OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 25 November 1986 *

Mr President,
Members of the Court,

The actions brought by Cerealmangimi SpA and Italgrani SpA in respect of the Commission's decision of 22 March 1985 refusing to allow the remission of monetary compensatory amounts with regard to exports by those undertakings to Belgium and France raise essentially the following two legal questions:

1. Are monetary compensatory amounts payable in respect of products (in this case durum wheat) exported from Italy to other Member States after having been imported from non-member countries under inward processing arrangements involving equivalent compensation and prior exportation of processed cereal products (in this case durum-wheat meal) from Italy to non-member countries?

2. Since the Italian customs authorities had initially decided that in such cases monetary compensatory amounts were not payable, do the circumstances of this case amount to 'special circumstances' justifying the remission of monetary compensatory amounts under Article 13 of Council Regulation No 1430/79 [1] which was thus wrongly refused by the Commission in the contested decision?

* Translated from the French.

1 — Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (Official Journal 1979, L 175, p. 1).

The fact that the applicants contest the applicability of monetary compensatory amounts in this case gives rise to a preliminary question: whether a Commission decision refusing to allow the remission of import or export duties on equitable grounds may be challenged on the ground that the national authorities' decision to impose such duties was unlawful.

In favour of the admissibility of such a submission it may be argued that the contested decision is based on the premise — which the Commission endeavours to prove in a detailed manner — that monetary compensatory amounts were in fact payable for the exports in question. It might be said that if the Commission has first established the existence of a customs debt before adopting a decision refusing to apply Article 13 of Regulation No 1430/79 in favour of the applicants, the latter should logically be able to seek the annulment of that decision by contesting the cogency of the reasoning upon which it is based. If it could be shown that the monetary compensatory amounts were not in fact payable, the decision would be based on a mistake of law and ought consequently to be annulled.

That does not, however, mean that the Court could, in an action for challenging the validity of a decision based on Article 13 of Regulation No 1430/79, order the repayment of monetary compensatory amounts which had been collected unlawfully. As will be seen in a moment,

proceedings for recovery of unlawful payments are a matter for the national courts.

The following arguments may be put forward in support of the opposite view.

In the first place, as the Court has stated in a number of judgments,[2] it is clear from the provisions on the Communities' own resources that disputes in connection with the reimbursement of sums collected by the Member States on behalf of the Community and in connection with the revenue which they are bound to collect on its behalf are a matter for the national courts and must be settled by them in accordance with national law in so far as no provisions of Community law are relevant.

In this case Community law, that is to say Article 2 of Regulation No 1430/79, expressly provides that where there is a dispute with regard to the very existence of a customs debt an application for repayment or remission of duties is to be submitted to the appropriate customs office within three years of the date on which those duties were entered in the accounts by the authority responsible for their collection.

The new version of Article 13[3] unambiguously confirms that the provision relates only to 'situations other than those referred to in Sections A to D' of Regulation No 1430/79. In fact Section A includes Article 2 which applies, as we have seen, when there is no customs debt.

2 — See in particular its judgment of 21 May 1976 in Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraphs 9 and 11 of the decision, and its judgment of 27 March 1980 in Joined Cases 66, 127 and 128/79 *Amministrazione delle Finanze* v *Salumi* [1980] ECR 1237, paragraph 17 of the decision.

3 — Council Regulation (EEC) No 1672/82 of 24 June 1982 (Official Journal 1982, L 186, p. 1).

The Court has already stated in a case to which the new version of Article 13 was not yet applicable that in the light of the recitals in the preamble to Regulation No 1430/79 (in particular the seventh recital) Article 13 appears to be 'a general equitable provision designed to cover situations *other* than those which have most often arisen in practice and for which special provision could be made when the regulation was adopted' (paragraph 7 of the Court's judgment of 15 December 1983 in Case 283/82 *Papierfabrik Schoellershammer H. A. Schoeller* v *Commission* [1983] ECR 4219).

Finally, logic itself dictates the exclusion of the possibility of contesting whether a payment was due at the same time as remission thereof is sought on equitable grounds.

