JUDGMENT OF THE COURT

23 September 2003 *

In Case C-78/01,

REFERENCE to the Court under Article 234 EC by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Bundesverband Güterkraftverkehr und Logistik eV (BGL)

and

Bundesrepublik Deutschland, represented by the **Hauptzollamt Friedrichshafen,**

third party:

Préservatrice Foncière Tiard SA,

* Language of the case: German.

on the interpretation of Articles 454 and 455 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, A. La Pergola, V. Skouris, F. Macken, N. Colneric, J.N. Cunha Rodrigues and A. Rosas (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Bundesverband Güterkraftverkehr und Logistik eV (BGL), by M. Gräfin von Westerholt and M. Lausterer, Rechtsanwälte,

— the Hauptzollamt Friedrichshafen, by H.E. Brandner and J. Kummer, Rechtsanwälte,

— Préservatrice Foncière Tiard SA, by H.-J. Prieß, Rechtsanwalt,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Commission of the European Communities, by J.C. Schieferer, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Bundesverband Güterkraftverkehr und Logistik eV (BGL), represented by M. Gräfin von Westerholt and M. Lausterer; the Hauptzollamt Friedrichshafen, represented by J. Kummer; Préservatrice Foncière Tiard SA, represented by H.-J. Prieß; and the Commission, represented by U. Wölker, acting as Agent, at the hearing on 9 July 2002,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2003,

gives the following

Judgment

1 By order of 11 January 2001, received at the Court Registry on 15 February 2001, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of

Articles 454 and 455 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1, 'the implementing regulation').

2 Those questions were raised in proceedings between Bundesverband Güterkraftverkehr und Logistik eV ('BGL'), a guaranteeing association, and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Hauptzollamt (Principal Customs Office) Friedrichshafen ('the Hauptzollamt'), concerning the payment of a sum representing the customs duties due as a result of irregularities committed in the course of international transport operations under cover of TIR carnets.

Legal background

Provisions applicable to TIR transit

The TIR Convention

3 The Customs Convention on the International Transport of Goods under cover of TIR Carnets ('the TIR Convention') was signed in Geneva (Switzerland) on 14 November 1975. The Federal Republic of Germany is a party to the Convention, as is the European Community, which approved it by Council Regulation (EEC) No 2112/78 of 25 July 1978 (OJ 1978 L 252, p. 1).

4 The TIR Convention provides, in particular, that goods carried under the TIR procedure it establishes are not to be subject to the payment or deposit of import or export duties and taxes at customs offices en route.

5 For those facilities to be applied, the TIR Convention requires that the goods be accompanied throughout the transport operation by a standard document, the TIR carnet, which serves to check the regularity of the operation. It also requires that the transport operations be guaranteed by associations approved by the contracting parties, in accordance with the provisions of Article 6 of the Convention.

6 Article 6(1) of the TIR Convention provides as follows:

'Subject to such conditions and guarantees as it shall determine, each Contracting Party may authorise associations to issue TIR carnets, either directly or through corresponding associations, and to act as guarantors.'

7 A TIR carnet consists of a set of sheets each comprising vouchers No 1 and No 2 with the corresponding counterfoils, on which appears all the necessary information, one pair of vouchers being used for each territory crossed. At the start of the transport operation, counterfoil No 1 is left with the customs office of departure; discharge takes place once counterfoil No 2 is returned from the customs office of exit in the same customs territory. The procedure is repeated for each territory crossed, using the pairs of vouchers in the one carnet.

8 TIR carnets are printed and distributed by the International Road Transport Union ('IRU'), established in Geneva, for issue to users by the national guaranteeing associations authorised to do so by the administrations of the contracting parties. The TIR carnet is issued by the guaranteeing association of the country of departure, the guarantee provided being covered by the IRU and a pool of insurers established in Switzerland.

9 Under Article 8 of the TIR Convention:

'1. The guaranteeing association shall undertake to pay the import or export duties and taxes, together with any default interest, due under the customs laws and regulations of the country in which an irregularity has been noted in connection with a TIR operation. It shall be liable, jointly and severally with the persons from whom the sums mentioned above are due, for payment of such sums.

2. In cases where the laws and regulations of a Contracting Party do not provide for payment of import or export duties and taxes as provided for in paragraph 1 above, the guaranteeing association shall undertake to pay, under the same conditions, a sum equal to the amount of the import or export duties and taxes and any default interest.

