

OPINION OF ADVOCATE GENERAL  
KOKOTT

delivered on 30 September 2004<sup>1</sup>

**I — Introduction**

supervision and incurrence of the customs debt under the Community Customs Code.<sup>3</sup>

1. The facts in these proceedings for a preliminary ruling can be described in everyday language as ‘cigarette smuggling’. In essence, they concern an operation in which cigarettes, having been brought into the customs territory of the Community, were declared as cookware and subsequently removed from customs supervision.

**II — Relevant provisions**

*A — Community law*

3. *Supervision by the customs authorities* is defined in Article 4(13) of the Customs Code as follows:

2. In this case, proceedings concerning various customs offences, brought against Mr Papismedov and other defendants, are pending on appeal before the Belgian Hof van Beroep te Antwerpen<sup>2</sup> (hereinafter also ‘the referring court’). In connection with those criminal proceedings, the referring court submits to the Court a number of questions regarding the concepts of customs

‘action taken in general by those authorities with a view to ensuring that customs rules

1 — Original language: German.

2 — Court of Appeal, Antwerp.

3 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), last amended by Annex II (A.II) to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 762). The provisions relevant to the present case were, however, already contained in the original version of the Customs Code.

and, where appropriate, other provisions applicable to goods subject to customs supervision are observed’.

‘1. Goods brought into the customs territory of the Community shall, from the time of their entry, be subject to customs supervision. They may be subject to control by the customs authority in accordance with the provisions in force.

4. Article 4(17) of the Customs Code lays down the following definition for *customs declaration*:

2. They shall remain under such supervision for as long as necessary to determine their customs status, if appropriate, and in the case of non-Community goods and without prejudice to Article 82(1), until their customs status is changed, they enter a free zone or free warehouse or they are re-exported or destroyed in accordance with Article 182.’

‘the act whereby a person indicates in the prescribed form and manner a wish to place goods under a given customs procedure’.

5. Article 4(19) of the Customs Code establishes the following definition for *presentation of goods to customs*:

7. Articles 38 to 42 of the Customs Code lay down the obligations of the person bringing in goods brought into the customs territory of the Community for the period from crossing the frontier up to and including presentation of the goods to customs. They provide, in particular, as follows:

‘the notification to the customs authorities, in the manner laid down, of the arrival of goods at the customs office or at any other place designated or approved by the customs authorities’.

‘Article 38

6. The beginning and end of customs supervision are clear from Article 37 of the Customs Code:

1. Goods brought into the customs territory of the Community shall be conveyed by the person bringing them into the Community without delay, by the route specified by the

customs authorities and in accordance with their instructions, if any: *‘Article 202*

(a) to the customs office designated by the customs authorities or to any other place designated or approved by those authorities;

1. A customs debt on importation shall be incurred through:

(a) the unlawful introduction into the customs territory of the Community of goods liable to import duties, ...

...

...

#### *Article 40*

For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

Goods which, pursuant to Article 38(1)(a), arrive at the customs office or other place designated or approved by the customs authorities shall be presented to customs by the person who brought the goods into the customs territory of the Community or, if appropriate, by the person who assumes responsibility for carriage of the goods following such entry.’

2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.

3. The debtors shall be:

8. Articles 202 et seq. of the Customs Code contain rules on the incurrance of the customs debt where failures to comply with customs rules occur on the importation of goods into the customs territory of the Community. In the present context, the following articles in particular are relevant:

— the person who introduced such goods unlawfully,

...

Article 203

1. A customs debt on importation shall be incurred through:

- the unlawful removal from customs supervision of goods liable to import duties.

- any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and

- where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

*Article 204*

3. The debtors shall be:

1. A customs debt on importation shall be incurred through:

- the person who removed the goods from customs supervision,

- (a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed,  
...

- any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

...

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure.'

#### B — National law

9. Belgian customs law provides in substance, in Article 257(3) of the Algemene

Wet inzake Douane en Accijnzen<sup>4</sup> (General Law relating to Customs and Excise, hereinafter 'the AWDA') of 18 July 1977, that anyone who, without the prior permission of the customs administration, conveys goods to a place other than that specified in the corresponding customs documents, commits an offence.

#### III — Facts, reference for a preliminary ruling and procedure

10. On 10 June 2001 a container ship docked in the port of Antwerp and was cleared through customs by the local customs office. According to the transport documents produced for that purpose, one of the unloaded containers was supposed to contain 406 boxes of cookware. Prior notice of that cargo had been given by electronic goods declaration ('goederencomptabiliteit') before the ship arrived. According to that declaration, the goods were from the People's Republic of China and were destined for a consignee in Belgium.

11. One day later, on 11 June 2001, the container was checked by the customs office.

<sup>4</sup> — *Belgisch Staatsblad* of 21 September 1977, as amended by the Law of 6 July 1978 (BS of 12 August 1978).

It was found to contain only 29 cases of cookware, which were in the first two rows in the cargo space. Behind them were identical cases which, however, contained black plastic sacks each containing two smaller boxes of cigarettes. The container was then closed again, re-sealed and placed under observation.

12. Also on 11 June 2001, the goods were placed under what is known as the external Community transit procedure. In the 'T1 document' made out for that purpose, cookware was again stated as the cargo of the container, as in the declaration. The principal in respect of the procedure was the company Transocean System Transport BVBA. According to the instructions in that document, the container was to be transported by United Logistic Partners BVBA to a customs warehouse in Merksem (Belgium) as the customs office of destination.

13. However, the following day the container was transported by one of the defendants to Schoten (Belgium), to a warehouse which was not approved for the storage of goods subject to customs supervision. There, Belgian customs officers, who had followed the lorry and trailer without being recognised, stepped in. During the search of the warehouse, in addition to other items, the entire cargo of the container, including 7 090 000 cigarettes, was seized.

14. Mr Papismedov, who was present during the unloading of the container in Schoten, and the other parties involved were indicted in connection with those operations before the Rechtbank van eerste aanleg (Court of First Instance) in Antwerp. They were accused, *inter alia*, of having committed offences under Article 257(3) of the AWDA in respect of the seized cigarettes. The parties were charged with smuggling the cigarettes into the customs territory of the Community, the goods having been removed from customs supervision during carriage under the transit procedure.

15. In this matter, the Rechtbank van eerste aanleg te Antwerpen, as the court of first instance, convicted, by judgment of 30 July 2001, eight defendants and sentenced them to periods of imprisonment of between six and eight months. In addition, as joint and several debtors, those defendants were sentenced to a fine of 10 times the amount of the customs debt arising from the importation of the cigarettes. Mr Papismedov was one of those convicted.

