leave it full freedom to take criminal proceedings in respect of offences committed, with all the attendant consequences, including fines.

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 5 February 1981.

A. Van Houtte
Registrar

T. Koopmans
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 27 NOVEMBER 1980 [1]

Mr President,
Members of the Court,

1. The reference for a preliminary ruling in relation to which the present opinion is delivered concerns the customs provisions applicable to a smuggled narcotic substance which cannot be lawfully traded and which is liable to be confiscated and destroyed by national authorities. The substance is in fact heroin. The issue is whether Community law permits the charging of customs duties on goods of that nature and, if so, under which rules and according to which criteria the value for customs purposes must be determined.

Let me give a brief summary of the facts.

In March 1978 Joszef Horvath, who had been sentenced by the Landgericht [Regional Court] Hamburg to five years' imprisonment for dealing in heroin and smuggling, received a demand from the German customs authorities for payment of DM 1 296 by way of duty on the smuggled heroin. Mr Horvath's objection to that demand was dismissed by the Hauptzollamt Hamburg-Jonas and he then commenced proceedings in the Finanzgericht [Finance Court] Hamburg. In the course of those proceedings that court submitted the following questions to the Court of Justice by order of 15 January 1980:

"1. Are the provisions of Regulation (EEC) No 803/68 of the Council of 27 June 1968 and of Regulation

1 — Translated from the Italian.

(EEC) No 603/72 of the Commission of 24 March 1972 to be interpreted as meaning that, with the exception of those provisions which require goods subject to customs control to be formally presented, they also apply directly to the valuation for customs purposes of goods smuggled into the customs territory of the Community?

2. Are the provisions of Regulation (EEC) No 803/68 of the Council, especially Articles 1, 2, 4, 6, 7, and 8 thereof, to be interpreted as meaning that the value for customs purposes of the goods smuggled into the customs territory of the Community is fixed with reference to the time and place of their introduction into the customs territory of the Community, even if according to the national substantive legal provisions from time to time applicable the liability to the customs arises at another time and is payable by a person other than the first buyer residing in Community territory?

3. Are the provisions of Regulation (EEC) No 375/69 of the Commission of 27 February 1969 and of Regulation (EEC) No 1343/75 of the Commission of 26 May 1975 to be interpreted as meaning that they apply also in the event of goods being smuggled into the customs territory of the Community with the attendant condition that any buyer subsequent to the first residing in that territory who is found to be in possession of the smuggled goods has to supply particulars of the price which he has paid so that the price paid by that person is the relevant value for customs purposes, or do the competent national authorities have to take the purchase price paid by the first buyer residing in Community territory as the basis of the value of the smuggled goods for customs purposes in accordance with the rules laid down in Articles 1, 2, 4, 6, 7 and 9 of Regulation (EEC) No 803/68?"

Subsequently, at the request of the Court of Justice, the Commission supplied information on the customs provisions of Member States with regard to the illegal importation of drugs. In particular, it pointed out that in eight of the nine Member States (the Federal Republic of Germany being the exception) illegally imported drugs are confiscated and generally destroyed and in such cases no customs duty is charged. Having received this information, the national court, by order of 8 July 1980, rectified and supplemented the questions submitted to the Court of Justice by the following paragraphs:

"1. Are the provisions of the EEC Treaty on the customs union (Article 9 (1) and Articles 12 to 29) to be interpreted as meaning that a Member State is not entitled to charge customs duty on unlawfully imported drugs which have subsequently been destroyed when all the other Member States do not charge customs duty on drugs which have been unlawfully imported but seized and destroyed? Might the charging of customs duty in one Member State alone also infringe Article 7 of the EEC Treaty?

2. The questions previously referred to the Court in the order of 15 January 1980 are raised only in the event of the Federal Republic of Germany being entitled to charge customs duty on drugs which have been smuggled in and destroyed."

