

OPINION OF ADVOCATE GENERAL  
TIZZANO

delivered on 26 June 2003<sup>1</sup>

1. By order of 24 April 2001, the Bundesfinanzhof (Federal Finance Court) referred to the Court of Justice for a preliminary ruling under Article 234 EC three questions concerning the interpretation of the Community rules on external transit. These questions specifically concern the incurring of a customs debt following the removal of certain goods from customs supervision, and the repayment of import duties in special situations.

**Legislative background**

*Community legislation*

2. As far as Community legislation is concerned, for the purposes of this Opinion reference must be made to a number of provisions on Community transit, the

incurring of a customs debt, the persons liable and the repayment of import duties in special situations.

3. With regard to Community transit, account must be taken of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit,<sup>2</sup> which was applicable at the material time.<sup>3</sup> As far as concerns us here, Article 12 of that regulation provides that '[a]ny goods that are to be carried under the procedure for external community transit shall be covered, in accordance with the conditions laid down in this regulation, by a T 1 declaration. ... The T 1 declaration shall be signed by the person who requests permission to effect an external Community transit operation or by his authorised representative; and at least three copies of it shall be produced at the office of departure'.<sup>4</sup>

2 — OJ 1977 L 38, p. 1.

3 — That regulation was repealed, with effect as of 1 January 1993, by Article 46(1) of Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit (OJ 1990 L 262, p. 1). It is applicable to the present case, however, as Article 129(1) of Commission Regulation (EEC) No 1214/92 of 21 April 1992 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1992 L 132, p. 1) provides that '[c]arriage begun, in accordance with the provisions of Regulation (EEC) No 222/77 and of Regulation (EEC) No 1062/87 on the last day that precedes the date of application of this Regulation, will be continued after that date under the conditions laid down in those Regulations'.

4 — Paragraphs 1 and 3.

1 — Original language: Italian.

4. For present purposes, it should also be noted that under Article 18 of that regulation, '[a]s a general rule, identification of the goods shall be ensured by sealing. ... The office of departure may dispense with sealing if, having regard to other possible measures for identification, the description of the goods in the T 1 declaration or in the supplementary documents makes them readily identifiable'.<sup>5</sup>

5. Article 19 provides that '[t]he copies of the T 1 document delivered to the principal or to his representative by the office of departure must accompany the goods'.<sup>6</sup> Under Article 20, '[c]opies of the T 1 document shall be produced in each Member State as required by the customs authorities, who may satisfy themselves that the seals are unbroken. The goods shall not be inspected unless some irregularity is suspected which could result in abuse.'

6. With regard to the incurring of a customs debt, reference must be made to Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt.<sup>7</sup>

5 — Paragraphs 1 and 4.

6 — Paragraph 1. According to Article 11(a), 'principal' means 'the person who, in person or through an authorized representative, requests permission ... to carry out a Community transit operation and thereby makes himself responsible to the competent authorities for the execution of the operation in accordance with the rules'.

7 — OJ 1987 L 201, p. 15.

7. Under Article 1(2) of that regulation, 'customs debt' means 'the obligation on a person to pay the amount of the import duties (customs debt on importation) or export duties (customs debt on exportation) which apply under the provisions in force to goods liable to such duties'. As far as concerns us here, Article 2(1)(c) specifies that a customs debt is incurred inter alia in the case of 'the removal of goods liable to import duties from the customs supervision involved in the temporary storage of the goods or their being placed under a customs procedure which involves customs supervision'.

8. With regard to the persons liable, reference must also be made to Council Regulation (EEC) No 1031/88 of 18 April 1988 determining the persons liable for payment of a customs debt.<sup>8</sup> Of particular relevance for present purposes is Article 4, which provides:

'1. Where a customs debt has been incurred pursuant to Article 2(1)(c) of Regulation (EEC) No 2144/87, the person who removed the goods from customs supervision shall be liable for payment of such debt.

8 — OJ 1988 L 102, p. 5.

Under the provisions in force in the Member States, the following shall also be jointly and severally liable for payment of such debt:

- (a) any persons who participated in the removal of the goods from customs supervision and any persons who acquired or held them;

2. The person required to fulfil, in respect of goods liable to import duties, the obligations arising from their temporary storage, or from the use of the customs procedure under which they have been placed, shall also be jointly and severally liable for payment of the customs debt.'