16. The referring court is hearing the case as the appellate court. It takes the view that its decision on the appeal hinges on whether the customs debt in respect of the imported cigarettes was incurred under Article 202, 203 or 204 of the Customs Code. Because of doubts regarding the interpretation of Community law, the Hof van Beroep Antwerpen, by judgment of 7 May 2003, referred the following questions to the Court for a preliminary ruling:

'1. Must goods in respect of which a summary declaration was submitted with

an incorrect designation/commercial designation ('cookware' instead of cigarettes), or goods which were declared under an incorrect designation/commercial designation for the purposes of a customs procedure (such as the procedure for external Community customs transit), be regarded as having been lawfully introduced into the customs territory of the Community and, accordingly, as being under customs supervision (temporary storage or customs procedure), notwithstanding the fact that, intentionally or not, the goods bore an incorrect designation/commercial designation?

supervision were declared, intentionally or not, under an incorrect designation/commercial designation, whilst the goods had not (by then) been removed from customs supervision and the customs authorities still had access to the goods, must the customs debt in respect of the goods which were declared under an incorrect designation/commercial designation be regarded as arising under Article 204 of the Community Customs Code or must the view be taken that in respect of those goods no customs debt has yet arisen?

2. If the answer to the first question is affirmative must the view be taken, in the case of removal from customs supervision of goods which, intentionally or not, were declared under an incorrect designation/commercial designation, that the customs debt arises under Article 203 of the Community Customs Code and must the person liable to comply with the obligations arising out of temporary storage of the goods or from use of the customs procedure under which the goods (even if under an incorrect designation) were placed, also be regarded as a debtor in respect of the customs debt?

4. If the answer to the first question is negative must goods which, intentionally or not, were declared under an incorrect designation/commercial designation be regarded as having been introduced unlawfully into the customs territory of the Community (in other words imported in breach of the provisions of Articles 38 to 41 inclusive and of the second indent of Article 177 of the Community Customs Code) as a result of which the customs debt in respect of those goods arises under Article 202 of the Community Customs Code and the person making the summary declaration or the declaration for a customs procedure, even if with an incorrect designation/commercial designation, may be deemed to be the customs debtor only if he may be regarded as a debtor within the meaning of Article 202 (3) of the Community Customs Code?

3. If the answer to the first question is affirmative, on establishment by the customs authorities that the goods under customs

17. In the proceedings before the Court, the defendant, Mr Papismedov, the Belgian Government, the Finnish Government and the Commission submitted written observations.

#### IV — Summary of the observations lodged before the Court

18. The defendant, Mr Papismedov, is of the opinion that the first question should be reformulated and answered to the effect that, if the goods were presented to customs under an incorrect description/trade description, that is an unlawful introduction into the customs territory of the Community within the meaning of Article 202 of the Customs Code. In the alternative, Mr Papismedov claims that the Court should answer the first question in the negative and the fourth question in the affirmative and leave the second and third questions unanswered since they are devoid of purpose.

19. The Finnish Government and the Commission are in substantial agreement in taking the view that, in a situation such as that in the main proceedings, the customs debt is incurred under Article 202 of the Customs Code.

20. By contrast, the Belgian Government takes the view that the obligation to present goods to customs does not include their correct description and that goods presented to customs under an incorrect description were nevertheless introduced lawfully into the customs territory of the Community, so that no customs debt is incurred under Article 202 of the Customs Code. If, during a check, it comes to light that goods were summarily declared under an incorrect description and then removed from customs supervision, the customs debt is, in the opinion of the Belgian Government, incurred under Article 203 of the Customs Code. In those circumstances, the fourth question should not be answered.

#### V — Legal assessment

21. This reference for a preliminary ruling follows a number of sets of proceedings before the Court concerning, in particular, the interpretation of Article 202 et seq. of the Customs Code.<sup>5</sup> However, the facts submitted by the Hof van Beroep te Antwerpen raise a number of questions on which the Court has not yet adjudicated in detail. In

5 — See Case C-66/99 *D. Wandel* [2001] ECR I-873, Case C-371/99 *Liberexim* [2002] ECR I-6227, Case C-337/01 *Hamann International* [2004] ECR I-1791 and Case C-222/01 *British American Tobacco* [2004] ECR I-1683. With regard to cigarette smuggling in particular, see Joined Cases C-238/02 and C-246/02 *Viluckas and Others* [2004] ECR I-2141.



particular, the referring court seeks to establish the correct delimitation between the individual conditions for incurrence of a customs debt on importation under the Customs Code.

depends on which provision of the Customs Code applies.

*A — The first question: customs supervision*

22. Normally, a customs debt on importation is incurred when, to put it in everyday language, goods ‘are cleared through customs’, that is to say, in the words of Article 201(1)(a) of the Customs Code, when goods liable to import duties are released for free circulation.<sup>6</sup>

25. By its first question, which is an introductory question in relation to the remaining questions, the referring court essentially seeks to ascertain whether imported goods can be considered to be under customs supervision if they were incorrectly described to the customs authority in the relevant summary declaration or in the declaration for placing them under the customs procedure in question.

23. By contrast, when certain failures to comply with customs rules are committed, incurrence of the customs debt on importation is governed by Articles 202 to 205 of the Customs Code. Depending on the situation, those articles provide, in paragraphs 2 and 3 in each case, for incurrence of the customs debt at different points in time and for different debtors.

26. In answering that question, it would seem appropriate, as a first step, to outline the conditions governing customs supervision. It will then be necessary to consider whether an incorrect customs declaration can affect the existence of customs supervision.

24. Since the individual defendants were not involved in the entire operation between 10 and 12 June 2001, but each of them only in different acts during that period, only some of them, if any, can be debtors in respect of the import duty on the cigarettes. That

1. Conditions governing customs supervision

27. According to the first sentence of Article 37(1) of the Customs Code, customs supervision begins as soon as the goods are *brought* into the customs territory of the Community.

<sup>6</sup> — See also, in this regard, the judgment in *Wandel*, cited in footnote 5, paragraph 41.

28. Unlike the customs declaration (Article 4(17) of the Customs Code) and the presentation of goods to customs (Article 4(19) of the Customs Code), which in each case require a *declaration* in the prescribed form to the customs authority, the introduction of goods into the customs territory of the Community is a mere action, a *physical act*.

29. Customs supervision therefore presupposes neither that given goods (in this case cigarettes) are *deliberately* imported, nor that they are *lawfully* imported.