2. I start by examining the first point raised by the later order. The matter to be determined is whether Article 9 (1)

and Articles 12 to 29 of the EEC Treaty allow a Member State to charge customs duties on drugs imported illegally and subsequently destroyed. The court making the reference expresses doubts in this regard on account of the fact that only German law provides for the charging of duties in the type of case described. Should this more severe treatment accorded to drug smugglers in the Federal Republic — and hence this lack of uniformity between the laws of the Member States with regard to a particular aspect of customs law — be regarded as compatible or not with the provisions of the Treaty relating to the customs union?

Before answering that question I believe that it would be appropriate to emphasize that the Finanzgericht Hamburg, which took into consideration "goods smuggled into *the customs territory of the Community*" and requested an interpretation of Community regulations on the determination of the value of goods for customs purposes, had in mind a case of importation from a non-nember country. In the present case the heroin had been imported into Germany across the frontier with the Netherlands, but it clearly originated in a State outside the Community. Consequently the provisions of the EEC Treaty on the customs union which are relevant to the matter before the Court are those governing the position of the Community as against non-member countries, that is to say, Articles 18 to 29 and not Articles 12 to 17, which deal with the elimination of customs duties between Member States.

Article 9 (1) provides that "the Community shall be based on a customs union which shall cover all trade in goods and which shall involve... the adoption of a common customs tariff in [Member States'] relations with third countries". It was recognized at the outset that, in addition to setting up a new system of tariffs (according to the rules laid down in Articles 19 to 26), it was necessary to harmonize customs regulations. That is clear from Article 27, which provides for the approximation, "in so far as may be necessary", of provisions laid down by law, regulation or administrative action in the Member States and prescribes a short period for that purpose (before the end of the first stage). Under Article 27 the Commission has power to address "all appropriate recommendations" to Member States.

As regards this provision, I would observe that it indicates rather vaguely the extent to which the approximation is intended to attain and does not provide for any form of intervention by the Community institutions which is endowed with binding effects. In these circumstances the harmonization directives in the field of customs law have been issued under the general provision contained in Article 100 of the Treaty, whilst the use of regulations has been possible only by having recourse to Article 235. Moreover, the period stipulated in Article 27 expired quite some time ago without the approximation of national provisions having been attained to the extent objectively required. That is proved by the fact that in 1979 the Commission drew up a new "Multiannual programme for the attainment of the customs union" (published in Official Journal C 84 of 31 March 1979), in which it stated *inter alia:* "The ultimate objective of that customs union is to create the conditions on which the fusion of the national markets into a single market and the elimination of internal frontiers depend. These conditions entail more than the mere establishment of a Common Customs Tariff and a number of basic principles governing the application of such a tariff. *They must be given practical*

effect via the establishment of a complete, uniform and effective body of legislation, designed to ensure the homogeneity of trade arrangements between the Community and non-nember countries and thereby to create the conditions required for goods to be able to move within the Community under the same conditions as within domestic markets". Subsequently the 1980 programme for the attainment of the customs union (published in Official Journal C 44 of 21 February 1980) announced the Commission's intention to transmit to the Council "proposals containing the basic Community principles which will replace those set out in national legislation in those areas where customs provisions exist only at a national level" (paragraph 3).

Given that state of affairs, it is not surprising that certain customs matters continue to be governed in the individual Member States by national provisions which have not been harmonized with those in force in the other Member States. In such cases it would be inaccurate to speak of *lacunae* in Community law, since we are not dealing with a matter which has been assigned in its entirety to the Community legislature but rather with a matter which in part still falls within the scope of national provisions and in respect of which a wider or more comprehensive harmonization of those provisions is awaited. It is therefore possible that certain aspects of customs activities are covered by national rules which differ from State to State, in spite of the risk that that may impede the full attainment of the customs union.