9. Finally, with regard to the repayment of import duties in special situations, regard must be had to Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,<sup>9</sup> as amended by Council Regulation

(EEC) No 3069/86 of 7 October 1986.<sup>10</sup> Article 13, in particular, provides that '[i]mport duties may be repaid or remitted in special situations other than those referred to in Sections A to D, [<sup>11</sup>] which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned'.

### *National legislation*

- (b) any other persons who are liable by reason of such removal.

10. As far as national legislation is concerned, reference must be made to Paragraph 10(1) of the Tabaksteuergesetz (Law on Tobacco Tax) of 1980,<sup>12</sup> which provides that 'where tobacco products or cigarette papers are imported into the territory in which the tax is levied, the provisions for customs duties shall apply mutatis mutandis, to the incurring of tax and the date which is relevant for its assessment, to the identity of the person liable to pay the tax, personal liability, additional tax in the event of failure to comply with tax rules, the taxation procedure, and, where the tax is not paid through

10 — OJ 1986 L 286, p. 1.

11 — Those sections are entitled as follows: section A, cases where there is no customs debt, or where the amount is fixed at a level higher than that lawfully due; section B, goods entered in error for free circulation; section C, goods refused by the importer because they are defective or do not comply with the terms of the contract; section D, goods in a special situation.

12 — Law enacted on 13 December 1979, published in BGBl I, 2118.

9 — OJ 1979 L 175, p. 1.

the use of revenue stamps, to the time of payment, deferment of payment, remission and repayment. This shall apply even where customs duties are not to be levied'.

stated on the delivery note and invoice. The transit document did not identify or indicate the nationality of the means of transportation.

## Facts and procedure

11. According to the order for reference, in June 1992 an undercover customs investigations officer was contacted by a national of an eastern European country (through an intermediary) and offered for sale a container of 'Golden American' cigarettes, without revenue stamps, intended for export to Poland. It was agreed that payment and delivery of the cigarettes would take place on 16 July 1992 at the premises of a forwarding agency in Nettel-Kaldenkirchen (Germany).

13. According to the driver of the lorry on which the cigarettes were loaded, the customs and transport documents were removed and later returned no fewer than three times en route by eastern European nationals. The driver was unable to say, however, whether the documents had been replaced or modified.

14. As had been arranged with the undercover officer, on 16 July 1992 the lorry was brought to the forwarding agency's yard. Here it was opened by the driver using a crowbar and partially unloaded. Several further undercover customs investigations officers were present at the scene.

12. On 9 July 1992, Rothmans Manufacturing, of which British American Tobacco Manufacturing ('BAT') is the successor in title, arranged on behalf of a Swiss company in the same group for a consignment of 11 000 000 'Golden American' cigarettes to be cleared under the external Community transit procedure at the Zevenaar customs office in the Netherlands. The final date for presentation of the goods was set at 16 July 1992. The transit document named a St Petersburg company as the consignee, but this was at variance with what was

15. Examination of a random sample of the goods on the lorry revealed that all the boxes contained cigarettes without revenue stamps. On the strength of this, the driver and his mate were arrested. A torn-off Netherlands lead customs seal was found in the driver's trouser pocket. The lorry and its load were seized and the cigarettes later destroyed.

16. Deeming BAT responsible for removal of the goods from customs supervision, the Hauptzollamt Krefeld (Krefeld Customs Office, 'the Hauptzollamt') issued a notice of assessment to the company on 7 August 1992 claiming DEM 1 436 776 in tobacco excise duty. On 24 November 1992, BAT applied to the Hauptzollamt for the remission of the assessed amount, arguing in particular that the circumstances constituted a 'special situation' within the meaning of Article 13 of Regulation 1430/79.

17. The Hauptzollamt rejected the application, however, by decision of 14 January 1993, as amended on 4 May of the same year. BAT thereupon appealed to the Düsseldorf Finanzgericht (Finance Court), seeking an order that the Hauptzollamt refund the excise duty. When that appeal also failed, BAT brought an appeal on a point of law to the Bundesfinanzhof, claiming a breach of Regulation No 1430/79.

18. Taking the view that the outcome of the dispute before it required an interpretation of the relevant Community legislation, by order of 24 April 2001 the Bundesfinanzhof referred the following questions to the Court for a preliminary ruling:

- '(1) Are goods which have been cleared for Community transit removed from customs supervision if the T 1 transit document is temporarily removed from the consignment?
- (2) If the Court answers Question 1 in the negative:

Have goods cleared for Community transit been removed from customs supervision if the customs seal affixed to ensure their identification was opened and the goods were partially unloaded, without the consignment having first being duly presented to customs, even though the operation was arranged with the persons in question by undercover customs investigation officers operating incognito and observed in every detail by those officers?