30. Firstly, it is not a question of whether the persons involved in the importation knew in detail what kind of goods they were importing into the territory of the Community; the powers of control available to the customs authorities cannot exist only in the case of *deliberate* importation of given goods; on the contrary, they must also exist *a fortiori* when goods are *unintentionally* smuggled into economic circulation in the Community by, for example, carriers acting in good faith, evading payment of import duties.<sup>7</sup> Nor, moreover, is it a question of the customs authority somehow acquiring a knowledge of the existence of the goods at the time of their

introduction into the customs territory of the Community. On the contrary, the customs authority normally only ever becomes aware of the existence of goods as a result of their being presented to customs (cf. Article 4(19) and Article 40 of the Customs Code).

31. That purely objective interpretation of Article 37(1) is also dictated by the meaning and purpose of customs supervision. Under Article 4(13) of the Customs Code, customs supervision entitles the customs authorities to take action in general in relation to goods brought into the customs territory of the Community with a view to ensuring that customs rules and, where appropriate, other provisions are observed (see also the second sentence of Article 37(1) of the Customs Code). That supervision would be deprived of much of its practical effectiveness if only *deliberately imported* goods were subject to it; any meaningful monitoring of the import operation would then be impossible.

32. Secondly, under Article 37(1) of the Customs Code, nor does the beginning of customs supervision presuppose the *lawful* introduction of goods into the customs territory of the Community. Contrary to what may have been assumed by the referring court in its first question, there is no causal connection between the lawful introduction of goods into the customs

<sup>7</sup> — See, to that effect, for example, the judgment in *Viluckas*, cited in footnote 5, paragraph 24.

territory of the Community and the beginning of customs supervision. It can in fact be inferred by converse reasoning from the second subparagraph of Article 202(1) of the Customs Code that goods are only *introduced lawfully into the customs territory* if, in addition to mere carriage across the frontier, the obligations arising from Articles 38 to 41 of the Customs Code are also fulfilled. In particular, presentation of the goods to customs, as referred to in Article 40 of the Customs Code, must have been carried out.

customs procedure are no more prerequisites for the commencement of customs supervision than is presentation of the goods to customs. That follows not only from the wording of the relevant provisions, but also from the scheme of the Customs Code. Both the summary declaration and the assignment of a customs-approved treatment or use, by means, for example, of a declaration for transit, presuppose, pursuant to the first paragraph of Article 43 and Article 48 of the Customs Code, that the goods have been *presented to customs*, whereas, as has been shown, the starting-point for customs supervision is the mere *bringing* of the goods into the customs territory of the Community; in other words, it begins even before the goods are presented to customs.

33. However, imported goods are already under customs supervision *before* they are presented to customs. That is significant in particular when the appropriate customs office is not situated directly at the external frontier of the Community. In such a case, the customs authority must be entitled, as part of customs supervision, to check that the approved traffic routes (customs routes, for example) for transport from the frontier crossing-point to the customs office have been followed.<sup>8</sup> Otherwise customs supervision would again be deprived of its practical effectiveness, and any meaningful checking of imports would be impossible.

2. Effect of an incorrect declaration on the existence of customs supervision

35. It still remains to be considered whether an incorrect declaration of goods, such as occurred in the present case ('cookware' instead of 'cigarettes'), can affect the *continued existence* of customs supervision, that is to say, whether customs supervision is *ended* by an incorrect declaration.

34. The summary declaration and the declaration for placing the goods under a

36. Article 37(2) of the Customs Code alone suggests that an incorrect declaration has no such effect but that customs supervision continues to exist unaltered. Under that provision, customs supervision of goods

8 — In this respect, customs supervision differs, moreover, from temporary storage under Article 50 of the Customs Code, which begins only when the goods have been validly presented to customs within the meaning of Article 40 in conjunction with Article 4(19) of the Customs Code.

continues for as long as is necessary to determine their customs status. In the case of non-Community goods, customs supervision even continues until those goods *have changed* their customs status, which normally means until they have been released for free circulation (see the second indent of Article 4(7) and Article 79 et seq. of the Customs Code).<sup>9</sup> Mere *declaration* for release for free circulation does not, by itself, produce a change in status;<sup>10</sup> the latter occurs only on the *release* of the goods by the customs authorities within the meaning of Article 4(20) and Articles 73 and 74 in conjunction with Article 79(2) of the Customs Code, that is, when the goods are released after payment of the customs debt or provision of security.<sup>11</sup>

lead to any change in the customs status of the goods. It is a suspensive procedure which is intended to allow the transport of the goods to the destination and their 'clearance through customs' at the destination;<sup>12</sup> for its part, the end of the external transit procedure is the presentation of the goods to customs and the determination of their customs status at the customs office of destination (see Articles 92, 40 and 42 of the Customs Code).

37. In the present case, the stage of declaration for release for free circulation was not even reached. On the contrary, only an *externaltransit procedure* was carried out, that is, a separate procedure which must be distinguished from release for free circulation (see Article 4(16)(a) and (b) of the Customs Code) and which does not by itself

38. Purely in passing, it will be observed that incorrect declaration of the goods likewise does not constitute *removal* of the goods as referred to in Article 203(1) of the Customs Code, by which the customs supervision would be ended. According to what has now become settled case-law, removal arises when an act or omission results in the competent customs authority's being prevented, if only for a short time, from gaining access to goods under customs supervision and from monitoring them as provided for in Article 37(1) of the Customs Code.<sup>13</sup> The mere fact that goods are incorrectly declared therefore does not constitute such removal, since it does not affect the *actual opportunity* for the customs authorities *to seize* the imported goods.

9 — Only where goods are released for free circulation on account of their end-use does customs supervision continue despite the change in status (see the first sentence of Article 82(1) of the Customs Code). That and the other circumstances mentioned in Article 37(2) of the Customs Code, in which customs supervision ends, clearly do not apply in this case.

10 — See, in that regard, the judgment in *Wandel*, cited in footnote 5, paragraph 45, according to which the change in status is not a consequence of the customs declaration alone, and customs supervision therefore continues beyond the time when the customs declaration is accepted.

11 — See also the judgment in *Wandel*, cited in footnote 5, paragraph 38.

12 — In that regard, see also the judgment in *Liberexim*, cited in footnote 5, paragraph 51, according to which goods under the external Community transit procedure must be subject to customs supervision until the recovery of import duties.

13 — Judgments in *Wandel*, paragraph 47, *Liberexim*, paragraph 55, *Hamann International*, paragraph 31, and *British American Tobacco*, paragraph 47, all cited in footnote 5.

### 3. Conclusion

39. In the light of all the foregoing, goods brought into the customs territory of the Community must be regarded as being under customs supervision even if they were incorrectly described, whether intentionally or unintentionally, to the customs authority.

