this case, the Commission sought to ensure the harmonization of the practices of the Member States whenever the amount of duties in question was of a certain order of magnitude.

14. However, the arguments which may be adduced in support of the Commission's point of view, which were also supported, at any rate at the hearing, by the Spanish Government, do not however lack weight either.

15. First of all, it follows from Article 2(1) of the basic regulation (Council Regulation No 1697/79, mentioned above) that:

'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 obli-

3 — Commission Regulation (EEC) No 2380/89 of 2 August 1989 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 225, 3.8.1989, p. 30).

gation to pay such duties has not been required of the person liable for payment, they shall take action to recover the duties not collected.'

16. In its judgment of 21 September 1989 in Case 68/88 *Commission* v *Greece* [1989] ECR 2965, the Court has again pointed out that the post-clearance recovery of duties constitutes an obligation imposed on the Member States.

17. Commission Regulation No 1573/80 is solely intended to lay down the conditions for the implementation of Article 5(2) of the basic regulation, that is to say the provision permitting waiver of recovery in certain cases. (In the first two recitals in the preamble to the regulation the words 'refrain from taking action for the ... recovery' may be found in three places.)

18. It may therefore be argued that Article 4 of the Commission regulation and the relevant recital in no way refer to the situation in which the national authorities are persuaded that the conditions laid down in Article 5(2) are not fulfilled, and that in such cases the question of requesting the Commission to take a decision cannot even arise, whatever the amount in question.

19. Viewed in that light, the phrase 'in any event' in the third recital in the preamble to Regulation No 1573/80 (except in the German version) is not intended, it may be argued, to extend Article 4 to the case where the national authority considers that it must effect post-clearance recovery but merely indicates that when there are weighty arguments for not proceeding to recover an amount of ECU 2 000 or more, the Commission must in any event be requested to take a decision, that is to say even when the national authority is in no doubt that all the conditions for forgoing recovery are fulfilled.

20. That is certainly the system under Regulation No 2380/89, which replaced Regulation No 1573/80. Article 2(b) thereof is essentially identical to the former Article 2, since it permits the competent authority to refrain from requesting the Commission to take a decision when it considers that all the conditions laid down in Article 5(2) of the basic regulation are fulfilled, provided that the amount in question is less than ECU 2 000. The new Article 4 is worded as follows:

'Where, other than in the cases referred to in Article 2, the competent authority of the Member State in which the error was committed *either considers that the conditions of Article 5(2) of the basic regulation are fulfilled*, or is in doubt as to the precise scope of the criteria of that provision with regard to a particular case, that authority shall submit the case to the Commission ...'

21. One might certainly be tempted to argue that when a new text, worded differently, replaces an earlier text which governs exactly the same subject-matter, an *a contrario* reasoning must be adopted to arrive at the conclusion that the text was amended in order to express a different idea.

22. In the present case, it seems to me, however, that it is possible to accept the argument that the new wording of Article 4 is specifically intended to remove the ambiguities of the former provision.

23. The Commission tells us, in fact, that the practice of the German customs authorities not to request the Commission to take a decision when they are persuaded that the conditions laid down in Article 5(2) are not fulfilled is in conformity with the practice of the other Member States and the Commission's position.

24. Since Regulation No 1573/80 was adopted following the favourable opinion of the Committee on Duty-Free Arrangements, on which all Member States are in principle represented, one is entitled to assume that the homogeneity of the practices followed by the Member States is in keeping with the manner in which the Commission and the Member States interpreted that provision at the time when they adopted it. Moreover, I basically agree with the arguments which the Commission deduces from the purpose of the provisions in question.

25. The Commission submits, first of all, that the uniform application of Community law is adequately guaranteed, even if the national authorities are not required to request it to take a decision whenever the amount at stake is equal to or greater than ECU 2 000. In addition to the arguments put forward by the Commission, which are summarized in the Report for the Hearing, I would point out that, under Article 3 of Regulation No 1573/80, the Member States must send to the Commission a list of the cases, giving a short summary of each case, in which they considered themselves able by their own means to ascertain that it was not necessary to effect recovery in respect of amounts less than ECU 2 000 (Article 2 of that regulation). Even if the regulation does not expressly so provide, the Commission could certainly make known to the Member States, for example within the Committee on Duty-Free Arrangements, its observations on cases in which, in its opinion, non-recovery was not justified.

26. On the other hand, discussion within the Committee on Duty-Free Arrangements of cases about which the Member States are doubtful and of those in which the waiver of recovery of customs duties equal to or greater than ECU 2 000 is in their opinion justified allows the progressive development of criteria enabling the Member States to identify cases in which they may themselves legitimately decide that the conditions laid down in Article 5(2) are not fulfilled.