- (3) If the Court answers one of Questions 1 and 2 in the affirmative:

Do special circumstances exist within the meaning of Article 13 of Regulation No 1430/79 if a customs investigation officer acting undercover has provoked infringements of the Community transit procedure? Does the deception or obviously negligent con-

duct of persons used by the principal in fulfilling the obligations assumed by him under the Community transit procedure preclude repayment to him of the duties incurred by the removal from customs supervision of goods cleared for Community transit?’

munity rules on the incurring of a customs debt, the person liable and the repayment of import duties.

19. In the ensuing proceedings before the Court, written observations were submitted by BAT and the Commission, which subsequently took part in the hearing on 6 February 2003.

## Legal analysis

### *The jurisdiction of the Court*

20. Before analysing the questions referred, I must note, as does the Commission, that the dispute in the main proceedings concerns the payment of excise duties prescribed under national legislation and not under Community law. This could give rise to doubts as to the jurisdiction of the Court to rule on the interpretation of the Com-

21. According to the referring court, however, the Community rules fall to be applied to the case by virtue of the reference thereto in Paragraph 10(1) of the TabStG. That being the case, I must point out that, according to a well-known decision, ‘[i]t does not appear either from the wording of Article 177 or from the aim of the procedure introduced by that article that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific case where the national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State. On the contrary, it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied’.<sup>13</sup>

13 — Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 36 and 37. In that judgment the Court also explained that ‘[w]here Community law is made applicable by national provisions, it is for the national court alone to assess the precise scope of that reference to Community law. If it takes the view that the content of a provision of Community law is applicable, by virtue of that reference, to the purely internal situation underlying the dispute brought before it, the national court is entitled to request the Court for a preliminary ruling on the terms laid down by the provisions of Article 177 as a whole, as they have been interpreted in the case law of the Court of Justice’ (paragraph 41).

22. However open it may be to criticism in various respects,<sup>14</sup> that view of the law has been repeatedly confirmed by the Court, including recently.<sup>15</sup> It must therefore be concluded that the Court has jurisdiction to answer the questions referred by the Bundesfinanzhof.

### *The first question*

23. By its first question, the national court asks whether the temporary removal of the T 1 document from goods placed under the external transit procedure constitutes a 'removal from customs supervision' within the meaning of Article 2(1)(c) of Regulation No 2144/87.

24. BAT proposes that this question should be answered in the negative, arguing that the temporary removal of the T 1 document does not prevent the customs authorities from carrying out the necessary controls. In its view, not only does such removal not

involve an unlawful dealing with the transported goods, but neither does it hinder their presentation to the customs office of destination and their examination by that office.

25. The Commission takes the opposite view, arguing that customs supervision is effective only if at all times during the transit procedure the competent officers can simultaneously check the seals and the transit and transport documents. In this regard, the Commission does not share the opinion of the referring court that there can be no 'removal of goods from customs supervision' if no supervision actually takes place during the temporary absence of the T 1 document. According to the Commission, a customs debt is incurred by virtue of the mere fact that the goods are removed from potential supervision and it is not necessary for the supervision to be actually carried out.

26. For my part, I would first note that in *Liberexim* the Court recently explained, referring to a previous ruling concerning the Community Customs Code, that the expression 'removal from customs supervision' in Article 2(1)(c) of Regulation No 2144/87 'must be understood as encompassing any act or omission the result

14 — See, in particular, the Joined Opinion of Advocate General Jacobs in Cases C-28/95 *Leur-Bloem* and C-130/95 *Giloy* [1997] ECR I-4161, the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-1/99 *Kofisa Italia* [2001] ECR I-207, and the Opinion of Advocate General Jacobs in Case C-306/99 *BIAO* [2003] ECR I-1.