#### *B — The fourth question: Article 202 of the Customs Code*

40. It is appropriate to consider the fourth question before the second and third questions, since that sequence corresponds to the course of the import operation and to the position of the relevant provisions within the Customs Code.

41. The fourth question concerns that section of the facts in the main proceedings in which the goods (cookware and cigarettes) were brought into the port of Antwerp and certain declarations regarding them were made to the local customs authority by one of the defendants. By that question, which consists of two parts, the referring court essentially wishes to know, firstly, whether the customs debt on importation is incurred pursuant to Article 202(1)(a) of the Customs

Code where goods are wrongly described to the customs authority after they have crossed the frontier and, secondly, whether the person who gave the defective description can be held liable as a debtor.

42. Contrary to the wording of the reference for a preliminary ruling, this question is also relevant if, as is proposed here, the first question is answered in the affirmative. Goods are subject to customs supervision as soon as they are brought into the customs territory of the Community.<sup>14</sup> However, customs supervision is not a condition either justifying or precluding the application of Article 202 of the Customs Code. The existence of customs supervision is irrelevant in the context of that provision.

1. Incurrence of a customs debt on importation under Article 202 of the Customs Code

43. A customs debt on importation is incurred under Article 202(1)(a) of the

<sup>14</sup> — As observed in points 31 to 34, it is immaterial in this regard whether the goods are subsequently lawfully declared or not.

Customs Code when goods liable to import duties are introduced unlawfully into the customs territory of the Community.<sup>15</sup> For the purposes of the legal definition in the second subparagraph of Article 202(1) of the Customs Code, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177 of the Customs Code.

Customs Code thus requires, not a declaration, but the carrying out of a physical act, namely, conveyance of the goods in accordance with certain temporal and spatial instructions. An incorrect declaration therefore falls outside the scope of Article 38 of the Customs Code simply because it is not one of the circumstances of fact which it covers.

44. Accordingly, the answer to the first part of the fourth question hinges on whether an incorrect description of goods to the customs authority ('cookware' instead of 'cigarettes') must be characterised as a breach of the obligations arising from Articles 38 to 41 of the Customs Code.<sup>16</sup>

46. Nor, in the present case, is there any basis for a finding of infringement of Article 39 of the Customs Code. Unlike Article 38 of the Customs Code, that provision does establish a duty to inform the customs authority where, by reason of unforeseeable circumstances or *force majeure*, the above-mentioned obligation to convey the goods cannot be complied with. However, that is a derogating provision which replaces the obligation to convey the goods with an obligation to inform. Where the goods have been duly conveyed as provided for in Article 38(1)(a) of the Customs Code, there is no obligation to provide information under Article 39 of the Customs Code.

45. The incorrect description of goods to the customs authority does not infringe Article 38 of the Customs Code. Under that provision, after crossing the frontier, goods are to be *conveyed* without delay, by the route specified by the customs authorities, if any, to a designated place. This is normally a customs office where identification of the goods can take place. Article 38 of the

47. Likewise, there is no basis whatsoever for a finding of infringement of Article 41 of the Customs Code in this case.

15 — There is no basis for the application of Article 202(1)(b) of the Customs Code in this case; such an application would presuppose that the goods were located in a free zone or free warehouse.

16 — Article 177 of the Customs Code, to which the second subparagraph of Article 202(1) also refers, is not relevant here. It relates exclusively to cases as referred to in Article 202(1)(b) of the Customs Code and is therefore not applicable in this case (see footnote 15).

48. However, the possibility of an infringement of the obligation under Article 40 of the Customs Code to present the goods to customs does arise. Where goods are imported and *no presentation to customs at all* is carried out in respect of them, Article

40 of the Customs Code is undoubtedly infringed. On the other hand, it is questionable whether a mere *substantive error* in the description of goods *which were presented to customs* is to be regarded as an infringement of the obligation to present goods to customs pursuant to Article 40 of the Customs Code. I shall examine both aspects in detail below.

(a) Goods presented to customs, but under a substantively incorrect description

49. With regard to goods *which have been presented to customs under a substantively incorrect description* ('cookware' instead of 'cigarettes' or 'cookware' instead of 'cookware and cigarettes'), an infringement of Article 40 of the Customs Code arises as a possibility only if the obligation to present the goods to customs also includes the *correct description of the goods*.

50. Under Article 4(19) of the Customs Code, 'presentation of goods to customs' means the notification to the customs authorities, in the manner laid down, of the arrival of goods at the customs office or at any other place designated or approved by the customs authorities. By the presentation of goods to customs, the customs authority's attention is drawn for the first time to the fact that imported goods are located in the

customs territory of the Community. At that stage, the person under that obligation is not yet required to inform the customs authority as to the nature and quantity of the imported goods. Indeed, according to the above definition, presentation to customs is not a notification to the customs authority as to *what* goods are located at the customs office. It is merely intended to notify it *that* goods have arrived there. That is especially clear from, for example, the English and Portuguese versions of Article 4(19) of the Customs Code, according to which presentation of goods to customs is a '*notification ... of the arrival of goods*' or a '*comunicação ... da chegada de mercadorias*'.

51. The scheme of the Customs Code supports that interpretation. Thus the Community legislature considered it appropriate to formulate the provisions on presentation of goods to customs, on the one hand, and the summary declaration, on the other, separately in each case, to assign them to different chapters<sup>17</sup> and to lay down different rules governing incurrance of the customs debt in the event of unlawful conduct.<sup>18</sup>

17 — See, on the one hand, Chapter 2 of Title 3 of the Customs Code (Article 40 et seq.) and, on the other, Chapter 3 of Title 3 of the Customs Code (Article 43 et seq.).

18 — An infringement of the provisions on presentation of goods to customs (Article 40 of the Customs Code) results in incurrance of the customs debt under Article 202(1)(a) of the Customs Code, whereas an infringement of the provisions on the summary declaration (Article 43 et seq. of the Customs Code) results in the incurrance of a customs debt under Article 204(1)(a) of the Customs Code (see, as regards the latter, the observations on the third question in point 71 et seq. of this Opinion).

52. Admittedly, Article 43 of the Customs Code shows that the two declarations are connected both in substance and in time; in practice they are also normally made together or in the form of a single declaration. That also seems to have been the case in the situation in the main proceedings.

53. From the legal point of view, however, the two declarations must be distinguished from one another, and it is only logical to apply different requirements as to content to the two declarations. In the summary declaration<sup>19</sup> and the subsequent customs declaration, the precise description of the imported goods is mandatory. On the other hand, at the stage of presentation of the goods to customs, it is sufficient to require only a general notification to the customs authority that imported goods have arrived at a specified place.

