OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 4 November 2008 [1]

1. The problem on which a ruling is sought in the present case is in itself relatively restricted: the Court is essentially being asked to interpret a single short passage in the Community Customs Code ('the Customs Code'), namely the expression 'upon their unlawful introduction' as used in point (d) of the first paragraph of Article 233.

2. However, despite its apparent simplicity, the question has some rather complex aspects. First, the wording of the legislation does not provide clear indications as to how it is to be interpreted. Secondly, the choice of one possible interpretation rather than another may have important practical consequences, notably with regard to the recovery of customs duties.

3. It is also significant that the problem that the referring court has put to the Court has its origins in a jurisprudential disagreement — which is reflected in academic commentary — between certain national courts as to the correct way to interpret Article 233 of the Customs Code.

4. Moreover, the jurisprudential disagreement that the referring court has asked the Court to resolve is transnational, albeit relating to two States in the same language area: the two courts which at present follow different interpretations of the provision are, on the one hand, the Austrian Verwaltungsgerichtshof (Constitutional Court) and, on the other, the German Bundesfinanzhof (Federal Finance Court). Two authoritative representatives of those courts have recently set out the respective positions of the judicial bodies to which they belong in a joint essay. [2]

1 — Original language: Italian.

2 — K. Höfinger, R. Rüsken, 'Wann erlischt die Zollschuld infolge Beschlagnahme und Einziehung von Schmuggelware?', in *Zeitschrift für Zölle und Verbrauchsteuern*, No 8/2007, p. 197.

I — Legislative background

…

A — *The provisions of the Customs Code*

5. The following provisions of the Customs Code [3] are relevant for the purposes of the case at issue:

'*Article 38*

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:

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

2. Any person who assumes responsibility for the carriage of goods after they have been brought into the customs territory of the Community, inter alia as a result of transshipment, shall become responsible for compliance with the obligation laid down in paragraph 1 …

Article 202

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 …

…

3 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

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.

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

…

Article 203

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

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

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

…

Article 233

Without prejudice to the provisions in force relating to the time-barring of a customs debt and non-recovery of such a debt in the event of legally established insolvency of the debtor, a customs debt shall be extinguished:

…

(d) where goods in respect of which a customs debt is incurred in accordance with Article 202 are seized upon their unlawful introduction and are simultaneously or subsequently confiscated.

In the event of seizure and confiscation, the customs debt shall, nonetheless, for the

purposes of the criminal law applicable to customs offences, be deemed not to have been extinguished where, under a Member State's criminal law, customs duties provide the basis for determining penalties or the existence of a customs debt is grounds for taking criminal proceedings.'

B — *The provisions of the Implementing Regulation*

6. Attention is also drawn to two provisions of the regulation on the implementation of the Customs Code [4] ('the Implementing Regulation'):

'*Article 867*

The confiscation of goods pursuant to Article 233(c) and (d) of the code shall not affect the customs status of the goods in question.

4 — Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 of establishing the Community Customs Code (OJ 1992 L 253, p. 1).

Article 867a

1. Non-Community goods which have been abandoned to the exchequer or seized or confiscated shall be considered to have been entered for the customs warehousing procedure.

2. The goods referred to in paragraph 1 may be sold by the customs authorities only on condition that the buyer immediately carries out the formalities to assign them a customs-approved treatment or use.

Where the sale is at a price inclusive of import duties, the sale shall be considered as equivalent to release for free circulation, and the customs authorities themselves shall calculate the duties and enter them in the accounts.

In these cases, the sale shall be conducted according to the procedures in force in the Member States.

3. Where the administration decides to deal with the goods referred to in paragraph 1 otherwise than by sale, it shall immediately

carry out the formalities to assign them one of the customs-approved treatments or uses laid down in Article 4(15)(a), (b), (c) and (d) of the code.'

II — The facts, the main proceedings and the questions referred

7. On 21 May 2001, acting on information obtained in the course of telephone surveillance, the Austrian police stopped near Wels a tourist coach that had come from Kosovo and that was found to be carrying 150 cartons of smuggled cigarettes, which were seized and subsequently confiscated and destroyed.

8. The coach in question had entered the customs territory of the Community in Italy, at the port of Brindisi, on an unspecified date between 19 and 21 May 2001. The vehicle's destination was the village of Eferding, which it had not yet reached when the police intervened.

9. The Austrian customs authorities subsequently calculated the customs duties on the cigarettes in question and issued a demand for payment. The duty amounted to EUR 961.46.