I must therefore conclude that an individual who challenges a decision based on Article 13 of Regulation No 1430/79 may not put forward submissions designed to show that there was no customs debt. The submissions in question are therefore inadmissible.

I shall nevertheless examine the question of the applicability of the monetary compensatory amounts in this case, should the Court not agree with my conclusion.

I — Were monetary compensatory amounts applicable?

In order to place that question in its context I would like to remind the Court very briefly of the background to and the course of the transactions effected by the two Italian undertakings 'under authorizations granted under the inward processing

arrangements established by Council Directive 69/73/EEC.[4] The authorizations granted to the two undertakings included the possibility of having recourse to the system of equivalent compensation provided for in Article 24 and to the system of prior exportation provided for in Article 25 of the directive. The undertakings carried out prior exportations of cereal products (in particular durum-wheat meal) from Italy to non-member countries and finally discharged those inward processing operations by importing durum wheat released for free circulation in Italy. At the same time as the durum wheat was released for free circulation in order to discharge the prior exportation it was the subject of a declaration of exportation to France or Belgium' (second recital in the preamble to the contested decision).

The dispute between the parties turns on the question of which of the following two provisions should govern the exports as regards the applicability of monetary compensatory amounts:

Article 20 of Commission Regulation (EEC) No 1371/81 of 19 May 1981 laying down detailed rules for the administrative application of monetary compensatory amounts,[5] which authorizes the Member States to exempt from the application of monetary compensatory amounts 'products declared at the same time both for release at import and for re-export', the article favoured by the applicants;

or Article 5 of Commission Directive 75/349/EEC of 26 May 1975 on detailed rules concerning equivalent compensation and prior exportation under inward processing arrangements,[6] the provision which the Commission considers to be applicable. That article provides that 'import goods' (in this case imported durum wheat) 'on substitution shall . . . take the same status as compensation goods' (in this case Italian durum wheat used for the manufacture of cereal products which have been the subject of prior exportation, known as 'compensating products').

There can be no dispute about the answer once the aforementioned transactions are analysed closely. It will be apparent that there are in fact two distinct transactions:

(i) durum-wheat meal is exported to non-member countries prior to the importation of durum wheat from non-member countries;

(ii) durum wheat is exported to Member States.

It was precisely in order to facilitate transactions falling within the first category that inward processing arrangements were established. Those arrangements are defined in Article 2 (1) of Directive 69/73 as 'the customs arrangements whereby imported goods which do not satisy the conditions contained in Articles 9 and 10 of the Treaty may be processed without giving rise to liability for payment of customs duties, of charges having equivalent effect or of agricultural levies' (including monetary compensatory amounts[7]) 'where such goods are intended for export outside the customs territory of the Community wholly or partly in the form of compensating products . . . '.

In this case compensating products were exported before the imports were effected (Article 25 of Directive 69/73). They should therefore have been 'products derived from

4 — Council Directive 69/73/EEC of 4 March 1969 on the harmonization of provisions laid down by law, regulation or administrative action in respect of inward processing (Official Journal, English Special Edition 1969 (I), p. 75).

5 — Official Journal 1981, L 38, p. 1.

6 — Official Journal 1975, L 156, p. 25.

7 — Monetary compensatory amounts are covered by the terms 'import duties' and 'export duties' as defined in a general manner in Community legislation on customs matters since they were introduced in 1971 (see, for example, Article 1 (2) (a) and (b) of Regulation No 1430/79).

processing of goods of the same kind and quality and having the same technical characteristics as those of the imported goods' (Article 24 of the directive).

The former, that is to say the compensation goods, since they are not themselves subject to inward processing arrangements, were in free circulation in Italy in accordance with Article 2 (1) of Directive 75/349.

The latter, that is to say the import goods, for which the compensating products were substituted in advance, should therefore, under Article 5 (1) of Directive 75/349, be regarded as having the same status.

Moreover, one of the conditions which must be laid down by the competent authorities in the authorization granting the benefit of inward processing arrangements is the time-limit within which the importation of 'import goods' corresponding to a prior exportation of compensating products must take place (Article 9 (1) of Directive 75/349). To ensure that the time-limit is observed it is even provided that the holder of the authorization must lodge a security in order to guarantee payment of the export duty payable in respect of the compensating products if they are not exported under inward processing arrangements (Article 10).