54. Such a difference in the requirements as to content which are applicable to the presentation of goods to customs and to the summary declaration is not least also reflected in the respective purposes of the two declarations. The summary declaration serves to identify the goods and as an aid to

clearance through customs in the event that the goods are removed from customs supervision after presentation to customs. Presentation to customs, on the other hand, is intended merely to ensure in advance that the customs authority is able, from an early stage, to monitor the import operation or to continue monitoring it, by means of specific controls, after the arrival of the goods at the customs office.

55. Initially, for the purposes of supervision and checking it is necessary, but also sufficient, for the authority merely to learn *that* goods — regardless of their nature and quantity — have arrived and *the place in which* the goods which have arrived are located. An erroneous description of the goods at the time of presentation to customs does not in any way alter the fact that imported goods are located at the place specified and are *available for seizure by the customs authorities*.<sup>20</sup>

56. Nor can it be inferred from the reference in Article 4(19) to 'the manner laid down' that further (and substantively correct) particulars concerning the imported goods must be provided. Community law, in

19 — The requirement for goods to be described precisely in the summary declaration formerly arose expressly from Article 3 (2) of Council Directive 68/312/EEC of 30 July 1968 on harmonisation of the provisions laid down by law, regulation or administrative action relating to: 1. customs treatment of goods entering the customs territory of the Community; 2. temporary storage of such goods (OJ, English Special Edition 1968 (II), p. 416, repealed with effect from 3 January 1989). In the current legislation, the same requirement follows from Article 44(1) of the Customs Code in conjunction with the forms used, which expressly require a description of the nature of the goods.

20 — Ultimately, the facts in the main proceedings also show very clearly that presentation of the goods to customs can fulfil its purpose despite incorrect particulars being given as regards the nature of the goods which have arrived. Thus, the customs office of the port of Antwerp was clearly able to exercise its powers of control effectively even though the declaration contained (in part) incorrect particulars relating to the nature of the imported goods.



particular the regulation implementing the Customs Code,<sup>21</sup> specifies no detailed requirements as to the form and content of presentation to customs. Unless national provisions lay down additional requirements, presentation to customs may be carried out in any desired manner, and even in the form of conduct from which the intention may be inferred.

57. It must therefore be concluded that the obligation to present goods to customs pursuant to Article 40 of the Customs Code does *not* imply an obligation to provide a substantively correct description of those goods. Consequently, so far as goods *which have been presented to customs*, even under a substantively incorrect description, are concerned, there can be no question of an infringement of Article 40 of the Customs Code.

(b) Goods which have not been presented to customs at all

58. Instances in which goods (such as cigarettes, for example) were not presented to customs at all, regardless of whether those goods were imported by carriers acting in good faith without their knowledge or whether information about the existence of

those goods was quite deliberately withheld with the aim of evading import duties, must be distinguished from the situation discussed above.

59. In the judgment in *Viluckas*, the Court ruled that the presentation to customs of goods introduced into the Community, in terms of Article 4(19) of the Customs Code, concerns *all goods*, including those hidden in a secret compartment specially made for that purpose, and that the obligation to present goods rests with the driver and co-driver of a lorry who introduced those goods into the customs territory of the Community, even though the goods were hidden in the vehicle without their knowledge.<sup>22</sup> If such goods are not presented to customs, they are introduced unlawfully into the customs territory of the Community in terms of Article 202(1) (a) of the Customs Code.<sup>23</sup>

60. It is therefore necessary to examine in each individual case whether goods which were not expressly mentioned in a notification of presentation to customs were still included in that presentation, that is to say, whether they were *covered* by the notification of presentation to customs at all.<sup>24</sup> It is

21 — Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1, hereinafter 'the regulation implementing the Customs Code').

22 — Judgment in *Viluckas*, cited in footnote 5, paragraphs 22 to 24.

23 — *Viluckas*, paragraph 28.

24 — *Viluckas*, paragraph 28.

true that in proceedings under Article 234 EC the Court is not itself competent to apply Community law to the dispute in the main proceedings. However, it is competent to provide the referring court with all the elements of interpretation of Community law which are necessary to enable that court to assess whether goods, such as the cigarettes seized in the main proceedings, which were not expressly declared to the customs authority, are covered by a notification of presentation to customs.

meaningfully<sup>26</sup> and ensure effective supervision of the import operation.<sup>27</sup>

62. In a situation such as that in the *Viluckas* case, it is not readily possible for the customs authority to exercise its powers of control effectively, since in that case the smuggled cigarettes were located separately from the actual cargo space, in a secret compartment which was specially made for the purpose in the ceiling of a lorry and trailer.<sup>28</sup> The customs authority could therefore not necessarily be expected to discover those goods in the course of a mere routine check. The situation is similar when goods are concealed in a vehicle's engine compartment, inside its seats or behind its wheels, for example.

61. As a guiding principle for that purpose, it may be inferred from the judgment in *Viluckas* that a notification of presentation of goods to customs (which is not otherwise specific) only ever covers goods which are located in the *usual* places for storing goods in the means of transport.<sup>25</sup> That is consistent with the purpose of presentation of goods to customs. Only in relation to such goods can the customs authority exercise its powers of control under Community law

63. In a situation such as that referred to the Court in the present case, on the other hand, the customs authorities are much more likely to be able to find undeclared or incorrectly declared goods. In this case, the cigarettes were stored in the same place as the cookware and were also packed in the same boxes (although not those intended for the product). The cigarettes were not camou-

25 — The judgment in *Viluckas*, cited in footnote 5, paragraphs 11 and 28, is in fact based on the assumption that concealed goods are not covered by a notification of presentation to customs.

26 — The need, when defining any obligation under customs legislation, to take account of the requirement for the customs authorities to be able to exercise effective supervision of the goods, stems from the third and fifth recitals in the preamble to Council Regulation (EEC) No 4151/88 of 21 December 1988 laying down the provisions applicable to goods brought into the customs territory of the Community (OJ 1988 L 367, p. 1, repealed with effect from 1 January 1994). As the predecessor of the current Customs Code, that regulation continues to be of interest for the purpose of interpreting it. According to the first and second recitals in the preamble to the Customs Code, the latter assembles *inter alia* the customs legislation in force up to then.

27 — Moreover, provisions of Member States' legislation, such as, for example, Paragraph 37 of the Austrian Zollrechts-Durchführungsgesetz (Law implementing Customs Legislation) (BGBl. I No 126/1998, p. 1542) are based on similar considerations. Under that provision, only goods which are carried in accordance with normal trade practice, and of which the customs authority can therefore acquire knowledge without difficulty, are covered by presentation to customs.