10. Following various proceedings before the Austrian authorities (concentrating essentially on problems connected with determining the precise sequence of events and the specific responsibilities of the persons involved), the matter was brought before the referring court. In view of the central role of Article 233 of the Customs Code for the purposes of the decision, that court stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) The criterion for extinction laid down in point (d) of the first paragraph of Article 233 of [the Customs Code] does not refer to the time at which the customs debt is incurred but to a time after the customs debt is incurred, because it presupposes a customs debt "incurred" in accordance with Article 202 of the Customs Code. Is the expression "upon their unlawful introduction" within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code to be interpreted as meaning that:

— the introduction into the customs territory of the Community of goods in respect of which a customs debt is incurred in accordance with Article 202 of the Customs Code ends when they are introduced at the border customs office or at any other

place designated by the customs authorities, but at the latest when they leave the premises of the border customs office or of the otherwise designated place, because the goods have thus entered the customs territory, with the result that seizure and confiscation of the goods after that time no longer results in the extinction of the customs debt,

or as meaning that

— the introduction into the customs territory of the Community of goods in respect of which a customs debt is incurred in accordance with Article 202 of the Customs Code continues, adopting an economic approach, for as long as their transport continues as a single process following the introduction of the goods into the customs territory, and the goods in the customs territory have not yet therefore reached their first destination and come to rest there, with the result that seizure and confiscation of the goods up to that time results in the extinction of the customs debt?

(2) In the event of unlawful conduct for the purposes of Article 202 of the Customs Code which is discovered upon introduction, the customs debt must be extinguished. By contrast, seizure of goods directly upon their being removed from customs supervision, as unlawful conduct for the purposes of Article 203 of the Customs Code, results in no immediate extinction of the customs debt. Is point (d) of the first paragraph of Article 233 of the Customs Code to be interpreted as meaning that this extinction of the customs debt, which is restricted expressly to cases where the customs debt is incurred in accordance with Article 202 of the Customs Code, is nevertheless consistent with the principle of equal treatment of unlawful conduct?'

III — The questions referred

A — *The first question*

11. The first question is undoubtedly the more important and the more delicate of the two questions raised by the referring court. By this question, the referring court is asking the Court, in particular, to rule on the interpretation of the expression 'upon their unlawful introduction' in Article 233 of the Customs Code. To be more precise, the Unabhängiger Finanzsenat has presented a kind of multiple-choice question, indicating two possible interpretations. In fact, as we shall shortly see, the expression may also be open to other interpretations.

12. In any event, in order to understand the full scope of the problem raised by the referring court, it is necessary first to examine briefly the two legal positions described in the order for reference.

1. The 'broad' interpretation

13. According to the less strict interpretation of Article 233 of the Customs Code — supported notably by the Austrian Verwaltungsgerichtshof, among others — extinction of the customs debt in respect of goods smuggled into the Community is to take place in all cases where such goods are seized before they reach their first destination in the customs territory of the Community.

14. In the case at issue, therefore, the fact that the cigarettes were seized before the coach in which they were hidden reached its destination (the village of Eferding) would result, on that interpretation, in the extinction of the customs debt.

15. That position is supported by the Austrian Government, in particular, in the present case.

16. The *Austrian Government* notes first that the concept of 'introduction' in Article 233 of the Customs Code does not coincide with the concept of 'introduction' as used elsewhere in the Customs Code. As a rule, the act of introduction is instantaneous, and consequently complete as soon as the border has been crossed. However, the Austrian Government points out that Article 202 of the Customs Code defines 'unlawful introduction' as 'any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177'. In its view, that phrase would be impossible to explain if the ordinary concept of 'introduction' were being employed. If 'introduction' here meant the instantaneous act of crossing the border, there would be no point in mentioning Articles 38 to 41 or Article 177 of the Customs Code, which refer to acts which take place after the line marking the border has been crossed.

17. Consequently, according to the Austrian Government, the concept of 'introduction' in Articles 202 and 233 of the Customs Code is a separate concept, which covers a wider timespan than the purely instantaneous crossing of a border. [5]

18. Moreover, in its view, to employ a strict interpretation here would limit, wholly unrea-

5 — Observations of the Austrian Government, paragraph 10.

sonably, the number of cases in which the provision could apply in practice. [6]

19. The *Finnish Government*, for its part, proposes an even broader interpretation: in its view, the extinction of the customs debt provided for in Article 233 should take place in all cases where it can be shown that the goods unlawfully introduced into the customs territory have not entered into the economic circuit. Thus, provided that the goods in question have not yet been 'put into circulation', the obligation to pay duty is extinguished even in cases where the goods are seized after they have reached their first destination in the customs territory of the Community. [7]

20. According to the Finnish Government, that would be consistent with the objective of the rule laid down in Article 233 of the Customs Code, because timely seizure of the goods would prevent any loss to the exchequer. However, under Article 867a of the Implementing Regulation, any subsequent sale of the confiscated goods would entail payment of customs duty, so the amount of the duty would in any event be recovered.

21. Also, according to the Finnish Government, the strict interpretation is inconsistent with the principle of equal treatment, since the situation of a person who unlawfully introduces goods which are seized upon crossing the border and the situation of a person who has such goods seized afterwards (but perhaps only slightly later) — situations which are in fact quite similar — would be treated in radically different ways. [8]

2. The strict interpretation

22. According to the strict interpretation of Article 233 of the Customs Code — which, as was noted above, has recently been followed by the German Bundesfinanzhof — extinction of the customs debt in consequence of the seizure and subsequent confiscation of smuggled goods is limited to cases where the goods are seized at the precise moment of crossing the border or of passing through the border customs office. That is because, on this view, the expression 'upon their unlawful introduction' refers only to the precise moment at which the goods enter the customs territory of the Community.