3. Each Contracting Party shall determine the maximum sum per TIR carnet, which may be claimed from the guaranteeing association on the basis of the provisions of paragraphs 1 and 2 above.

4. The liability of the guaranteeing association to the authorities of the country where the customs office of departure is situated shall commence at the time when the TIR carnet is accepted by the customs office. In the succeeding countries through which goods are transported under the TIR procedure, this liability shall commence at the time when the goods are imported...

...

7. When payment of sums mentioned in paragraphs 1 and 2 of this Article becomes due, the competent authorities shall so far as possible require payment from the person or persons directly liable before making a claim against the guaranteeing association.'

10 Article 10(2) of the TIR Convention provides:

'When the customs authorities of a country have discharged a TIR carnet unconditionally they can no longer claim from the guaranteeing association payment of the sums mentioned in Article 8(1) and (2) unless the certificate of discharge was obtained in an improper or fraudulent manner.'

11 Article 11 of the TIR Convention reads as follows:

'1. Where a TIR carnet has not been discharged or has been discharged conditionally, the competent authorities shall not have the right to claim payment of the sums mentioned in Article 8(1) and (2) from the guaranteeing association

unless, within a period of one year from the date of acceptance of the TIR carnet by those authorities, they have notified the association in writing of the non-discharge or conditional discharge. The same provision shall apply where the certificate of discharge was obtained in an improper or fraudulent manner, save that the period shall be two years.

2. The claim for payment of the sums referred to in Article 8(1) and (2) shall be made to the guaranteeing association at the earliest three months after the date on which the association was informed that the carnet had not been discharged or had been discharged conditionally or that the certificate of discharge had been obtained in an improper or fraudulent manner and at the latest not more than two years after that date. However, in cases which, during the abovementioned period of two years, become the subject of legal proceedings, any claim for payment shall be made within one year of the date on which the decision of the court becomes enforceable.

3. The guaranteeing association shall have a period of three months, from the date when a claim for payment is made upon it, in which to pay the amounts claimed. The sums paid shall be reimbursed to the association if, within the two years following the date on which the claim for payment was made, it has been established to the satisfaction of the customs authorities that no irregularity was committed in connection with the transport operation in question.'

12 Article 37 of the TIR Convention provides:

'When it is not possible to establish in which territory an irregularity was committed it shall be deemed to have been committed in the territory of the Contracting Party where it is detected.'

Community law

13 For the purpose of applying the TIR Convention, the European Community constitutes a single customs territory.

14 Article 454 of the implementing regulation contains a number of provisions specific to the TIR Convention and to the Customs Convention on the ATA Carnet for the Temporary Admission of Goods ('the ATA Convention') done at Brussels on 6 December 1961. That article provides:

'1. This Article shall apply without prejudice to the specific provisions of the TIR and ATA Conventions concerning the liability of the guaranteeing associations when a TIR or an ATA carnet is being used.

2. Where it is found that, in the course of or in connection with a transport operation carried out under cover of a TIR carnet or a transit operation carried out under cover of an ATA carnet, an offence or irregularity has been committed in a particular Member State, the recovery of duties and other charges which may be payable shall be effected by that Member State in accordance with Community or national provisions, without prejudice to the institution of criminal proceedings.

3. Where it is not possible to determine in which territory the offence or irregularity was committed, such offence or irregularity shall be deemed to have been committed in the Member State where it was detected unless, within the period laid down in Article 455(1), proof of the regularity of the operation or of the place where the offence or irregularity was actually committed is furnished to the satisfaction of the customs authorities.

Where no such proof is furnished and the said offence or irregularity is thus deemed to have been committed in the Member State in which it was detected, the duties and other charges relating to the goods concerned shall be levied by that Member State in accordance with Community or national provisions.

If the Member State where the said offence or irregularity was actually committed is subsequently determined, the duties and other charges (apart from those levied, pursuant to the second subparagraph, as own resources of the Community) to which the goods are liable in that Member State shall be returned to it by the Member State which had originally recovered them. In that case, any overpayment shall be repaid to the person who had originally paid the charges.

Where the amount of the duties and other charges originally levied and returned by the Member State which had recovered them is smaller than that of the duties and other charges due in the Member State where the offence or irregularity was actually committed, that Member State shall levy the difference in accordance with Community or national provisions.