28 — *Viluckas*, cited in footnote 5, paragraph 11.

flagged by a special device or kept in a concealed place in which goods are not normally stored.

However, concealed or secreted goods which were not expressly mentioned to the customs authority and are not located in the usual places for storing goods in a means of transport are not covered by a notification of presentation of goods to customs within the meaning of Article 40 in conjunction with Article 4(19) of the Customs Code; a customs debt on importation is incurred under Article 202(1)(a) of the Customs Code in respect of such goods.

64. In summary, the obligation to present goods to customs also applies to goods which are simply hidden or are secreted by means of specially installed devices. Such goods are covered by a notification of presentation only if they are either expressly mentioned in it or are located in the *usual* places for storing goods in the means of transport. Otherwise Article 40 of the Customs Code is infringed.

2. The debtor within the meaning of Article 202(3) of the Customs Code

### (c) Conclusion

65. The first part of the fourth question should therefore be answered as follows:

66. By the second part of its fourth question, the referring court wishes to know, on the one hand, whether the person who has lodged a substantively incorrect summary declaration or an erroneous declaration for the customs procedure is a debtor and, on the other hand, whether a person 'may be deemed to be the customs debtor only if he may be regarded as a debtor within the meaning of Article 202(3) of the ... Customs Code'.

A customs debt on importation is not incurred under Article 202(1)(a) of the Customs Code where goods were presented to the customs authority, even if under a substantively incorrect description.

67. Article 202(3) of the Customs Code contains differentiated rules on the persons who may be regarded as debtors in respect of import duties which are to be levied under Article 202(1) of the Customs Code. If, in

addition to Article 202(3), account is taken of the corresponding provisions in Articles 203 (3), 204(3) and 205(3) of the Customs Code, it is obvious that each is an exhaustive list of possible debtors, drawn up in relation to the matters covered by the respective article. Consequently, in respect of a failure under Article 202(1)(a) of the Customs Code, the customs administration may regard as debtors only persons who satisfy the requirements of Article 202(3) of the Customs Code.<sup>29</sup>

69. However, as already mentioned,<sup>30</sup> the lodging of the summary declaration is directly linked in time with that of the presentation of the goods to customs (see also the first sentence of the second paragraph of Article 43 of the Customs Code) or even coincides with the latter. If, therefore, the lodging of a substantively incorrect summary declaration *simultaneously* involves a breach of the obligation to present the goods to customs pursuant to Article 40 of the Customs Code — which is the case where, for instance, concealed or secreted goods were not covered by the notification to the customs authority at all and so not presented to customs either<sup>31</sup> —, the person who lodged the summary declaration is a debtor within the meaning of the first indent of Article 202(3) of the Customs Code. It is for the referring court to establish whether that is the position in the case pending before it.

68. In itself, the fact that a person has lodged an erroneous *summary declaration* or *declaration for a customs procedure* is not relevant in the context of Article 202 of the Customs Code. Declarations of that type are not covered by the provisions referred to in the second subparagraph of Article 202(1) of the Customs Code. The debtor within the meaning of the first indent of Article 202(3) of the Customs Code is, rather, the person who introduced the goods into the customs territory of the Community in breach of the *obligation to convey them* pursuant to Article 38(1)(a) or of the *obligation to present them to customs* pursuant to Article 40 of the Customs Code.

#### C — *The second and third questions: Articles 203 and 204 of the Customs Code*

70. By its second and third questions, the referring court seeks not only information about the respective interpretations of Articles 203 and 204 of the Customs Code; both questions also touch upon the relationship of those provisions to one another. The delimitation of those two provisions is of

29 — To that effect, see also the judgment and point 20 et seq. of the Opinion of Advocate General Tizzano in Case C-414/02 *Spedition Ulustrans* [2004] ECR I-8633.

30 — Points 52 and 53 of this Opinion.

31 — See, in that regard, points 58 to 64 of this Opinion.

practical significance *inter alia* because only Article 204 of the Customs Code provides, at the end of paragraph 1, for a possibility of rectification if it is established that the failure to comply with a customs rule has no significant effect on the correct operation of the temporary storage or customs procedure in question.

1. The third question: the material scope of Article 204 of the Customs Code

71. The third question again concerns that section of the facts in the main proceedings in which certain declarations regarding the imported goods were made to the customs authority by one of the defendants ('cookware'). By this question, the referring court essentially asks whether a customs debt is incurred under Article 204 where the declaration of goods presented to customs is substantively incorrect but the goods continue to be under customs supervision.

72. Under Article 204(1)(a) of the Customs Code, a customs debt on importation is incurred through non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed.

73. The temporary storage of goods begins following their presentation to customs (see Article 50 of the Customs Code). Under Article 43 of the Customs Code, the lodging of a summary declaration is one of the obligations arising from the temporary storage of goods. As already observed,<sup>32</sup> the summary declaration, in contrast to presentation to customs, requires a precise description of the goods. If, therefore, something other than the goods actually being imported (a product of a completely different nature such as, for example, 'cookware' instead of 'cigarettes' or 'cookware' instead of 'cookware and cigarettes') is entered in the summary declaration, the obligation under Article 43 of the Customs Code is not fulfilled.

74. It is of course true that the goods in question are always under customs supervision at the time of a failure under Article 204(1)(a) of the Customs Code; that provision specifically attaches a penalty to non-compliance with obligations arising from temporary storage or from the use of a customs procedure, namely, obligations which fall within the temporal scope of customs supervision (Article 37 of the Customs Code).

75. However, it is not necessary for customs supervision to be impaired as a consequence

<sup>32</sup> — Points 49 to 57 of this Opinion.

of a failure to fulfil obligations as referred to in Article 204(1)(a) of the Customs Code (for example, as a consequence of a substantively incorrect summary declaration). That follows from a comparison with Article 203 of the Customs Code. As the Court held in the judgment in *Hamann International*,<sup>33</sup> Articles 203 and 204 of the Customs Code have different spheres of application. Whilst the first provision covers conduct leading to the goods' being removed from customs supervision, the second covers failures to fulfil obligations *which have had no effect on customs supervision*.

77. Possible effects on customs supervision of a failure to fulfil obligations may, at best, acquire relevance indirectly under the *rectifying clause* at the end of Article 204(1) of the Customs Code. Thus it follows from Article 859 of the regulation implementing the Customs Code, which contains an exhaustive list of possibilities of rectification,<sup>35</sup> that rectification is excluded if there has been an attempt to remove the goods from customs supervision.<sup>36</sup> However, by contrary inference, that means that even infringements of obligations which do not affect, or attempt to affect, customs supervision are covered by the conditions for the application of Article 204(1) of the Customs Code (but may possibly be rectified).