27. On the other hand, I find much less convincing the Commission's argument that it is not necessary to confer a decision-making power on the Commission itself where the national authorities order post-clearance recovery because in that case the recovery of own resources is guaranteed. Ultimately, that could mean that, once the money has been paid over, everything else is secondary and that even an interpretation of the provisions of Article 5(2) which is unduly unfavourable to individuals should be tolerated.

28. In my view, the essential argument for an affirmative reply to the first question is the following: when an institution has drawn up and adopted rules after consultation with the representatives of the Member States and interprets those rules in a certain way (which does not moreover result in the grant to it of the maximum possible powers), and when that interpretation is corroborated by the practice of the Member States, which, in their capacity as members of the Council, are the authors of the basic regulation, and when furthermore that interpretation is enshrined in a new regulation, there is no reason to place reliance on the ambiguities of the former provision in order to apply an interpretation which runs counter to that given to it by the institution which is the author of that provision.

29. For all those reasons, I propose that the reply to the first question should be along the lines suggested by the Commission and the Spanish Government.

II — The second question

30. The second question is formulated as follows:

'In the event that Question 1 is answered in the affirmative, is Article 5(2) of Regulation (EEC) No 1697/79 to be interpreted as meaning that whether the error could not reasonably have been detected by the person liable is to be determined on the basis of an objective test and that it is therefore to be assumed that the error could have been detected where the party concerned could have ascertained it in the light of the relevant (published) provisions, which are neither unclear nor incomplete, or is the error to be treated as undetectable even where the customs authority, when twice providing (legally non-binding) information, conveyed to the party concerned its erroneous view on which the customs treatment was based?'

31. It should be noted straight away that the Bundesfinanzhof does not ask the Court in what circumstances the person liable must be deemed to be acting in good faith but only inquires about the definition of an 'error not detectable by the person liable'.

32. In fact, the Bundesfinanzhof tells us expressly (at the beginning of point II of its order for reference) that it is uncontested that the plaintiff acted in good faith and observed the rules relating to customs declarations.

33. Indeed, one cannot regard as acting in bad faith a person liable to pay duties who, prior to carrying out the first importation, applied to the customs authority to ask what the applicable rules were and who, after a first customs clearance transaction which did not result in the imposition of customs duties, had the question re-examined.

34. That shows that good faith and non-detectability of the customs error cannot always be regarded as constituting one and the same condition, contrary to what the Court held in its judgment of 22 October 1987 in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4225, paragraph 25).

35. As to the question whether one must apply an objective or subjective test in order to determine whether the person liable could or could not detect the error of the administration, I would point out straight away that I share the Commission's opinion that it is necessary to take into consideration both the objective aspects and the subjective aspects of each individual case. If Article 5(2) could come into play only where the (published) provisions are ambiguous or incomplete, its scope of application would be too narrow for it to be able to operate as an equitable provision in the manner intended.

36. Secondly, as the Hessische Finanzgericht, before which the case came at first instance, stated, it is of the very essence of an error that it is detectable, so that, in the final analysis, with the requisite knowledge and the necessary care, any error committed by an authority can be detected by those concerned.

37. Finally, it may be inferred from a word missing in the German version of Article 5(2) of Regulation No 1697/79 but which appears in the French and English versions in particular, namely the word 'raisonnablement', 'reasonably' ('error ... which could not reasonably have been detected by the person liable'), that subjective factors must also be taken into consideration.

38. I thus come to the second part of the question which is whether an error must be regarded as undetectable when the customs authority has twice supplied to the person liable wrong, yet non-binding, information.

39. Ought this reply to this question to be in the affirmative, on the basis of the principle that an importer is not to be expected to have wider knowledge than the customs officials themselves?

40. Like the Bundesfinanzhof and the Commission, I recognize that if this argument were accepted without qualification,

'it would be practically impossible to effect post-clearance recovery since the error must always have been committed by a competent official who has not examined in all its aspects a given factual or legal situation' (p. 9 of the Commission's observations).

41. I consider, however, that in certain circumstances the repetition of an error committed even by higher ranking customs authorities, even if in a form not binding on them, justifies the conclusion that the error was not detectable by the importer. Thus, at paragraph 50 of my Opinion of 2 March 1989 in Case 378/87 *Top Hit Holzvertrieb GmbH* v *Commission* [1989] ECR 1359, at p. 1369, I pointed out that:

'The error committed was not "reasonably detectable" by the person liable to pay the duties since even the customs authority responsible for checking the activities of the clearance offices did not detect it. Even a firm specializing in dealing in a certain kind of product cannot be expected to have greater oversight than better-informed customs officials, especially where such officials have in fact inspected the goods in question on numerous occasions'.[4]

42. Is it possible to go further and state that it is sufficient for the authority to express a mistaken view more than once with regard to the same problem for the error no longer to be regarded as detectable by the importer? I would remind the Court that the question raised by the Bundesfinanzhof expressly addresses the case of incorrect information being given on two occasions.