In that context I refer to the fact that Council Regulation (EEC) No 1999/85, [8] which is designed to replace Directive 69/73 and the directives adopted to implement it with effect from 1 January 1987, expressly provides that in the case of prior exportation the inward processing arrangements 'shall be finally discharged when the customs authority has accepted the declaration on the non-Community goods' (second paragraph of Article 18 (1)) which must be done within the period laid down (Article 14 (3)). That is the moment at which the inward processing operation is completely settled.

The second operation was then grafted onto that state of affairs: the 'import goods' which had, so to speak, taken the place of the 'compensation goods' (Italian durum wheat) used in advance to manufacture the 'compensating products' previously exported to non-member countries, were re-exported to other Member States.

That operation is completely separate from and subsequent to the first and does not take place under inward processing arrangements. It constitutes part of intra-Community trade and is, as such, subject to the Community rules on monetary compensatory amounts applicable to trade between Member States.

The situation is therefore the same as if the applicants had proceeded not by means of operations involving equivalent compensation and prior exportation but by means of operations involving compensation known as identical compensation where the very goods which have been imported are re-exported outside the customs territory of the Community as compensating products: in such a case the applicants may export to France and Belgium only Italian durum wheat, which is by definition in free circulation within the Community since the imported durum wheat was used for the manufacture of meal intended for export to non-member countries.

Any other conclusion would be contrary not only to the wording but also to the scheme of the inward processing system. 'The inward processing system enables

8 — Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements (Official Journal 1985, L 188, p. 1).

Community products destined for non-member countries to be put on an equal footing with products from non-member countries since it makes it possible for Community producers to obtain the goods needed to manufacture their products on the same favourable terms as those available to producers in non-member countries. In many cases that is the only way in which Community producers may compete with their rivals on non-Community markets.' [9]

Since the Community is based upon a customs union the inward processing system does not apply, by definition, to trade between Member States.

Therefore, exemption from duties, including monetary compensatory amounts, applies only to imports *from non-member countries* and exports *to non-member countries.*

As those principles derive from the very nature of the inward processing system Article 20 of Regulation No 1371/81 can do nothing to change them. That provision, which forms part of a corpus of rules laying down detailed rules for the administrative application of monetary compensatory amounts, provides that no monetary compensatory amounts are to be granted or levied on products declared at the same time both for importation *and* re-exportation. It therefore presupposes that the monetary compensatory amounts are applicable to *each* of the two proposed operations and that the grant and levy will cancel each other out financially.

In this case the imports of durum wheat effected under inward processing arrangements were, by definition, carried out under exemption from duties including monetary compensatory amounts. There can therefore be no corresponding compensation since monetary compensatory amounts are not payable in respect of one of the two operations.

In addition, the relevant exports to France and Belgium must be regarded, as has been seen, as relating to a product of Italian origin and not imported. No importation therefore took place, at least nominally; consequently and inevitably there could be no simultaneous re-exportation.

In short, the importation which took place was effected by final discharge of the prior exportation under inward processing arrangements and could therefore not figure in any other operation on pain of giving the persons concerned an unjustified advantage. If the applicants wished to finally discharge their inward processing operations, which they could do only by importing durum wheat and at the same time putting it into free circulation, they could not benefit from the fact that the wheat was at the same time the subject of exportation to France and Belgium. The simultaneous occurrence of those events was merely coincidence in this case and cannot be used to make a single operation from the two operations at issue.

In other words, either the importation of durum wheat complements the exportation of durum-wheat meal to non-member countries, or it is compensated by its re-exportation to other Member States, but not both at the same time; otherwise, as the Commission correctly emphasizes in the sixth recital in the preamble to the decision at issue, 'the undertakings would benefit from exemption from those amounts' (monetary compensatory amounts) 'on exportation both as regards the durum wheat which was imported and forwarded' (to another Member State) 'and as regards

9 — Ursula Baumann, 'Le régime douanier de perfectionnement actif', in *Revue du Marché Commun*, No 280, 1984, p. 406 *et seq.*

the compensating products which were exported' (to a non-member country) and which were obtained, in principle, from the same imported durum wheat.