76. Article 204 of the Customs Code would, moreover, be deprived of its practical effectiveness if it applied only to failures to fulfil obligations with effects on customs supervision. It would then be practically redundant. If a failure within the meaning of Article 204(1) of the Customs Code had the effect of simultaneously removing the goods from customs supervision, the conditions for the application of Article 203(1) of the Customs Code would always also be fulfilled in any case, and Article 203 would, by virtue of the wording of the Customs Code alone,<sup>34</sup> have to take precedence, as the *lex specialis*, over Article 204.

78. In summary, the customs debt on importation under Article 204 of the Customs Code is incurred in the case of a substantively incorrect declaration of goods, regardless of whether that failure affects customs supervision.

33 — Cited in footnote 5, paragraph 28.

34 — According to its wording, Article 204(1) of the Customs Code is applicable only 'in cases other than those referred to in Article 203'.

35 — Case C-48/98 *Sohl & Sohlke* [1999] ECR I-7877, paragraph 43.

36 — See the first indent of Article 859 of the implementing regulation.

2. The second part of the second question: the personal scope of Article 203 of the Customs Code

Customs Code, the following persons are deemed to be the debtors: firstly, the person who removed the goods from customs supervision; secondly, certain persons who participated in such removal; and, finally, certain persons who acquired or held the goods in question.

79. The second question concerns that section of the facts in the main proceedings in which the goods were transported away from the port of Antwerp and conveyed to a place other than the warehouse specified as the customs office of destination in the transit document.

80. By the second part of its second question, the referring court essentially asks whether a person who is required to comply with the obligations arising from temporary storage of the goods or from the use of the customs procedure may also be held liable as a debtor in respect of import duty incurred under Article 203(1) of the Customs Code. This question becomes relevant where, for example, as in the situation in the main proceedings, the principal in respect of the transit procedure, who declared the goods for that procedure, is not identical with the person who then removed the goods from customs supervision when they were either transported away or unloaded.

81. It must first be observed that, under the first three indents of Article 203(3) of the

82. However, a further debtor is deemed to be, 'where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed' (fourth indent of Article 203(3) of the Customs Code). The Customs Code thus lays down the *prima facie* clear rule that, in addition to the persons mentioned previously, the last-mentioned person is *also* liable for the import duty. In contrast to the previous indents of Article 203(3) of the Customs Code, however, this rule contains an additional clause: the person required to fulfil the obligations arising from temporary storage of the goods or from the use of a customs procedure is only a debtor *where appropriate*. However, it is not easy to infer from the Customs Code what that means.

83. In my view, the phrase 'where appropriate'<sup>37</sup> contains no additional, restrictive condition governing the indebtedness of the persons concerned. It is, rather, merely clarification of the fact that the fourth indent can, logically, apply only *where* a 'person' within the meaning of that provision exists at all. That is the case where, as in the situation in the main proceedings, the goods removed from customs supervision were previously presented to customs or declared for a customs procedure *by another person*, that is to say, where presentation to customs or declaration of the goods and their removal were *not carried out by the same person*.<sup>38</sup> If, on the other hand, the goods were presented or declared to customs and removed from supervision by the same person, no recourse to the fourth indent of Article 203(3) of the Customs Code is necessary, because the first indent already applies to that person in any case. Nor does recourse to the fourth indent

of Article 203(3) of the Customs Code make sense if the goods had not been presented or declared to customs at all when they were removed from customs supervision if, for instance, they had already been removed from supervision before reaching the customs office by, for example, leaving the prescribed route (a customs route, for example); in the latter case, no 'person required to fulfil the obligations' within the meaning of the fourth indent exists at all.

84. That interpretation of the phrase 'where appropriate' as a mere clarification, and not a restriction, takes account of the spirit and purpose of Article 202 et seq. of the Customs Code. The Community's fiscal interest dictates that the group of debtors should be widened as far as possible so as to ensure the recovery of customs duty in the most effective way possible.

37 — In the German version of the Customs Code this expression reads 'gegebenenfalls', in the French 'le cas échéant', in the Italian 'se del caso', in the Spanish 'en su caso', in the Portuguese 'se for caso disso' and in the Dutch 'in voorkomend geval'.

38 — Like the fourth indent of Article 203(3) of the Customs Code, Article 96(2) of the Customs Code also extends the group of possible debtors in the event of removal of the goods from customs supervision in the context of the external Community transit procedure. Under that provision, subject to certain conditions, the carrier and recipient of goods are also deemed responsible for production of the goods in the proper manner at the customs office of destination.

85. In circumstances such as those in the main proceedings, in which the person who



declared the goods for the external Community transit procedure is not the same person as the person who subsequently transported or unloaded the goods, the fourth indent of Article 203(3) of the Customs Code has an independent sphere of application since it leads to the existence of a further debtor not covered by the preceding indents.

meaning of Article 203(1) of the Customs Code is incurred through unlawful removal from customs supervision of goods liable to import duties. The referring court correctly assumes in that regard that goods placed under the external Community transit procedure are in fact removed from customs supervision if, as in the situation in the main proceedings, they are conveyed to a place other than the warehouse specified as the customs office of destination in the transit document.<sup>39</sup>

86. In summary, it must be concluded that, in a situation such as that in the main proceedings, under the fourth indent of Article 203(3) of the Customs Code, the person who is required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed is also a debtor in respect of the import duty arising under Article 203(1) of the Customs Code.

### 3. The relationship of Article 203 to Article 204 of the Customs Code

87. By the first part of its second question, the referring court is only apparently seeking information which can readily be deduced from the wording of the Customs Code. A customs debt on importation within the

88. However, if this first part of the second question is viewed in conjunction with the other questions, in particular the third question, it becomes apparent that the referring court is also raising the issue of the relationship between Article 203 and Article 204 of the Customs Code and specifically wishes to know under which of the two provisions the customs debt on importation is incurred when, as in this case, initially a failure to comply with customs rules under Article 204(1) of the Customs Code was committed and subsequently the goods were also removed from customs supervision. In essence, therefore, it is necessary to examine whether Article 203 or Article 204 of the Customs Code or both provisions apply when a failure within the meaning of Article 204(1) of the Customs Code was already committed before the goods were removed from customs supervision but which did not affect customs supervision (in this case, incorrect descrip-

<sup>39</sup> — See, in that regard, points 12 and 13 of this Opinion.

tion of the goods to the customs authority — ‘cookware’ instead of ‘cigarettes’ or ‘cookware’ instead of ‘cookware and cigarettes’).<sup>40</sup>

90. The rule on concurrence favouring Article 203 of the Customs Code thus operates whenever *the same factual situation* is to be assessed. By contrast, it is doubtful whether Article 203 of the Customs Code, as the special rule, also takes precedence over Article 204 of the Customs Code when *different factual situations* are to be assessed, one of which falls under Article 204 of the Customs Code and a subsequent one falls under Article 203 of the Customs Code.