23. According to the referring court, in the case before it, the fact that the smuggled cigarettes were seized after they had crossed the border (which, it will be remembered, they did at the port of Brindisi in Italy) precludes the possibility of extinction on that ground.

6 — Ibidem, paragraph 15.
7 — Observations of the Finnish Government, paragraphs 13 and 14.
8 — Ibidem, paragraphs 16 and 17.

Consequently, despite the seizure and confiscation of the smuggled goods, the persons responsible for unlawfully introducing the cigarettes should also, in its view, be required to pay the related customs duty.

24. That position is supported in particular, in the present case, by the Danish Government and by the Commission.

25. The *Danish Government* argues for a strict interpretation of Article 233 on grounds of consistency, since elsewhere in the Customs Code the term 'introduction' refers to an instantaneous act, not to an act over time, [9] and also on grounds of legal certainty, because concepts such as the concept of 'entry into the economic circuit' and 'destination' are too vague. [10]

26. In its view, the strict interpretation also helps to prevent fraud because, in practice, it entails an additional penalty for anyone smuggling goods into the customs territory of the Community. [11]

27. The *Commission* argues that the strict interpretation can be sustained, first, on the basis of a literal interpretation of Article 233 and a comparison of the various language versions of that article. [12] It claims that that interpretation is further supported by considerations relating to the conceptual coherence of the legislative text, since it would mean that the same concept of 'introduction' was used throughout the Customs Code. Also, the extinction of the customs debt is provided for in Article 233 by way of an exception and should accordingly be narrowly construed. [13]

3. An alternative view: the Polish Government's position

28. The *Polish Government* suggests, however, that the Court should adopt a different line of interpretation, according to which there would be no need to answer the questions raised by the referring court. The Polish Government refers to Article 867a of the Implementing Regulation, under which non-Community goods which have been seized or confiscated are to be considered to have been entered for the customs warehousing procedure. In its view, Article 867a of the Implementing Regulation is a *lex specialis* in relation to the rules governing the creation and the extinction of a customs debt and, in cases where that provision applies, a customs debt does not even arise, which means that there is no need to consider the conditions for its extinction in accordance with Article 233 of the Customs Code. [14]

9 — Observations of the Danish Government, paragraph 16.
10 — Ibidem, paragraph 20.
11 — Ibidem, paragraph 26.
12 — Observations of the Commission, paragraphs 15 to 23.
13 — Ibidem, paragraph 36.
14 — Observations of the Polish Government, paragraphs 18 to 26.

29. The Polish Government also points out that, if customs duties were held to be applicable to confiscated goods, a situation would arise where duty would be paid twice if the goods were subsequently sold by the public authorities. [15]

4. Analysis

30. As I have already mentioned, the question which the Court has been asked to resolve in this case is not of the simplest. The legislation to be interpreted does not provide decisive guidance and all the positions expressed by the parties have highly interesting aspects, deserving the closest scrutiny.

31. The approach which I intend to propose to the Court is that contended for by the Austrian Government. I shall explain below the reasons that have led me to prefer it to the other possible interpretations, without however concealing that some aspects of that interpretation are problematic.

15 — Ibidem, paragraph 23.

(a) The various language versions

32. The Commission maintains that an analysis of the various language versions supports the strict interpretation of Article 233 which that institution favours. In its view, this is particularly obvious from the Italian and Spanish versions of the Customs Code. Other language versions, although they do not prove the Commission's point so clearly, nevertheless confirm the strict interpretation.

33. It seems to me, however, that — contrary to the view supported by the Commission — an analysis of the various language versions [16] of the Customs Code does not provide any decisive guidance as to the correct interpretation of Article 233. The Italian version ('all'atto dell'introduzione irregolare') and the Spanish version ('en el momento de la introducción irregular') are compatible both with the idea that the introduction of goods is 'instantaneous' and also with the idea that introduction takes place over time. As to whether the use of the terms 'atto' and 'momento' is indicative, it should be noted that they are simply part of set phrases ('all'atto di' and 'en el momento de', respectively) and that they do not define or in any way characterise the introduction of goods into the customs territory. From that point of view, the Italian and the Spanish versions appear to

16 — As we know, the Court has consistently held that, in the event of doubts as to interpretation, it is essential to employ comparison of the various language versions of Community legislative acts as an instrument of interpretation. See, for example, Case 19/67 *van der Vecht* [1967] ECR 345, in particular 353; Case 9/79 *Koschniske* [1979] ECR 2717, paragraph 6; and Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 36. With specific reference to the Customs Code, see Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 46.

be equivalent to the other versions. [17] Also, even if it were to be argued that those two language versions suggest an event simultaneous with the border crossing, the fact remains that that shade of meaning is not reflected in the other language versions.

34. In conclusion, I consider that an analysis of the various language versions does not provide any decisive guidance for the purposes of interpretation.