3. One matter in which harmonization of the laws of Member States has not yet been attained is the circumstances in which customs debts may be extinguished. On 25 June 1979 the Council issued Directive 79/623/EEC on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt, which seeks amongst other things to unify to a certain extent the rules governing the extinction of customs debts. However, the period granted to Member States for compliance with the obligations laid down will not expire until 1 January 1982. In relation to the issue with which we are dealing it is interesting to mention the ninth recital in the preamble to the directive, which states *inter alia* that it is necessary "to specify in what circumstances the customs debt may be deemed not to have arisen or to be extinguished" and which adopts the idea that "the reasons for this extinction must be based on the recorded fact that the goods have not been used for the economic purpose which justified the application of import or export duties". In accordance with this principle, the circumstances which are stated to entail the extinction of the customs debt on importation include the destruction, on the order of the authorities and before their release from customs supervision, of the goods entered for release into free circulation (Article 9 (2) (a)).

The very fact that a Community legislative instrument was only recently adopted in order to make rules governing the extinction of customs debts suggests that until the aforesaid directive is put into effect by the Member States the pre-existing national rules on that matter remain in force. The conclusion must therefore be that it is not contrary to the provisions of the Treaty on the customs union for the law of one Member State to allow a customs debt to continue to exist in particular circumstances (confiscation and destruction of the goods by order of the authorities), although the laws of all the

other Member States provide that in the same circumstances that debt does not arise or is extinguished.

I do not believe that that view can be countered by invoking general principles of Community law. The national court probably had in mind the desirability of full equality of treatment of importers when it pointed out the disadvantages inherent in the fact that the German rules differed from the rules in the other Member States. However, we have seen that the provisions of Community law on the customs union temporarily allow certain differences in national customs law to continue in existence and it is inevitable that those differences will give rise to disparities in the treatment of importers of goods originating in non-nember countries depending on the Member State in which customs clearance is carried out. In my opinion, therefore, there can be no question of any principle of equality of treatment of importers extending over the entire field of customs law; equality exists to the extent to which there is Community customs legislation. Further proof of that is given by the eighth recital in the preamble to Regulation No 803/68 on the valuation of goods for customs purposes, which mentions amongst its specific aims the need "to ensure equal treatment of importers *as regards the collection of Common Customs Tariff duties*". I would add that, when the Court of Justice had occasion to give judgment in a case in which equality of treatment of importers was in issue (I refer to the recent case, Case 135/79 *Gedelfi* [1980] ECR 1713, decided by judgment of 3 June 1980), it confined itself to observing that "a single trading system with non-member countries constitutes one of the fundamental *objectives* of the common market" and "one of the essential aims of Regulation No 516/77", before going on to use that objective as a factor in interpreting the Regulation. I find that approach significant, inasmuch as it gives equality of treatment of importers the status of an objective — gradually pursued by Community law — and not a general principle.

As regards the possibility of elevating the connexion between the customs debt and the economic purpose of the imported goods to a principle of Community law, I believe that that remains an abstract hypothesis. As I have observed, only Directive 79/623/EEC has adopted the rule that the customs debt must be extinguished when the goods have not been used for the economic purpose which justified the application of duty. That, however, is no reason for holding that the Community legislature has applied a general principle; once again the truth is that it has introduced provisions designed to obtain a particular objective.

4. In the final part of the question under consideration the German court asks whether the charging of customs duty in one Member State on the importation of goods which were seized and subsequently destroyed by order of the authorities is contrary to Article 7 of the Treaty. That article, of course, prohibits "any discrimination on grounds of nationality". It is beyond discussion that the case in point discloses no such discrimination between importers from the point of view of the Member State

which charges duty in spite of ordering the destruction of the goods. What is in issue is the different treatment of importers according to the Member State in which customs clearance is performed. That however has nothing to do with the rule contained in Article 7.

5. I now turn to consideration of the questions raised in the first order of the Finanzgericht Hamburg, which concern first of all the issue of the applicability of the Community provisions on value for customs purposes to goods smuggled into the customs territory of the Community and secondly the detailed rules for the determination of that value in relation to such goods.

With regard to the first point, I am of the opinion that the provisions of Regulation No 803/68 and of the Commission's supplementary regulations also apply to goods which are illegally imported into the customs territory of the Community.