15 — See, in particular, Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 26, C-130/95 *Giloy* [1997] ECR I-4291, Case C-1/99 *Kofisa Italia* [2001] ECR I-207, and Case C-306/99 *BIAO* [2003] ECR I-1.

of which is to prevent, *if only for a short time*, the competent customs authority from gaining access to goods under customs supervision and from monitoring them as provided for by the Community customs rules'.<sup>16</sup> In the same judgment, it was also held that 'removal of goods from customs supervision does not require intent, but only that certain objective conditions be met'.<sup>17</sup>

27. In that specific case, the Court found that the irregularities that had been committed, consisting 'of breaking the seals, unloading the goods and placing them on the market, constitute[d] a removal of the goods from customs supervision and therefore cause[d] the goods to cease to be covered by the external Community transit arrangements'. On the other hand, 'the fact that the original tractor was previously replaced by a new tractor ... without the seals being broken and without unloading or transhipment of the goods, would not have prevented the competent customs authority from carrying out, where appropriate, its supervisory function'.<sup>18</sup>

28. That having been noted, and turning to the present case, I take the view that the temporary removal of the T 1 document from the consignment placed under the external transit procedure constitutes a 'removal from customs supervision' if that document cannot be produced promptly in the event of a check by the competent authorities.

29. I agree with the Commission that during the external transit procedure customs supervision requires the simultaneous checking of the seals (and the goods, where appropriate) and of the transit documents, in order to establish that the goods being transported are the same as those declared to customs and placed under the transit procedure. That is, it seems to me, the clear sense of Article 20 of Regulation No 222/77, according to which '[c]opies of the T 1 document shall be produced in each Member State as required by the customs authorities, who may satisfy themselves that the seals are unbroken. The goods shall not be inspected unless some irregularity is suspected which could result in abuse'.

30. I further take the view that to constitute a 'removal from customs supervision' it is sufficient for the goods to be objectively removed from potential customs supervision, regardless of whether such controls are actually carried out by the competent

16 — Case C-371/99 *Liberexum* [2002] ECR I-6227, paragraph 55, (emphasis added), in which reference is made to Case C-66/99 *D. Wandel* [2001] ECR I-873. In so doing, the Court noted in particular that '[t]he new customs provisions interpreted in that judgment, which are laid down in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), have not affected the interpretation of the expression "removal from customs supervision" used in Regulation No 2144/87, which was applicable at the material time in the main proceedings' (paragraph 54).

17 — Paragraph 60, where reference is again made to the *Wandel* judgment.

18 — Paragraph 56.



authorities. I do not see any reason to restrict the scope of Article 2(1)(c) of Regulation No 2144/87, for the sole benefit of persons who infringe the Community rules on external transit.

31. In the light of the foregoing considerations, I therefore propose that the answer to be given to the first question referred is that the temporary removal of the T 1 document from goods placed under the external transit procedure constitutes a 'removal from customs supervision' within the meaning of Article 2(1)(c) of Regulation No 2144/87 if that document cannot be produced promptly in the event of a check by the competent authorities.

33. By this question, the national court asks whether, in the context of the external transit rules, the breaking of the seals and the partial unloading of the goods constitute a 'removal from customs supervision' within the meaning of Regulation No 2144/87, if those operations were arranged with undercover customs investigation officers and were observed in every detail by those officers.

34. In this regard, BAT submits that a 'removal from customs supervision' does not arise where — as in this case — the customs authorities oversee the breaking of the seals and the unloading of the goods and have control of the situation at all times with officers standing by to intervene.

### *The second question*

32. As we have seen, the second question referred is asked by the national court only in the case of a negative answer to the first question. Having regard to the conclusion which I have reached in relation to the first question, I will briefly analyse the second question in the alternative only, in case the Court should not agree with what I have said above.

35. I agree with the Commission, however, that the fact that the breaking of the seals and the unloading of the goods were arranged with undercover customs investigation officers and took place in their presence does not negate the 'removal from customs supervision'. There would be no such removal if the breaking of the seals and the unloading of the goods took place,

in compliance with the rules governing the system of external transit, with the consent and under the supervision of the competent customs authorities rather than of officers infiltrated among the suspected smugglers.

whether deception or obviously negligent conduct on the part of agents employed by the principal in fulfilling its obligations under the Community transit procedure preclude repayment to the principal of the duties paid by it in discharge of a debt incurred as a result of the removal of goods from customs supervision.

36. I therefore take the view that the answer to be given to this question is that, in the context of the external transit rules, the breaking of the seals and the partial unloading of the goods do constitute a 'removal from customs supervision' within the meaning of Regulation No 2144/87, even where those operations were arranged with undercover customs investigation officers and were observed by them throughout.

38. Citing the relevant Community case-law<sup>19</sup> and relying on the principle of fairness that underlies Article 13(1) of Regulation No 1430/79, both parties propose in substance that sub-question (a) be answered in the affirmative.