The customs administrations of the Member States shall take the necessary measures to deal with any offence or irregularity and to impose effective penalties.'

15 Article 455 of the implementing regulation provides:

'1. Where an offence or irregularity is found to have been committed in the course of or in connection with a transport operation carried out under cover of a

TIR carnet or a transit operation carried out under cover of an ATA carnet, the customs authorities shall notify the holder of the TIR carnet or ATA carnet and the guaranteeing association within the period prescribed in Article 11(1) of the TIR Convention or Article 6(4) of the ATA Convention, as the case may be.

2. Proof of the regularity of the operation carried out under cover of a TIR carnet or an ATA carnet within the meaning of the first subparagraph of Article 454(3) shall be furnished within the period prescribed in Article 11(2) of the TIR Convention or Article 7(1) and (2) of the ATA Convention, as the case may be.

3. Such proof may be furnished to the satisfaction of the customs authorities *inter alia*:

(a) by production of a document certified by the customs authorities establishing that the goods in question have been presented at the office of destination. This document must include information enabling the goods to be identified; or

(b) by the production of a customs document issued in a third country showing release for home use, or a copy or photocopy thereof; such copy or photocopy must be certified as a true copy either by the body which endorsed the original document, or by the authorities of the third country concerned, or by the authorities of one of the Member States. This document must include information enabling the goods in question to be identified; or

(c) for the purposes of the ATA Convention, by the evidence referred to in Article 8 of that Convention.'

16 Under Article 457 of the implementing regulation:

'For the purposes of Article 8(4) of the TIR Convention, where a consignment enters the customs territory of the Community or starts from a customs office of departure situated in the customs territory of the Community, the guaranteeing association shall become or shall be responsible to the customs authorities of each Member State the territory of which the TIR consignment enters, up to the point at which it leave the customs territory of the Community or up to the customs office of destination in that territory.'

17 Articles 454 and 455 of the implementing regulation were amended by Commission Regulation (EC) No 2787/2000 of 15 December 2000 (OJ 2000 L 330, p. 1).

18 Recital 12 in the preamble to Regulation No 2787/2000 reads as follows:

'Certain corrections should be made to the content with regard to references to the TIR Convention.'

19 Article 1(54) of Regulation No 2787/2000 provides:

'In the first subparagraph of Article 454(3), the words "Article 455(1)" are replaced by the words "Article 455(2)".'

20 Article 1(55) of Regulation No 2787/2000 provides:

'In Article 455(2), the words "Article 11(2) of the TIR Convention" are replaced by the words "Article 11(3) of the TIR Convention".'

21 In accordance with the first subparagraph of Article 4(2) of Regulation No 2787/2000, those provisions apply from 1 July 2001.

Mutual assistance between the administrative authorities of the Member States

22 This is provided for by Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1981 L 144, p. 1), as amended by Council Regulation (EEC) No 945/87 of 30 March 1987 (OJ 1987 L 90, p. 3) ('Regulation No 1468/81').

23 Article 9(1) of Regulation No 1468/81 provides:

'1. At the request of the applicant authority, the requested authority shall carry out appropriate enquiries or arrange for such enquiries to be carried out concerning operations which are or appear to the applicant authority to be contrary to the law on customs or agricultural matters.

In order to carry out these enquiries the requested authority or the administrative authority which it has addressed shall proceed as though it were acting on its own account or at the request of another authority in its own country.

The requested authority shall communicate the results of these enquiries to the applicant authority.'

The main proceedings and the questions referred for a preliminary ruling

24 It appears from the order for reference that on 23 March 1994 the British transport undertaking Freight Forwarding Services ('FFS'), as the holder of a TIR carnet issued by Freight Transport Association Ltd, a British member association of the IRU, cleared at the Hauptzollamt, the customs office of departure, a consignment of 12.5 million cigarettes from Switzerland to be transported to Morocco via the customs office of destination of Algeciras (Spain).

25 The national court states that BGL is an association governed by German law which is authorised as a guaranteeing association in accordance with Article 6 of the TIR Convention. Its liability as guarantor for the holder of a TIR carnet is limited to a maximum of ECU 175 000. Since this is a guarantee as 'principal debtor' under German law, BGL cannot require the Hauptzollamt to proceed against the holder of the TIR carnet first. If BGL has to perform its obligation under the guarantee it has given, it will then have a right of recourse under the guarantee agreement entered into with the IRU. The IRU has in turn concluded an insurance contract with an insurance pool to which Préservatrice Foncière Tiard SA ('PFA'), the intervener in the main proceedings, belongs.