(b) The Polish Government's position

35. The original position adopted by the Polish Government, however interesting, does not seem to me to be acceptable. In the final analysis, to hold that a customs debt within the meaning of Article 202 of the Customs Code does not even arise in cases where Article 867a of the Implementing Regulation applies and that, in consequence, there is no need to interpret Article 233(d) of the Code, means attributing to an implementing provision (Article 867a) the effect of precluding the application of a 'primary' rule. Point (d) of the first paragraph of Article 233, which is based exclusively on the assumption that a customs debt within the meaning of Article 202 has been incurred, would then become redundant and consequently inapplicable.

36. Also, and above all, point (d) of the first paragraph of Article 233 refers expressly to a customs debt '*incurred* in accordance with Article 202' (my emphasis). In other words, there is no doubt that a customs debt must be incurred and then extinguished.

37. It should be noted, however, that the Polish Government draws attention in its observations to the risk of duty being charged twice on the same goods and to the need to avoid such a situation. I shall return to this particular problem later. [18]

17 — See, for example, the French ('lors de l'introduction irrégulière'), English ('upon their unlawful introduction'), German ('bei dem vorschriftswidrigen Verbringen') and Dutch ('bij het onregelmatig binnenbrengen') versions.

18 — See points 76 and 77 below.

(c) Indicia in favour of a less strict interpretation

(i) The concept of 'unlawful introduction'

38. 'Unlawful introduction' is defined, for present purposes, in Article 202 of the Customs Code, which identifies it as 'any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177'. It seems to me, however, that both in the written observations submitted by the parties and in their oral statements during the hearing, a point was overlooked which, to my mind, is crucial.

39. It is clear — and the Commission does not even deny this — that the introduction of goods into the Community customs territory is not 'unlawful' until and unless it is clear beyond a doubt from the conduct of the person introducing those goods that he intends not to inform the competent customs authorities of the introduction of the goods. In cases where goods are introduced at a supervised point on the border, such an intention is betrayed at the moment when the person in question leaves the customs post without declaring the goods he is carrying. Where goods are introduced across the 'green border' — that is to say, along an unsupervised stretch of the border — the moment when the introduction becomes unlawful will be the moment when it becomes obvious that the intention is not to take the goods to the customs office. [19]

19 — On this point, see point 67 et seq. below.

40. Consequently, 'unlawful introduction' comes into being only after the person has left the border post or has made it unequivocally clear in some other way that he intends not to declare the goods to the customs authorities.

41. According to the strict interpretation, as we have seen, extinction is to take place only in cases where the goods are seized before the person carrying them has left the border post or has made it clear that he intends not to report to the competent customs authorities. Thus, to adopt that interpretation means subscribing to the view that the extinction provided for in point (d) of the first paragraph of Article 233 of the Customs Code takes place — contrary to the wording of the provision — in relation to an '*introduction' that is not yet 'unlawful*'.

42. In my view, that would manifestly stretch the meaning of the legislative provision in question, especially as Article 202(2) of the Customs Code provides that '[t]he customs debt shall be incurred at the moment when goods are unlawfully introduced', which means that, on closer scrutiny, the strict interpretation would ultimately seek to extinguish a debt that has not yet been incurred.

43. Alternatively, moreover, the strict interpretation might cause it to be supposed that the extinction in question can never take place because one of the conditions explicitly laid

down (namely, 'unlawful introduction') will not have been fulfilled.

44. Consequently, the strict interpretation is ultimately caught in a logical contradiction which, in my view, reveals its intrinsic weakness.

(ii) Effectiveness (*effet utile*)

45. Although it does not explicitly say so, the Austrian Government suggests that a strict interpretation of the phrase contained in point (d) of the first paragraph of Article 233 of the Customs Code might make that provision redundant. The reason for this is that to limit the cases in which the customs debt is extinguished to cases where smuggled goods are seized at the moment when they cross the border would render that provision more or less inapplicable (or, in any event, applicable only in a very few cases): in practice, smuggled goods are not normally seized in the act of crossing the border, but later. [20]

46. That argument, although not in itself conclusive, seems to me to deserve attention. It is well known that the principle of effectiveness (*effet utile*) plays a decisive role in the interpretation of Community law: in accordance with that principle, preference must always be given to the interpretation which will enable a Community measure to achieve its aims. [21] Viewed from that perspective, there seems to be no doubt that the 'broad' interpretation is more apt to ensure the application of the provision.

(iii) Proportionality

47. As we know, the Court has consistently recognised the existence of the principle of proportionality as one of the general principles of Community law. That principle has been used as a basis for declaring that penalties deemed to be too severe (and therefore 'disproportionate') with respect to the conduct to be punished are unlawful. [22] It has also been established on the basis of that principle that, in general, where there are a number of penalties that could be imposed in a specific situation, recourse must be had to the least onerous measure among the measures that will enable the objective pursued to be attained. [23]

20 — Observations of the Austrian Government, paragraph 15.