### *The third question*

37. In the event of either of the first two questions being answered in the affirmative, by its third question the national court asks: (a) whether a 'special situation' which, under Article 13 of Regulation No 1430/79, can constitute grounds for the repayment of import duties, arises in a case where an undercover customs investigation officer has provoked infringements of the Community transit procedure; and (b)

39. As far as sub-question (b) is concerned, they also share the view that, if there is a 'special situation' within the meaning of that provision, only deception or obvious negligence on the part of the principal should prevent its being repaid the customs duties. The Commission adds, however, that in that regard the national court should also take into account any obvious negligence on the part of the principal in the

<sup>19</sup> — Both parties refer in particular to Case C-61/98 *De Hann* [1999] ECR I-5003, paragraph 53.

choice of the transport firm it employs to carry out the transit procedure and, with reference to the present case, expresses some doubts as to BAT's diligence.

40. For my part, I would first note that under Article 13(1) of Regulation No 1430/79

'[i]mport duties may be repaid or remitted in special situations ... which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned'. The Court has on more than one occasion held that that provision 'constitutes a general equitable provision designed to cover situations other than those which arose most often in practice and for which special provision could be made when the regulation was adopted'.<sup>20</sup> The Court has also explained that the article in question 'is intended to apply where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which he normally would not have incurred'.<sup>21</sup>

41. In line with those principles, so far as directly concerns us here, in the *De Hann* judgment which is cited by both parties, the

Court then went on to state that 'the demands of an investigation conducted by the customs authorities or the police constitute, in the absence of any deception or negligence on the part of the person liable, and where that person has not been informed that the investigation is being carried out, a special situation within the meaning of Article 13(1) of Regulation No 1430/79. Although it may be legitimate for the national authorities, in order better to dismantle a network, identify perpetrators of fraud and obtain or consolidate evidence, deliberately to allow offences or irregularities to be committed, to place on the person liable the burden of the customs debt arising from the choices made in connection with the prosecution of offences is inimical to the objective of fairness which underlies Article 905(1) of Regulation No 2454/93 [<sup>22</sup>] in that it puts that person in an exceptional situation in comparison with other operators engaged in the same business'.

42. In the light of that authority, I have no difficulty answering sub-question (a) to the effect that a 'special situation' which, under Article 13(1) of Regulation No 1430/79, can constitute grounds for the repayment of import duties, does arise in a case where an undercover customs investigation officer

20 — Of the many judgments in point, see Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani v Commission* [1987] ECR 1303, paragraph 10, and Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 41.

21 — Case 58/86 *Coopérative agricole d'approvisionnement des Aviron*s [1987] ECR 1525, paragraph 22.

22 — This is a provision giving effect to Article 239 of the abovementioned Community customs code (Regulation 2913/92), which corresponds in substance to Article 13(1) of Regulation 1430/79.

provokes infringements of the Community transit procedure.

on the part of the principal, and specifically whether there was obvious negligence in the selection of the transport firm employed to carry out the transit procedure.

43. As regards sub-question (b), I have to agree with the parties that from the wording and the rationale of the provision in question, as interpreted by the case-law, it is clear that only deception or obvious negligence on the part of the principal can prevent its being repaid the customs duties. It is of course for the national court to determine whether, in the light of the relevant facts, there was obvious negligence

44. I therefore take the view that the answer to be given to sub-question (b) is that deception or obviously negligent conduct on the part of agents employed by the principal in fulfilling its obligations under the Community transit procedure do not preclude repayment to the principal of duties paid by it in discharge of a debt incurred as a result of the removal of goods from customs supervision.

## Conclusions

In the light of the foregoing considerations, I therefore propose that the Court should answer the questions referred by the Bundesfinanzhof as follows:

- (1) The temporary removal of the T 1 document from goods placed under the external transit procedure constitutes a 'removal from customs supervision'

within the meaning of Article 2(1)(c) of Regulation No 2144/87 if that document cannot be produced promptly in the event of a check by the competent authorities.

- (2) In the context of the external transit rules, the breaking of the seals and the partial unloading of the goods do constitute a 'removal from customs supervision' within the meaning of Regulation No 2144/87, even where those operations were arranged with undercover customs investigation officers and were observed by them throughout.
  
- (3) A 'special situation' which, under Article 13(1) of Regulation No 1430/79, can constitute grounds for the repayment of import duties, does arise in a case where an undercover customs investigation officer provokes infringements of the Community transit procedure. Deception or obviously negligent conduct on the part of agents employed by the principal in fulfilling its obligations under the Community transit procedure do not preclude repayment to the principal of duties paid by it in discharge of a debt incurred as a result of the removal of goods from customs supervision.