The consideration foremost in support of this view is that neither the Treaty nor the secondary legislation restricts the applicability of the Common Customs Tariff to goods imported legally. What holds good for the Common Customs Tariff must also hold good for provisions which are instrumental in its application, in particular Regulation No 803/68, the preamble to which states in the penultimate recital that "the uniform application of the provisions of this regulation to imports of *all goods* must be ensured". Without wishing to exaggerate the importance of this wording, it seems to me that, in the absence of textual indications which might exclude them from the tariff, goods imported illegally must necessarily be covered by Community customs rules, including the provisions on the determination of value for customs purposes provided that they are applicable on the facts. It is true that in general (at least until Directive 79/623/EEC) those provisions seem to have been drafted on the assumption that legitimate commercial transactions are involved. In fact Regulation No 375/69 of the Commission of 27 February 1969 makes rules for the declaration which importers must deliver to the customs authorities and which is taken into account in ascertaining the value of goods for customs purposes. But it seems reasonable to assume that the secondary legislation was conceived in relation to the normal manner in which commercial transactions are undertaken and that may explain why the case of illegal dealers was not dealt with expressly. In any event, I do not consider that reference to the way in which the legislation on value for customs purposes is set out is sufficient to exclude illegally imported goods from its scope.

Of course the view which I have taken is subject to two reservations. In the first place, the goods in question must be covered by the Common Customs Tariff (as regards the present case, heroin falls into this category). Secondly, for obvious reasons there can be no application of those Community rules which presuppose that the importation (or exportation) took place lawfully, in particular — as the national court has rightly stated — the provisions which presuppose that the goods are properly entered for customs clearance.

6. Once it has been established that Regulation No 803/68 is applicable in principle to goods illegally imported into

the customs territory of the Community, it remains to be seen whether the time and place of the importation may be determined by reference to the provisions of that Regulation.

As regards the material time for valuation for customs purposes, Article 5 of Regulation No 803/68 contains two general provisions, formulated on the supposition that legitimate forms of importation (or exportation) are involved. Article 5 (2) refers to the date of acceptance by the customs authorities of the statement by which the trader manifests his intention that the goods should enter into home use, whilst subparagraph (b) refers to the time fixed by the Community institutions or by Member States for entry into home use according to a different customs procedure. Those provisions, being related to normal customs clearance, are not applicable to goods imported illegally. Therefore, in order to ascertain the time at which goods of the latter type must be valued for customs purposes it will be necessary to apply the national provisions of each Member State.

It is worth noting that in providing for the harmonization of legislation with regard to the creation of customs debts, the recent Directive 79/623/EEC, to which I have already referred, also deals with the moment when a customs debt is deemed to be incurred (Article 3) and the moment to be taken into consideration to determine the amount of the customs debt (Article 7). In the context of that directive the matter has also been settled with regard to illegal imports, it being provided that in the case of such goods the debt is incurred by "the introduction into the customs territory of the Community of goods liable to import duties" (Article 2 (b)) and that the moment when the customs debt is deemed to be incurred corresponds to the "moment when the goods are introduced into the customs territory of the Community" (Article 3 (b)). We already know that *ratione temporis* those provisions are not applicable to the present case. However, it is useful to bear them in mind because they show that before their adoption the matter was not regulated at Community level and was therefore left entirely to national legislation pending harmonization.

With regard to the place to be taken into account in determining the value for customs purposes, it seems possible to adopt the criterion of the place of introduction into the customs territory of the Community, irrespective of whether or not the goods are imported legally. Therefore, the relevant provisions of Regulation No 803/68 may also be applied to illegally imported goods, in so far as those provisions are not based on the observance of particular legal formalities.