26 The latest date for presenting the goods at the Algeciras customs office had been fixed at 28 March 1994. However, the Hauptzollamt did not receive a certificate of discharge from the customs office of destination. In response to its request, however, the customs office of destination informed the Hauptzollamt on 13 July 1994 that the goods had not been presented. The original TIR carnet, subsequently found and sent to the IRU, bore the forged stamp of the customs office of destination with the date 28 March 1994.

27 By letter of 16 August 1994, the Hauptzollamt notified BGL of the failure to discharge the TIR carnet. It sent FFS, by registered letter with return receipt, a notice of assessment dated 16 August 1994 for DEM 3 197 500 in respect of the transport operation in question. FFS did not pay that sum.

28 By an action brought before the Landgericht (Regional Court) Frankfurt am Main (Germany) in February 1996, the Hauptzollamt claimed from BGL, in respect of the duties owed as a result of the failure to discharge the TIR carnet, the maximum amount under the guarantee, namely DEM 334 132.75, plus default interest. In its defence submitted on 8 May 1996, BGL claimed that the consignment of cigarettes in question had been unloaded in Spain and offered to

produce witnesses to prove that claim. The national court states that, if that fact were proved, it would be the Spanish State, not the German State, which was owed the duties by FFS, in which case the action on the guarantee would be unfounded. The Landgericht Frankfurt am Main and the Oberlandesgericht (Higher Regional Court) Frankfurt am Main (Germany) on appeal nevertheless ruled in favour of the Hauptzollamt.

29 BGL appealed on a point of law to the Bundesgerichtshof. In the context of that appeal, the Bundesgerichtshof is uncertain as to whether, because of the expiry of the period for submitting proof, BGL may be barred from providing proof of the place where the irregularity or offence was committed, as a guarantor is entitled to under Paragraph 768 of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'). The national court observes that BGL first raised this plea only in the defence it submitted to the Landgericht Frankfurt am Main on 8 May 1996, although the Hauptzollamt had informed it by letter of 16 August 1994 of the failure to discharge the TIR carnet.

30 The Bundesgerichtshof states that, in the present case, the TIR carnet bearing the forged stamp of the customs office of destination does not amount to a certificate of discharge obtained in an improper or fraudulent manner within the meaning of the second sentence of Article 11(1) of the TIR Convention. According to that court, it is therefore the first sentence of that provision which applies, and the period for notifying the guaranteeing association of the failure to discharge the TIR carnet is therefore one year from the date of acceptance of the TIR carnet.

31 The national court considers that the provisions applicable are unclear. It is aware of the judgment in Joined Cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797, in which the Court stated, in paragraph 44, that the first subparagraph of Article 454(3) of the implementing regulation unambiguously refers, as regards the length of the period in question, to Article 455(1) of that regulation, which in turn refers, as regards the length of the period it lays

down, to Article 11(1) of the TIR Convention. The Court further observed, in that paragraph, that only one period is mentioned in Article 11(1) of the TIR Convention, namely a period of one year. The national court says, however, that that judgment does not refer to the period for furnishing proof applicable to the guaranteeing association.

32 In those circumstances the Bundesgerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. (a) Does the time-limit laid down in the first subparagraph of Article 454(3) of Commission Regulation (EEC) No 2454/93... for furnishing proof of the actual place of an offence or irregularity apply also where a Member State, pursuant to Article 454(2) and the first and second subparagraphs of Article 454(3) of Regulation No 2454/93, brings proceedings against the guaranteeing association for the payment of duties, and the association wishes to prove in those proceedings that the place where the offence or irregularity was actually committed is situated in another Member State?

(b) If the answer to Question 1(a) is in the affirmative:

(i) In such a case does the one-year time-limit in the first subparagraph of Article 454(3) and Article 455(1) of Regulation No 2454/93 in conjunction with the first sentence of Article 11(1) of the TIR Convention or the two-year time-limit in Article 455(2) of that regulation in conjunction with the first sentence of Article 11(2) of the TIR Convention apply?

(ii) Does the time-limit for furnishing proof in the case set out in Question 1(a) apply in such a way that the guaranteeing association must submit its allegation under tender of evidence that the offence or irregularity was actually committed in another Member State within the time-limit and, if that is not done, is barred from offering that proof?