It must be added that the argument put forward by the applicants with regard to the amendment of Article 20 of Regulation No 1371/81 [10] cannot be accepted.

As the Commission showed in a convincing manner in its rejoinder, it is not possible to conclude from that amendment, or from the views of certain members of the Committee on Customs Procedures for Inward Processing, that Article 20 was, either before or after its amendment, applicable to operations of the kind at issue in the cases before the Court.

From all the foregoing considerations I conclude that the monetary compensatory amounts were in fact payable and that undertakings as specialized as the applicants could hardly have been unaware of that. It remains to ascertain whether the Commission, acting on the basis of Article 13 of Regulation No 1430/79, was right in this case to refuse to grant them relief on equitable grounds.

II — The application of Article 13 of Regulation No 1430/79

1. In the course of the hearing the applicants abandoned their submission based on a 'subjective Community right on the part of the undertakings to exemption from payment of monetary compensatory amounts'.

However, it does not seem to me that they have likewise abandoned their submission that the decision to apply Article 20 of Regulation No 1371/81, previously adopted by the customs authorities of one Member State, should be regarded as a special circumstance within the meaning of Article 13 of Regulation No 1430/79 (Report for the Hearing at p. 1307).

Such an interpretation cannot, in any event, be accepted.

As the Commission pointed out, Article 2 of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties [11] expressly *obliges* the authorities of the Member States to *recover the sums* which have not been required on importation or exportation as a result of an error.

Article 5 (2) of the regulation provides, however, as follows: '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 . . . '.

In a decision notified to Italy on 6 February 1984 the Commission stated that in these circumstances the requirements laid down by the aforementioned provisions were not satisfied and that there was therefore no justification for waiving post-clearance recovery of the monetary compensatory amounts.

It was open to the applicants to challenge that decision within a period of three months from the date on which they were informed of the decision. They did not exercise that right.

It may be concluded from the foregoing that *the post-clearance recovery* of duties which were not collected as a result of an error made by the competent authorities is

10 — Commission Regulation (EEC) No 2883/83 of 14 October 1983 amending for the second time Regulation (EEC) No 1371/81 laying down detailed rules for the administrative application of monetary compensatory amounts (Official Journal 1983, L 283, p. 14).

11 — Official Journal 1979, L 197, p. 1.

exhaustively regulated by Article 5 (2) of Regulation No 1697/79 *and that in the absence of additional factors* such a failure to collect the duties cannot fall within the scope of Article 13 of Regulation No 1430/79 which, as the Court has stated, is 'designed to cover situations other than those which have most often arisen in practice'.

2. It remains to be considered, therefore, whether the error made by the Naples customs authorities may nevertheless constitute a special circumstance within the meaning of Article 13 of Regulation No 1430/79 because it was repeated on numerous occasions, because it was also made simultaneously by the British and French customs authorities and because even certain experts (possibly those of the United Kingdom and France?) convening in the Committee on Customs Procedures for Inward Processing seem to have been victims of confusion in that regard (see Point G of the summary record of the meeting of that committee on 3 November 1982 produced by the Commission, but offset by Point C thereof).

On the basis of those facts the applicants maintained that the view taken by the customs officers at Naples 'corresponded to the then prevailing policy of the customs authorities of the Member States' (see their reply, at p. 7).

It is clear that such a conclusion is quite exaggerated. The prevailing policy was without any doubt the reverse.

Moreover, in order to assess the weight to be attached to that argument it seems to me necessary to place Article 13 in its context and to refer to the manner in which that provision has been applied to the present time.

The Court itself has given judgment on three occasions on applications to have Commission decisions adopted on the basis of Article 13 of Regulation No 1430/79 declared void. [12]

Only Case 160/84 *Oryzomyli* v *Commission* turned on a mistake made by the administration which, on account of the inexperience of a newly appointed official, was not in a position to explain to the undertakings which brought the action the difference between an ordinary import licence and an advance fixing certificate. The Court considered that that failure by the authorities was part of a set of highly exceptional factors constituting 'special circumstances' within the meaning of Article 13 of Regulation No 1430/79 (see paragraphs 15 and 16 of the decision).