7. The final question raised by the German court concerns the ascertainment of the persons who are bound to provide the national customs authorities with the information required in order to determine the value of the goods for customs purposes. Commission Regulation No 375/69 of 27 February 1969 and Commission Regulation No 1343/75 of 26 May 1975 provide that the importer must furnish the customs authorities with a declaration of particulars relating to the value of the goods for customs purposes and supply those authorities with a copy of the relevant invoice, again for the purpose of determining that value. The German court asks whether those provisions apply in relation to someone who acquires, within the customs territory of the Community, goods brought there illegally — with the result that a person

acquiring the goods from the importer or from a subsequent dealer has to furnish the authorities with particulars of the price paid — or whether, in accordance with the principles laid down in Regulation No 803/68, the national authorities are obliged to determine the value for customs purposes on the basis of the price paid by the first purchaser residing in the territory of the Community.

It seems to me that both Regulation No 375/69 and Regulation No 1345/75 are applicable only to legitimate importations; in fact they provide for the completion of a series of procedural formalities conceivable only in the context of ordinary commercial transactions. It follows that those regulations cannot be applied to illegal importations. However, an obligation to furnish information on the value of the goods exists also in the case of an illegal importer and, in general, in the case of anyone who acquires smuggled goods since in fact Article 14 (a) (1) of Regulation No 803/68 (inserted by Regulation No 338/75 of 10 February 1975) provides that "with a view to determining value for customs purposes and without prejudice to national provisions which confer wider powers on the customs authorities of Member States, any person or undertaking directly or indirectly concerned with the import transactions in question shall supply all necessary information and documents to those authorities".

Undoubtedly, it is difficult to imagine that someone acquiring illegally imported goods would inform the authorities in view of the consequences, including criminal penalties, attendant upon such a type of admission. Therefore, in order to determine the value of such goods for customs purposes the national authorities will on most occasions be obliged to have recourse to other methods of assessment, in particular the comparative method.

If, as in this case, it is a question of goods which were not only imported as contraband but which may not even be freely traded, the determination of the normal value will encounter a further obstacle inasmuch as it will be necessary to refer to prices charged on the black market. However, the ascertainment of value on the basis of such prices is less unusual than might be imagined and is not performed solely by the customs authorities of the Federal Republic (although they are the only ones to do so in connexion with the payment of duty when goods are confiscated). Indeed, in other legal systems the criminal penalty for smuggling is calculated by reference to the customs duties evaded. I may cite by way of example Article 282 of the Italian Decreto del Presidente della Repubblica of 23 January 1973, No 43, which contains such a provision. That means that situations in which it is necessary to ascertain the value for customs purposes in the case of seizure or destruction of the goods are not exceptional and proves, in my opinion, the feasibility of ascertaining the value even when it is necessary to refer to the black market.

8. In view of all the considerations which I have set out above I propose that the Court should reply to the questions submitted by the Finanzgericht Hamburg by orders of 15 January and 8 July 1980 as follows:

(a) A Member State is entitled to charge duty on unlawfully imported drugs which have subsequently been destroyed, even though the other Member States do not charge duty on such importations. That power is not contrary to either the provisions of the EEC Treaty on the customs union or Article 7 of that Treaty.

(b) The rules of Community law on value for customs purposes are generally applicable to all goods in respect of which the Common Customs Tariff provides for the charging of customs duties, including goods illegally imported into the customs territory of the Community. However, an exception must be made in the case of those rules the content of which clearly presupposes that the importation or exportation of the goods took place legally and which for that reason are inapplicable in the case of goods imported or exported illegally.

(c) The provisions of Regulation No 803/68 of the Council are not applicable for the purpose of ascertaining the time which must be taken into consideration in determining the value for customs purposes of goods illegally imported into the customs territory of the Community. That time must therefore be ascertained on the basis of national law. The provisions of that regulation which indicate the place to be taken into account in determining the value for customs purposes of goods imported into the customs territory of the Community apply both to goods imported legally and to smuggled goods, unless they clearly presuppose the observance of certain legal formalities.

(d) The provisions of Commission Regulation No 375/69 and Commission Regulation No 1343/75 are not applicable to goods smuggled, into the customs territory of the Community. However, under Article 14 (a) (1) of Regulation No 803/68 the customs authorities may require the information needed to determine the value of the goods for customs purposes from anyone who has acquired the goods in question, the importer or a subsequent dealer, in the territory of the Community.