43. It does not seem to me possible to lay down any such general rule which would, moreover, amount to re-introducing in this way an 'objective' criterion likely to be applied more or less automatically. I consider that it is necessary to take into consideration each time the precise nature of the error committed by verifying whether the rules involved were complex, such as those governing outward processing or, as in the *Binder* case,[5] an error which is quite

4 — In the judgment of 23 May 1989 (ECR 1359) the case was decided on the basis of one of the other criteria contained in Article 5(2) of the basic regulation.

5 — Judgment of 12 July 1989 in Case 161/88 *Binder* [1989] ECR 2415.

easy to detect simply by comparing the German tariff in use and the Common Customs Tariff. The repetition of an error by the administration is obviously a factor indicating that the problem to be solved was a complex one. It is also necessary to examine whether the person liable habitually imports the type of product in question or whether it is a first transaction for him or a transaction carried out by him only occasionally. [6]

44. I therefore propose that the reply to the second question should be that the fact that the customs authority twice conveyed to the person concerned the mistaken view that it had formed and which underlay the customs treatment applied is not *in itself* sufficient to warrant the conclusion that the error was not detectable by the person concerned.

45. It is for the national court to examine whether the twice-repeated error of the customs authority, taken together with all the other circumstances of the case, might lead to the conclusion that the error was not detectable.

46. The finely balanced analysis carried out by the Commission in its observations could provide useful guidelines in this regard. The Commission acknowledges that this is a borderline case and that

'The relevant provisions in this case are provisions which in general do not make for easy reading at all. A non-lawyer or a lawyer not specialized in customs matters needed to study those provisions thoroughly in order to discover the rules actually applicable' (p. 10).

47. Nevertheless, it comes to the conclusion that, even if the customs authorities persisted in their incorrect point of view despite Deutsche Fernsprecher's expressed doubts about it, Deutsche Fernsprecher should nevertheless have seen that 'the position indicated by the customs authorities could not "genuinely", that is to say upon logical economic analysis, be correct' (Commission's observations, p. 11, first paragraph). In other words, Deutsche Fernsprecher should not have accepted that the law could be so illogical from an economic point of view as the authorities would have it believe. However, it may be argued in reply to that point that a mere reading of Article 2 of Council Directive 76/119/EEC of 18 December 1975 on the harmonization of provisions laid down by law, regulation or administrative action in respect of outward processing (Official Journal L 24, 30.1.1976, p. 58) may give the impression that importation totally free of duties is by no means unusual in this area. That article provides that:

'... outward processing arrangements means the customs arrangements whereby goods of whatever kind or origin may be temporarily exported outside the customs territory of the Community with a view to their being reimported in the form of compensating products, as defined in Article 3, *wholly* or partly free of import duties, after they have undergone one or more processing operations, as defined in Article 3, outside the customs territory of the Community.'

6 — See, in this regard, the Opinion delivered on 6 May 1989 by Mr Advocate General Darmon in the *Binder* case, paragraph 35 of the Opinion (ECR 2415, at p. 2424).

48. Moreover, the plaintiff cannot be criticized for not requesting the competent authorities to issue a notice binding on the latter Article 5(1) of Council Regulation No 1697/79, mentioned above, because, in accordance with Paragraph 23 of the 'Zollgesetz' (Customs Law), such notices may be issued only in connection with the tariff heading in which a product must be classified. Yet no problem of that kind arose in the present case.

49. In my opinion, a lot depends in the end on whether Deutsche Fernsprecher is, like *Binder*,

'a professional economic operator whose activities consist essentially in import-export transactions' (paragraph 22 of the *Binder* judgment, mentioned above),

or whether, at least, it already had some experience of outward processing, that is to say whether in the past it had already carried out such transactions in respect of which the customs duties had been correctly calculated. If that was not the case, I would consider it possible to take the view that the error was not detectable by Deutsche Fernsprecher.

Conclusion

50. I propose that the Court should reply as follows to the two questions raised by the Bundesfinanzhof:

'(1) Articles 2 and 4 of Commission Regulation No 1573/80 of 20 June 1980 must be interpreted as meaning that the national authorities are not required to request the Commission to take a decision on the possibility of not proceeding to effect the post-clearance recovery of customs duties although the amount of the uncollected duties is equal to or greater than ECU 2 000 if the national authorities consider that the conditions relating to the protection of legitimate expectations laid down in Article 5(2) of Regulation No 1697/79 are not satisfied and they therefore order recovery.

(2) Article 5(2) of Regulation No 1697/79 must be interpreted as meaning that a decision as to whether the person liable to pay duties could not detect the error must be based on both objective and subjective criteria. The fact that the customs authority twice conveyed to the person liable the mistaken view which it had adopted and which underlay the customs treatment applied is not in itself sufficient to conclude that the error was not detectable by the person liable.'