89. It must first be observed in this connection that the Customs Code expressly refers, in Article 204(1), to the complementary relationship between the two provisions. Thus, the customs debt under Article 204 of the Customs Code is incurred only *in cases other than those referred to in Article 203*. In the judgment in *Hamann International*, the Court therefore held that the two provisions have different spheres of application and that the decision as to which of them causes a customs debt to be incurred depends on whether the factual situation in question constitutes removal from customs supervision for the purposes of Article 203 (1) of the Customs Code. Only if that is not the case should the possibility of applying Article 204 of the Customs Code arise.<sup>41</sup>

91. The extent of the priority enjoyed by Article 203 of the Customs Code depends on what is understood by *a case* for the purposes of Article 204(1) of the Customs Code. In my view, that term should be understood as a reference to the particular factual situation and not be extended as a general reference to the import operation as a whole.<sup>42</sup>

92. That is because, firstly, it must, as evidenced by the wording of Article 204, be a case *referred to* in Article 203. However, in its first paragraph, Article 203 describes only one factual situation, namely, the *removal* of the goods from customs supervision.

40 — Unlike Articles 203 and 204, Articles 202 and 204, for example, are mutually exclusive simply in terms of the conditions for their application, since Article 202 presupposes unlawful introduction of the goods into the customs territory of the Community (for example, in breach of the obligation to present them to customs in accordance with Article 40 of the Customs Code), whereas Article 204 specifically presupposes lawful introduction (with presentation to customs).

41 — Judgment cited in footnote 5, paragraphs 28 and 30. See also point 57 of the Opinion of Advocate General Tizzano of 12 June 2003 in that case, in which he describes Article 204 of the Customs Code as a provision of residual application in relation to Article 203.

42 — To that effect, in the judgment in *Hamann International*, the Court also refers to the ‘factual situation in question’ (judgment cited in footnote 5, paragraph 30).

93. Secondly, the scope and thus the practical effectiveness of Article 204 of the Customs Code would be substantially restricted if that provision were always overridden in the event of subsequent removal of the goods from customs supervision. That is precluded by the Community's fiscal interest in being able to have recourse *jointly and severally* to all the debtors within the meaning of Articles 203 (3) and 204(3) of the Customs Code.<sup>43</sup>

94. Thirdly, it must be borne in mind that subsequent removal of goods from customs supervision does not nullify the effects of a preceding failure under Article 204 of the Customs Code, but *compounds* them, since after such removal the customs authority is no longer in a position to detect a previous failure to comply with obligations as referred to in Article 204, such as, for example, an erroneous declaration, by means of an inspection.

95. All the foregoing supports the proposition that the rule on concurrence in Article 204(1) of the Customs Code does not apply to cases where the conditions for the application of Articles 203 and 204 were brought about by *different, successive factual situations*. In such cases, therefore, Article

204 of the Customs Code is not overridden by Article 203.<sup>44</sup>

96. It is necessary to distinguish from the foregoing the question concerning the actual *payment* of the duty. Duty can never, of course, be collected more than once despite the existence of more than one legal basis for the incurrence of the customs debt, and need be paid only once. Where several persons owe the duty, they are liable as joint and several debtors (Article 213 of the Customs Code).

97. In summary, a customs debt on importation is incurred both under Article 203(1) and under Article 204(1) of the Customs Code where, as a result of different, successive factual situations, first, one of the obligations arising from temporary storage or from the use of a customs procedure is infringed and, subsequently, the goods liable to import duties are removed from customs supervision.

44 — Conversely, it would be equally inappropriate, in the case of successive factual situations, to disapply Article 203 of the Customs Code merely because a customs debt within the meaning of Article 204 of the Customs Code had already been incurred as a result of a failure committed previously. That is *a fortiori* the case since removal of the goods from customs supervision is the more serious offence, as shown by, *inter alia*, the absence of a possibility of rectification and the wide group of debtors (Article 203(3) of the Customs Code). In such a case, there is no reason to accord preferential treatment to the person who removes the goods from customs supervision, merely because another person has previously failed to fulfil an obligation as referred to in Article 204(1) of the Customs Code.

43 — See Article 213 of the Customs Code.

## VI — Conclusion

98. In the light of the foregoing considerations, I propose that the Court should answer the questions referred to it for a preliminary ruling by the Hof van Beroep te Antwerpen as follows:

(1) The first question:

Goods brought into the customs territory of the Community must be regarded as being under customs supervision even if they were incorrectly described, whether intentionally or unintentionally, to the customs authority.

(2) The second and third questions:

A customs debt is incurred both under Article 203(1) and under Article 204(1)(a) of the Customs Code where, as a result of different, successive factual situations, first, one of the obligations arising from temporary storage of the goods or from the use of a customs procedure is infringed and, subsequently, the goods liable to import duties are removed from customs supervision.

In a situation such as that in the main proceedings, under the first indent of Article 203(3) of the Customs Code, the person who was required to comply with the obligations arising from temporary storage of the goods liable to import duties or

from the use of the customs procedure under which the goods were placed is also a debtor in respect of the import duty.

The customs debt on importation under Article 204(1) of the Customs Code is incurred in cases of a substantively incorrect declaration of goods, regardless of whether that failure affected customs supervision.

(3) The fourth question:

A customs debt on importation is not incurred under Article 202(1)(a) of the Customs Code where goods were presented to the customs authority, even if under a substantively incorrect description.

However, concealed or secreted goods which were not expressly mentioned to the customs authority and are not located in the usual places for storing goods in a means of transport are not covered by a notification of presentation of goods to customs within the meaning of Article 40 in conjunction with Article 4(19) of the Customs Code; a customs debt on importation is incurred under Article 202(1)(a) of the Customs Code in respect of such goods.

In so far as lodging an incorrect summary declaration also involves a breach of the obligation to present the goods to customs under Article 40 of the Customs Code, the person who lodged the summary declaration is a debtor within the meaning of the first indent of Article 202(3) of the Customs Code.