21 — The concept and application of the principle of effectiveness (*effet utile*) are subjects that extend far beyond the scope of this Opinion, since the principle in question has informed the interpretation of Community law by the Court of Justice from the outset. See, for example, Case 9/70 *Grad* [1970] ECR 825, paragraph 5; Case 23/70 *Haselhorst* [1970] ECR 881, paragraph 5; Case 187/87 *Saarland and Others* [1988] ECR 5013, paragraph 19; and Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 24.

22 — See, for example, Case 122/78 *Buitoni* [1979] ECR 677, paragraph 16. On the principle of proportionality as a requirement for customs penalties in general, see Case C-210/91 *Commission* v *Greece* [1992] ECR I-6735, paragraphs 19 and 20.

23 — See, for example, Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21, and Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60 and the case-law cited therein.

48. Extending the argument based on the principle of proportionality to the interpretation of Community acts, the question could arise whether, in cases where there are two possible interpretations of a provision which has adverse effects on an individual, it is necessary to choose the interpretation that will have the least onerous effect. In principle, that seems to me to be a reasonable approach and, in the present case, it would lend support to the 'broader' interpretation.

49. That is all conditional, of course, on both possible interpretations being appropriate for attaining the objective pursued by the rule to be interpreted. And the aim of the provision to be interpreted is precisely what I shall now move on to consider.

(iv) The rationale for the provision

50. What is the objective that the rule to be interpreted — in this case, point (d) of the first paragraph of Article 233 of the Customs Code — seeks to attain? The question is obviously essential for the purposes of interpretation.

51. It seems to me difficult to deny that the objective of the extinction of the customs debt, provided for in point (d) of the first paragraph of Article 233 of the Customs Code, is to prevent duty from being charged where goods, although unlawfully introduced into the Community customs territory, had to remain *extra commercium* and did not therefore constitute a 'threat', in terms of competition, to Community goods. [24]

52. It is clear that a strict teleological interpretation of the rule, based on the premisses set out above, could lead it to be supposed that the customs debt is extinguished in all cases where smuggled goods are seized before they are placed on the market, whenever and wherever they are seized. Moreover, that is the view put forward by the Finnish Government, as I mentioned earlier.

53. In my view, however, that particularly 'broad' interpretation of Article 233 of the Customs Code cannot be accepted, for the simple reason that it quite obviously stretches the meaning of the provision.

54. On that interpretation, the customs debt on smuggled goods would have to be extinguished even if, for example, the smuggled goods were seized some months after their unlawful introduction, after remaining hidden

24 — See the Opinion of Advocate General Tizzano in Case C-337/01 *Hamann International* [2004] ECR I-1791, point 50.

in a 'safe' place until they could be traded. Clearly such a hypothesis would be absolutely incompatible with the provision under discussion here, according to which the debt is to be extinguished in the case of goods which are seized 'upon their unlawful introduction'. In other words, it seems to me clear that the rule requires a certain temporal continuity between the smuggled goods crossing the border and their seizure.

55. The particularly 'liberal' interpretation of the measure which I sketched out in point 52 cannot be accepted, but the fact remains that the rationale for the provision — although it does not permit a complete distortion of the literal meaning — requires it to be accorded a scope that is as consistent as possible with the aims of the rule laid down. In this case, therefore, consideration of the objectives of that legislation supports an interpretation which, while faithful to the wording, extends the range of situations in which the customs debt is extinguished, to the extent that the smuggled products have not been traded.

56. It is true that, as the Danish Government in particular noted in its written observations and as the Commission observed at the hearing, a stricter interpretation of point (d) of the first paragraph of Article 233 of the Customs Code would place greater emphasis on the punitive/deterrent aspect of the rule. However, I would make the following points in this connection.

57. As we have seen, the reason for the extinction of the customs debt in the case of smuggled goods which have been seized is that those goods can no longer pose a competitive threat to Community goods. If such products are subsequently released for circulation, the relevant duty must be paid in accordance with Article 867a of the Implementing Regulation.

58. The position taken by the Commission and the Danish Government — according to which the implementation of Article 233 of the Customs Code in a 'punitive' spirit is justified on the ground that, once smuggled goods have crossed the border, there is a greater likelihood that they will enter into the economic circuit and consequently represent a risk of damage to Community products and loss to the Community exchequer — is inconsistent and based on false reasoning.

59. On the one hand, if the smuggled goods are seized there will no longer be any risk of loss or damage: the smuggled products will not be in unfair competition with Community products and if they enter into the economic circuit they will do so after duty has been paid.

On the other hand, if such products avoid seizure they will find their way on to the market anyhow and duty will not be paid, irrespective of whether Article 233 is interpreted more or less strictly.

60. Nor can it even be maintained that the punitive effect really works as a deterrent to aspiring smugglers. Moreover, if the legislature had intended that the payment of duty on seized contraband was to represent a penalty, it would not have provided in Article 233 of the Customs Code for the possibility that, even for smugglers, duties could be extinguished. If the Community legislature had wanted the provision to have a deterrent effect, it would not have provided for extinction at all but would instead have decreed that smugglers were always and in all circumstances to pay duty on goods seized from them. As it is, on the strict interpretation, that 'penalty' would affect only smugglers discovered at a relatively advanced stage in their unlawful activity, while smugglers discovered at an early stage would be excused payment of duty.