In my Opinion in that case I referred to three decisions in which the Commission has accepted an administrative failure as justification for granting equitable relief. In the first case (Decision of 27 July 1981, No REM 7/81) the Commission charged the administration with failing to draw the attention of those concerned to an administrative step to be taken in order that the operation which they proposed to effect could be executed under exemption from duties. In the other two cases (Decision of 25 October 1982, No REM 12/82 and Decision of 14 September 1984, No REM 23/84) the Commission regarded as a 'special circumstance' the fact that wrong information given by a customs office led a private individual not to carry out a formality which he could easily have carried out if he had been correctly informed.

12 — Judgment of 15 December 1983 in Case 283/82, *Papierfabrik Schoellershammer H. A. Schoeller* v *Commission* [1983] ECR 4219; judgment of 13 November 1984 in Joined Cases 98 and 230/83 *Van Gend en Loos* v *Commission* [1984] ECR 3763; and judgment of 15 May 1986 in Case 160/84 *Oryzomyli* v *Commission* [1986] ECR 1633.

In all those cases the administration's error had adverse consequences for the persons concerned in that they were unable to exercise the rights comprising economic or commercial benefits which they could lawfully have claimed had the information received by them been correct. Consequently the treatment they received which was less favourable than they were due in strict law was based on the administration's error. However, in the end on grounds of equity they did receive the more favourable treatment to which they would have been entitled had they not been misled with regard to the action they should take.

In this case, by contrast, the applicants were not deprived of treatment which was more favourable than they could have claimed by virtue of the fact that they failed to satisfy certain conditions or complete certain formalities as a consequence of receiving incorrect information from the Italian customs authorities. The applicants merely revealed their intention of exporting to other Member States the durum wheat imported from non-member countries, and it was when applying the Community rules to those operations that the Italian authorities made a mistake with regard to the assessment of the facts and the interpretation of the relevant provisions. Once they discovered their error they immediately took steps to correct it and applied to the operations the only customs treatment which was lawfully possible having regard to their nature.

It should also be noted that the applicants have failed to show, or even to try to show, that they would not have exported the durum wheat to Belgium and France if they had known that monetary compensatory amounts were applicable to the transactions. It would in any case have been difficult for them to state that. They would then in fact have admitted that they were seeking to circumvent the rules of Community law which provide that with regard to Italy monetary compensatory amounts must be paid on the exportation of agricultural products.

I would also like to submit my opinion, equally briefly, with regard to the submission that the applicants were subjected to alleged *discrimination* in relation to other undertakings, especially French and British undertakings, which received authorization from their respective national authorities for similar operations without being required to pay monetary compensatory amounts. In that respect I take the view that there can be discrimination in such a situation only if the same provision is interpreted in different ways by one and the same authority and not where the different interpretations are given by two different authorities as in this case.

The erroneous interpretation given by certain British and French authorities cannot be relied upon against the Commission, especially since the Commission, as soon as it was aware of the operations authorized by those Member States, requested that the corresponding own resources be made available and, having failed to obtain satisfaction, instituted proceedings against them under Article 169 of the EEC Treaty.

In that connection I refer the Court to its judgment of 15 December 1982 (Case 5/82 *Hauptzollamt Krefeld* v *Maïzena* [1982] ECR 4601) where it decided as follows: 'A practice of a Member State which does not conform to Community rules may never give rise to legal situations protected by Community law and this is so even where

the Commission has failed to take the necessary action to ensure that the State in question correctly applies the Community rules' (paragraph 22 of the decision).

Finally, during the hearing the applicants put forward a new argument in support of their application. They pointed out that in the case of exports to a country which also applies negative monetary compensatory amounts it was the normal practice for the importer to pay to the exporter the amount of the monetary compensatory amounts received by him.

In view of the time that had passed they contended that they could no longer benefit from such payments. The damage they suffered thereby must be regarded as a special circumstance within the meaning of Article 13.

In respect of that argument it is necessary to make three observations.

First, it is not acceptable for the parties to proceedings to put forward for the first time at the hearing a completely new argument in relation to which the other party has had no opportunity to prepare a reply. The argument therefore appears to me to be inadmissible.