2. (a) Under Articles 454 and 455 of Regulation No 2454/93, is the Member State which finds that an offence or irregularity has been committed in connection with a transport operation under cover of a TIR carnet obliged as against the guaranteeing association, in addition to the notifications under Article 455(1) of that regulation and an enquiry to the customs office of destination, to investigate where the offence or irregularity was actually committed and who is the customs debtor within the meaning of Article 203(3) of Regulation No 2913/92, by requesting another Member State for administrative assistance in ascertaining the facts [see Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agriculture matters, OJ 1981 L 144, p. 1]?

(b) If the answer to Question 2(a) is in the affirmative,

(i) If such an investigative obligation is infringed, is the offence or irregularity not deemed under the first subparagraph of Article 454(3) of Regulation No 2454/93 to have been committed in the Member State in which it was detected?

(ii) Must the Member State which has detected the offence or irregularity, when claiming against the guaranteeing association, demonstrate and prove that such an investigative obligation has been complied with?'

The questions referred for a preliminary ruling

33 Parts (a) and (b)(ii) of Question 1 should be examined together.

Question 1(a) on the application to the guaranteeing association of the period for furnishing proof of the place of the irregularity and Question 1(b)(ii) on the nature of that period

34 By parts (a) and (b)(ii) of Question 1, the national court essentially asks whether the period referred to in the first subparagraph of Article 454(3) of the implementing regulation, within which proof may be furnished that the actual place where the offence or irregularity was committed is in a Member State other than that which recovers the customs duties, is applicable to a guaranteeing association against which proceedings are brought by a Member State for payment of a sum representing customs duties, and whether that guaranteeing association must furnish such proof within that period and is otherwise barred from furnishing proof.

Observations submitted to the Court

35 BGL submits that a guaranteeing association is entitled to furnish proof of the place where the offence or irregularity was committed, but the time-limit referred to in the first subparagraph of Article 454(3) of the implementing regulation does not apply to it. The right to furnish such proof is recognised by German law, which applies to the guarantee contract concluded between the German State and BGL, and more particularly by Paragraph 768 of the BGB on the guarantor's

right to put forward the same defences as the principal debtor. The latter is entitled to provide such proof. BGL moreover observes that the guarantor's right to put forward the same defences as the principal debtor is not subject to any time-limit.

36 At the hearing, BGL pointed out the importance for it of proving that the irregularity was committed in another Member State, since under the guarantee contract it guarantees debts resulting from a TIR transport only with respect to the Federal Republic of Germany. Moreover, the system of compensation laid down in the third subparagraph of Article 454(3) of the implementing regulation refers only to the principal debtor of the customs debt, not the guaranteeing association.

37 PFA likewise considers that the guaranteeing association is entitled to furnish proof of the place where the offence or irregularity was committed. It submits that the notification of the existence of an irregularity to the guaranteeing association provided for in Article 455 of the implementing regulation is an indication that the latter is entitled to furnish such proof. The reference to Article 11 of the TIR Convention, a provision which mentions the guaranteeing association in all three paragraphs, confirms that view.

38 According to PFA, the entitlement of the guaranteeing association to furnish that proof must lead to the conclusion that the period laid down in the first subparagraph of Article 454(3) of the implementing regulation applies to such an association. It would otherwise have been necessary to make express provision for a different period. The reference to the TIR Convention also confirms that view.

39 As regards the nature of the period, PFA submits that it is not a peremptory period but one of a non-binding character, since all the relevant customs law is based on the idea that the customs debt must be paid by the real debtor to the real

creditor. Material accuracy must therefore ultimately always take priority over subsidiary formal considerations such as rebuttable presumptions.

40 The Hauptzollamt and the German Government consider, on the other hand, that the guaranteeing association is not entitled to furnish proof of the place where the offence or irregularity was committed, and that the period laid down in the first subparagraph of Article 454(3) of the implementing regulation therefore does not apply to it. Neither the TIR Convention nor the implementing regulation provides for the possibility of furnishing that proof.

41 The German Government states that allowing the guaranteeing association the possibility of providing such proof, in the context of proceedings against the customs authorities in a civil court, would have the result that two different courts could have the same question to decide and might deliver contradictory judgments. The finance court would have jurisdiction over recovery of the customs debt owed by the holder of the TIR carnet, while recovery of the sums owed by the guaranteeing association would fall within the jurisdiction of the civil court, since the action for recovery is based on the guarantee contract. Those courts could arrive at different answers.