61. I believe on the contrary that the more strictly penalty-related aspects of smuggling activities are the subject of the penal and/or administrative measures against such conduct. However, such considerations must be held to have no bearing on the argument as to whether or not customs duties are to be imposed, which is the only subject at issue in the present case.

62. That is confirmed by the last paragraph of Article 233 of the Customs Code, which — precisely in order to preserve the possibility of imposing criminal penalties even in the event of the extinction of the customs debt — specifies that, for the purposes of the criminal law, seizure and confiscation of smuggled goods are to be deemed not to result in extinction of the customs debt.

63. The truth of that analysis is also explicitly confirmed in a judgment of the Court which, although formally referring to legislation preceding the entry into force of the present Customs Code, seems to me to be still valid: in particular, the Court held in that judgment that 'the reasons for the extinction must be based on the fact that the goods have not been used for the economic purpose which justified the application of import duties'. [25]

(v) The historical development of the legislation and of its interpretation

64. The rules on the extinction of the customs debt following seizure and confiscation of smuggled goods, as laid down in point (d) of the first paragraph of Article 233 of the Customs Code, represent a harsher version of the earlier rules governing that question, which, until the entry into force of the

25 — Joined Cases 186/82 and 187/82 *Magazzini generali* [1983] ECR 2951, paragraph 14.

Customs Code, were laid down in Regulation No 2144/87.[26] Under Article (8)(1)(b) of Regulation No 2144/87, the customs debt was to be extinguished in all cases where goods were confiscated.

65. On the other hand, Article 86 of Regulation No 450/2008,[27] which contains the new Customs Code that is to enter into force shortly, revives the 'soft' line already taken in Regulation No 2144/87, specifying in particular that a customs debt is to be extinguished 'where goods liable to import or export duties are confiscated' (paragraph 1(d)), 'where goods liable to import or export duties are seized and simultaneously or subsequently confiscated' (paragraph 1(e)), and 'where goods liable to import or export duties are destroyed under customs supervision or abandoned to the State' (paragraph 1(f)). Thus, even under the new Customs Code, the moment when goods are seized and/or confiscated is irrelevant for the purposes of the extinction of the customs debt.

66. As the Customs Code currently in force thus represents, with respect to the extinction of the customs debt on smuggled goods, a particularly severe measure falling, in chronological terms, between two measures that are much less severe, it seems to me that to interpret point (d) of the first paragraph of Article 233 of the Customs Code very strictly would, in all probability, be to strain the internal logic of the Community legal order and the presumed intention of the legislature.[28]

(vi) The problem of seizure along the 'green border'

67. The strict interpretation of Article 233 raises particular problems in cases where goods are smuggled into the Community along the 'green border'. Two possible interpretations can be envisaged in such cases.

68. On the first interpretation, which the Commission itself supported in point 26 of its written observations, in the case of smuggling on the unsupervised border, unlawful introduction would be complete as soon as the line marking the border was actually crossed. Clearly, if that approach were to be adopted, extinction of the customs debt in accordance

26 — Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt (OJ 1987 L 201, p. 15).

27 — Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1).

28 — I note moreover that, even in Germany, the strict interpretation is not unanimously followed. It is the product of a very recent, albeit quite authoritative, position on interpretation. This interpretation has however been the subject of strong criticism based on arguments which are partly similar to the arguments presented in this Opinion. See, for example, P. Witte, *Zollkodex — Kommentar* (4th ed., Munich, Beck, 2006), under Art. 233.

with point (d) of the first paragraph of Article 233 of the Customs Code would practically never apply, since it is more or less impossible for goods to be seized precisely on the line marking the border. A line is by definition a geometric entity without breadth.

69. On the alternative interpretation, which the Commission supported at the hearing, in the case of goods introduced along the green border, unlawful introduction within the meaning of Article 233 would achieve completion at the moment when the person carrying the goods takes a direction other than along the route leading to the nearest customs post, thus showing that he intends to smuggle the goods in question. [29]

70. I note that this second 'variant' of the strict interpretation certainly appears to be more convincing than the first: at least it does not render point (d) of the first paragraph of Article 233 virtually inapplicable. However, it still leaves some problems unsolved, since it is clear that it is not always easy in practice to determine the direction the person importing the goods has taken after crossing the border, particularly in woodland areas or other areas where access is difficult, such as the areas through which the 'green border' typically runs.

29 — I note, moreover, that in taking this position the Commission effectively contradicts its own statements about the essentially 'instantaneous' nature of introduction, which is alleged to follow from a literal interpretation of Article 233. See point 32 et seq. above.

71. I therefore consider that the less strict interpretation is preferable in this respect, too.

(d) The limitations of the proposed interpretation

72. Although the interpretation I propose seems to me to be undoubtedly the preferable one, the fact remains that it nevertheless presents certain problems.