Secondly, I take the view that when the Court is called upon to give a ruling on the applicability of a provision of Community law it does not have to take into consideration the arrangements which may exist between importers and exporters in different Member States.

Finally, the circumstance relied upon, namely the grant of monetary compensatory amounts by the country of importation, was only partially realized in this case. Throughout the whole of the period during which the exports in question were effected, that is to say between 5 October 1981 and 8 June 1982, negative monetary compensatory amounts were applicable in France for only 22 days (14 April to 5 May 1982). With regard to Belgium negative monetary compensatory amounts were only introduced on 22 February 1982.

In short, it is my opinion that when considering a request for the application of Article 13 of Regulation No 1430/79 the following questions are the most important to be considered.

What would have happened if the circumstances relied upon had not occurred? Would the applicant have received treatment which was more favourable than that which he in fact received or which it appeared he would receive? In the light of all the circumstances of the case would it be inequitable to deprive him of that more favourable treatment?

Since in the cases now before the Court the reply to those questions can only be in the negative and since, moreover, the applicants have failed to show that they would have abstained from making the exports in question if the customs authorities had indicated to them that monetary compensatory amounts were due, I come to the conclusion that the cases present no special circumstances within the meaning of Article 13 of Regulation No 1430/79.

It is therefore not necessary to consider whether the applicants were guilty of negligence or deception which would, according to Article 13, exclude any remission of duties.

I must, however, point out shortcomings in the statement of reasons on which the Commission's decision is based.

The Commission explains primarily why monetary compensatory amounts should be applied to the operations in question and it states that they were not collected as a result of an error. It does not, however, address itself clearly to the question why that error cannot constitute a special circumstance.

It merely states in the fifth recital in the preamble to the decision that the two undertakings specialize in international trade in cereals and products derived from the processing of cereals, in particular under the inward processing system, and could not therefore be unaware of the relevant rules. It seems to follow from the Commission's written observations (see its defence, at p. 9) that it considered that that amounted to 'negligence' on the part of the applicants, which prevents the grant of remission on equitable grounds.

In my view the fact that the applicants could not have been unaware of the law applicable is — in this case — more in the nature of corroboration of the contention that there were no special circumstances in these cases.

In any event the Commission should have given clearer explanations on that matter in its statement of reasons and have first considered, as it itself emphasizes in its rejoinder (at p. 8), whether or not there were reasons for granting equitable relief, that is to say, special circumstances, in these cases.

I find it difficult to accept that the reasons for applying monetary compensatory amounts to the transactions at issue can exclude the operation of any equitable considerations *a priori*. Surely the very purpose of the first paragraph of Article 13 of Regulation No 1430/79 is to authorize, in circumstances for which no provision has been made, the repayment or remission of the import or export duties which would normally be payable? As such and by definition, it provides the person benefiting from its application with an 'advantage' to which he is not, in principle, entitled.

From that point of view the Commission's argument that 'not to apply the monetary compensatory amounts to the applicant would amount to granting him a benefit for which there was no objective justification' (see its rejoinder, at p. 8; see also the final sentence of the fifth recital in the preamble to its decision of 22 March 1985) may serve to show that the monetary compensatory amounts are in principle payable, but not to exclude *a priori* the existence of 'special circumstances' within the meaning of Article 13 of Regulation No 1430/79. It would require a very broad interpretation of the fifth recital, reading, so to speak, between the lines, to find therein evidence of the absence of equitable grounds.

However, whilst I realize that the Court may consider of its own motion whether the obligation to state the reasons on which the decision is based was satisfied,[13] I propose that the Commission's decision should not be declared void for failure to provide a sufficient statement of reasons because I am convinced that, if it based its decisions on fuller reasons, the Commission could still only arrive at the same decision in substance, that is to say it would reject the application for the remission of monetary compensatory amounts.

Conclusion

On the basis of all the foregoing considerations I propose that the Court should dismiss the application and order the applicants to pay the costs.

13 — See the Court's judgment of 1 July 1986 in Case 185/85 *Usinor* v *Commission* [1986] ECR 2079, in particular paragraphs 19 and 23 of the decision.