42 The German Government submits, consequently, that when interpreting Article 454 of the implementing regulation account should be taken of the purpose of the guarantee, so that the findings of the finance court as to the place of the offence or irregularity cannot be called into question by divergent findings of the civil court. That has the consequence that the guarantor cannot raise the same defences as the principal debtor nor, in the present case, furnish proof of the place where the offence or irregularity was committed.

43 Should the Court accept that the guaranteeing association has a period within which it may furnish such proof, the Hauptzollamt and the German Government submit that that period is peremptory. The German Government states that, if it were accepted that that period is a procedural one, when relied on in proceedings between the customs authorities and the guaranteeing association, the latter would under German law have available the ordinary limitation period of 30 years to provide proof of the place of the offence or irregularity, which would not guarantee the necessary legal certainty in relations between the guarantor and the customs authorities. Moreover, that would give rise to an obvious contradiction with the cases where Article 11(1) of the TIR Convention is directly applicable.

44 At the hearing, the Commission submitted that neither the TIR Convention nor the implementing regulation precludes the guaranteeing association from relying, in accordance with German law, on the defences which the principal debtor could raise, or, in the present case, from being able to prove the place where the offence or irregularity was committed. However, Community law requires that proof to be furnished within the period laid down in the first subparagraph of Article 454(3) of the implementing regulation. Moreover, that time-limit must be peremptory, since there is no reason why a guaranteeing association should be in a better position if it is taken to court than if it is not.

Findings of the Court

45 BGL's rights and obligations are governed simultaneously by the TIR Convention, Community law and the guarantee contract, subject to German law, which it concluded with the Federal Republic of Germany.

46 Article 454(1) of the implementing regulation states that the regulation is to apply without prejudice to the specific provisions of the TIR Convention concerning the liability of the guaranteeing associations when a TIR carnet is used.

47 No provision of the TIR Convention expressly regulates the question whether the guaranteeing association may furnish proof of the place where an offence or irregularity was committed. Article 8(1) of the Convention merely sets out certain obligations towards the contracting parties to the Convention which the guaranteeing associations must enter into when they apply for authorisation to issue TIR carnets. Moreover, Article 11(3) of the Convention refers only to proof that there were no irregularities during a transport operation.

48 In German law, a guarantor is entitled to put forward against the creditor the same defences as the principal debtor. If German law alone were applicable in the main proceedings, then, provided this was not ruled out by the guarantee contract concluded between the parties, BGL would be entitled to furnish proof of the place where the offence or irregularity was committed, and would be subject to the conditions as regards time-limits prescribed by German law.

49 In the present case, however, it must be ascertained whether the implementing regulation, which, in accordance with the second paragraph of Article 189 of the EC Treaty (now the second paragraph of Article 249 EC), is directly applicable, contains provisions that preclude the right of the guaranteeing association to furnish proof of the place of the irregularity or lay down conditions for the exercise of that right which are essential for Community law to have full effect.

50 With respect to the right to furnish proof of the place where the offence or irregularity was committed, it must be observed that Articles 454 and 455 of the

implementing regulation do not specify the person who must or may furnish that proof, and in any event do not exclude the possibility of that proof being furnished by the guaranteeing association.

51 Moreover, Article 455 of that regulation refers to Article 11 of the TIR Convention, which deals exclusively with the guaranteeing association in each of its three paragraphs. It follows that Article 455 must be interpreted as not precluding the guaranteeing association from being able to furnish such proof.

52 Furthermore, respect for the right to a fair hearing in any procedure brought against a person which may lead to an act adversely affecting him, in particular a procedure which may lead to penalties being imposed, constitutes a fundamental principle of Community law. That principle requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on the basis of which the penalty is imposed and can produce any evidence relevant to his defence (see, to that effect, Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraphs 39 and 40, and Case C-142/87 *Belgium* v *Commission* ('*Tubemeuse*') [1990] ECR I-959, paragraphs 46 and 47).

53 It follows from the above that the first subparagraph of Article 454(3) of the implementing regulation must be interpreted as not precluding a guaranteeing association from furnishing proof of the place where the offence or irregularity was committed.