73. First, as we have seen, in order to give point (d) of the first paragraph of Article 233 of the Customs Code an interpretation which is not strict, it is necessary to accept that the concept of 'introduction' as used in Article 233 is different from the concept of 'introduction' as used elsewhere in the Customs Code. Ideally, of course, it would be preferable if this discrepancy could be avoided. However, I think I have shown that to attribute to the term 'introduction' in Article 233 a meaning that entails the quality of being 'instantaneous' and limited in time — a meaning which that term undoubtedly has elsewhere in the Customs Code — would ultimately create more problems than it would solve.

74. Secondly, the less strict interpretation involves an element of uncertainty as to the first destination of the smuggled goods. 'First destination' is obviously a somewhat indeterminate concept, which cannot be defined more precisely and which must be specified on the basis of a case by case assessment, as the Austrian Government itself recognised at the hearing. Moreover, cases may arise where goods are seized and where it is not in fact clear whether or not they have reached their first destination in the customs territory of the Community. It may be necessary to make further inquiries in such cases: investigations of this kind are very common in the context of criminal law, for example, and it must be borne in mind that, in any case, as smuggling is a criminal offence, the local authorities generally have to carry out investigations for purposes of prosecution. Conceivably, it could also be argued that where goods are seized 'in transit', it may be presumed in the absence of evidence to the contrary that they have not yet reached their first destination.

75. It does not do, of course, to overlook the fact that the strict interpretation has some equally vague aspects. This is particularly true in the case of the seizure of goods smuggled along the 'green border', as we saw earlier. [30]

76. Thirdly, although the proposed interpretation reduces the risk that duty may be paid twice on the same goods, it does not eliminate that risk [31]. A double payment situation could arise in cases where goods seized after they reach their first destination (so that the customs debt would not be extinguished) are then sold by the public authorities, with the result that duty is paid (for the second time) by the purchaser in accordance with Article 867a of Regulation No 2454/93.

77. I have already explained that the only way to avoid double imposition of duty completely would be to regard the customs debt as being extinguished in all cases where smuggled goods are seized and confiscated before they are put on the market. However, I have also pointed out already that that approach, which was adopted in Regulation No 2144/87 and which has now been taken up again in Regulation No 450/2008, appears to be unsustainable in the light of the actual wording of the Customs Code. [32]

30 — See point 67 et seq. above.

31 — Obviously, on the strict interpretation, that risk is much greater because in that case the possibility of the customs duty being extinguished is kept to a minimum.

32 — See points 53 and 54 above.

(e) Conclusions on the first question

78. I consider that the shortcomings and the problems I have indicated are not, on the whole, such as to represent a serious obstacle to the interpretation outlined above. In any case, the alternative interpretations present even more significant difficulties.

79. I therefore propose that the Court state in reply to the first question referred by the Unabhängiger Finanzsenat that the expression 'upon their unlawful introduction' in point (d) of the first paragraph of Article 233 of the Customs Code should be interpreted as covering the time-span from crossing the border to the moment when the unlawfully introduced goods reach their first destination in the Community customs territory.

B — *The second question*

80. By the second question, the referring court is essentially asking whether the fact that point (d) of the first paragraph of Article 233 of the Customs Code provides for the extinction of the customs debt only as a consequence of the seizure of goods unlawfully imported within the meaning of Article 202 of the Customs Code, whereas no such provision is made in the case of goods seized after they have been removed from customs supervision within the meaning of Article 203, may constitute a breach of the principle of equal treatment.

81. It is immediately apparent that the second question raises problems that cannot be overlooked in view of the relevance of that question for the purposes of the decision in the main proceedings.

1. The need to answer the question

82. Both the *Commission* and the *Austrian Government* maintain, albeit in slightly different terms, that the question patently has no bearing on the subject-matter of the main proceedings. [33]

33 — Observations of the Austrian Government, paragraph 22, and observations of the Commission, paragraph 44.

83. The arguments of the Commission and the Austrian Government seem to me to be correct. The position of the appellant in the main proceedings is indisputably governed by Article 202 of the Customs Code, which is concerned with the unlawful introduction of goods across the border. Conversely, the situation envisaged in Article 203 — the removal of goods from customs supervision — is wholly unrelated to the facts at issue in the present case.

84. It is clear that, in fact, if the situation envisaged in Article 203 were subject to more favourable rules than the situation referred to in Article 202, a problem might arise regarding the possible invalidity of the less favourable rules in the light of the principle of equal treatment. In the present case, however, the rules applicable in the main proceedings are the rules under Article 202: in other words, the more favourable rules.

85. The Court is always, rightly, very wary of not resolving a question referred for a preliminary ruling, but, according to settled case-law, it may decide not to give a preliminary ruling where it is obvious that the determination sought by the referring court has no bearing on the main proceedings. [34] It seems to me to be clear that in the present case the question is manifestly hypothetical and is irrelevant for the purposes of the decision in the main proceedings. I therefore consider that the Court need not give a ruling on the second question.

86. However, in case the Court should decide to examine the merits of the question, I append a few brief considerations on the subject.

2. In the alternative, on the merits of the question

87. In this connection, the *Danish Government* and the *Finnish Government* maintain that the situations governed by Article 202

34 — See in this connection, purely by way of example, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 26 et seq., and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 75.

and Article 203 of the Customs Code are objectively different, so that to treat them differently would not be contrary to the principle of equal treatment. [35]

88. The *Austrian Government*, on the contrary, seems to consider that Article 233 distinguishes, without justification, between the situation referred to in Article 202 and that referred to in Article 203: in fact, that discriminatory situation could be overcome by recognising extinction of the customs debt, by analogy, even in cases where goods are seized after their removal from customs supervision within the meaning of Article 203. However, in its view, the question is still absolutely irrelevant in the present case because the situation at issue in the main proceedings is the situation governed by Article 202 of the Customs Code. [36] The Austrian Government also points out that the problem will no longer arise under the new Customs Code, since it provides for the customs debt to be extinguished in the event of seizure and confiscation, irrespective of the moment when or the situation in which the seizure and/or confiscation take place. [37]

89. The *Commission*, on the other hand, employing an argument similar to that developed in more general terms by the Polish Government, [38] refers to Article 867a of the Implementing Regulation and maintains that, since that provision applies equally to the smuggled goods referred to in Article 202 of the Customs Code and the goods removed from customs supervision referred to in Article 203 thereof, the content of point (d) of the first paragraph of Article 233 cannot be held to be discriminatory.

90. In my view, in order to rule on the merits of the question, it is essential to make very clear the important *de facto* difference between the situations envisaged in Arti-

35 — Observations of the Finnish Government, paragraph 22, and observations of the Danish Government, paragraph 34.

36 — Observations of the Austrian Government, paragraph 22.

37 — Ibidem, paragraph 24. On this aspect, see point 65 above.

38 — The Commission's reasoning is also rather obscure in some respects and it refers to a provision that is characterised by certain differences between the various language versions. The ninth 'recital' — which it quotes — in the preamble to Regulation No 3665/93, which inserted Article 867a in the Implementing Regulation, states in the Italian version that, so long as these goods have not yet been released for free circulation,'può sorgere nei confronti di esse un'obbligazione doganale'. The same meaning is conveyed in the French ('une dette douanière reste susceptible de naître à leur égard'), English ('a customs debt may still be incurred with regard to them'), Spanish ('una deuda aduanera sigue siendo susceptible de nacer al respecto') and Dutch ('een douaneschuld ten aanzien daarvan zou kunnen ontstaan') versions. The German version, however, states that, so long as these goods have not yet been released for free circulation,'entsteht keine Zollschuld im Hinblick auf sie' (that is,'no customs debt is incurred with regard to them'). The versions are not incompatible, but the thrust is certainly quite different.

cles 202 and 203 of the Customs Code respectively.

91. Specifically, while Article 202 concerns 'classic' situations where goods are smuggled into the customs territory of the Community, Article 203 identifies all the situations where there is an act or omission the result of which is to prevent the competent customs authority, if only for a short time, from gaining access to goods under customs supervision and from carrying out the controls provided for in the Customs Code. [39]

92. In other words, in the situation referred to in Article 203 of the Customs Code, goods, once removed from customs supervision, are as a general rule more likely to enter into the economic circuit because they are in fact already in the customs territory. At the same time, however, the existence of those goods is known to the customs authorities. Those facts alone may be sufficient to justify the two situations being treated differently.

93. It should also be noted that the goods referred to in Article 203 of the Customs Code, which have been removed from customs supervision, are by definition goods whose introduction into the customs territory has already been notified. Consequently, as the Danish Government rightly emphasised, [40] the possibility of seizure/confiscation (and therefore the potential applicability of Article 233 of the Customs Code) is in fact less relevant in the case of goods which fall within the purview of Article 203 than in the case of goods introduced unlawfully within the meaning of Article 202.

94. It is true that, even in this connection, a provision such as the provision which is contained in the new Customs Code, due to enter into force shortly, and which provides for the extinction of the customs debt as a general rule in the case of all confiscated goods, probably appears to be more logical and 'fair'. However, I consider that in view of the clear content of the wording of Article 233 of the Customs Code currently in force, which does not provide for extinction in the case of confiscated goods covered by Article 203 of the Customs Code, the objective differences between the situations envisaged in Article 202 and Article 203 are sufficient for it to be held that the different treatment accorded by the Community legislature to the two situations is justified (even if it is, perhaps, not 'optimal').

39 — See *Hamann International*, cited in footnote 24, paragraph 31; Case C-66/99 *Wandel* [2001] ECR I-873, paragraph 47; and Case C-371/99 *Liberexim* [2002] ECR I-6227, paragraph 55.

40 — Observations of the Danish Government, paragraph 35.

IV — Conclusions

95. In the light of the foregoing considerations, I propose that the Court state in reply to the questions referred by the Unabhängiger Finanzsenat that the expression 'upon their unlawful introduction' in point (d) of the first paragraph of Article 233 of the Customs Code is to be interpreted as covering the time-span from crossing the border to the moment when the unlawfully introduced goods reach their first destination in the Community customs territory.