54 With respect to the period within which such proof must be furnished, it must be noted that the purpose of that proof is to contest the jurisdiction of the Member State which recovers the customs duties while identifying the Member State which will have jurisdiction to recover those duties where the presumption as to the place of the offence or irregularity is considered to be rebutted.

55 That other Member State must be determined speedily, so that it can take the necessary measures to recover the amounts due. The full effectiveness of Community law would therefore be affected if the question of the period for furnishing proof depended exclusively on national law, which might prescribe a period that was too long to make it legally and materially possible to recover amounts due in another Member State.

56 Consequently, the first subparagraph of Article 454(3) of the implementing regulation must be interpreted as meaning that the period it prescribes applies to a guaranteeing association against which proceedings are brought by a Member State for payment of customs duties on the basis of the guarantee contract it has concluded with that State in accordance with the TIR Convention, where that association wishes to furnish proof of the place where the offence or irregularity was committed.

57 The same aim of giving full effect to Community law requires that that time-limit should be a peremptory one, in that the guaranteeing association concerned must furnish the proof of the place where the offence or irregularity was committed within the period laid down in the first subparagraph of Article 454(3) of the implementing regulation, the proof otherwise being inadmissible.

58 The answer to parts (a) and (b)(ii) of Question 1 must therefore be that the first subparagraph of Article 454(3) of the implementing regulation does not preclude a guaranteeing association against which proceedings are brought by a Member State for payment of customs duties on the basis of the guarantee contract it has concluded with that State in accordance with the TIR Convention from being able to furnish proof of the place where the offence or irregularity was committed, provided that that proof is furnished within the period laid down in that provision, that time-limit being peremptory.

Question 1(b)(i) on the period for furnishing proof

59 By part (b)(i) of Question 1, the national court essentially asks what precisely is the length of the period prescribed in the first subparagraph of Article 454(3) of the implementing regulation.

Observations submitted to the Court

60 The parties to the main proceedings, the German Government and the Commission acknowledge that the provisions applicable in this respect are unclear and inconsistent. They submit that the reference in the first subparagraph of Article 454(3) of the implementing regulation to Article 455(1) of that regulation and thereby to Article 11(1) of the TIR Convention is incorrect and was expressly corrected by Regulation No 2787/2000, which is not, however, applicable in the main proceedings. It was also observed that the latter regulation scarcely improves the situation, since it for its part again refers to a provision containing several time-limits.

61 The periods regarded as applicable in the present case are three months, one year or two years, depending on which part of Article 11 of the TIR Convention is addressed by the reference in Article 455(1) of the implementing regulation.

62 BGL and PFA submit that, in the case in the main proceedings, it is a period of two years for furnishing proof which applies, under the first subparagraph of Article 454(3) in conjunction with Article 455(2) of the implementing regulation and the second sentence of Article 11(3) of the TIR Convention. According to

BGL, those provisions must be interpreted consistently and logically. PFA observes that, having regard to the penal effect of the time-limit for bringing proof, the provision which is most favourable to the guaranteeing association should be taken into consideration, namely the provision as amended by Regulation No 2787/2000. The Hauptzollamt and the German Government, on the other hand, submit that, if it is possible for the guaranteeing association to furnish proof, the period for doing so is one year, as the Court held in *Met-Trans and Sagpol*.

Findings of the Court

63 The provisions in question are unclear and inconsistent.

64 As Advocate General Mischo observed in point 43 of his Opinion in the *Met-Trans and Sagpol* case, it may be considered that it was by inadvertence that the legislature inserted a reference to Article 455(1) in the first subparagraph of Article 454(3) of the implementing regulation, and that the reference should have been to Article 455(2) of that regulation.

65 Article 455(1) makes no mention anywhere of a period relating to proof of the place where the offence or irregularity was committed, but refers to the period within which the customs authorities must notify the holder of the TIR carnet and the guaranteeing association of the existence of such an offence or irregularity. By contrast, paragraph 2 of that article deals with the period for proof of the regularity of the operation carried out under cover of the TIR carnet, and a reference to that provision would appear more consistent with regard to proof of the place where an offence or irregularity has been committed.

66 Moreover, if the first subparagraph of Article 454(3) of the implementing regulation were to be read and interpreted as referring in fact to Article 455(1) of that regulation, the period for proof of the place of the offence or irregularity would be the same as that prescribed for notification of the offence or irregularity and would run from the same date; it would thus be one year from the acceptance of the TIR carnet. It would suffice in that case for the customs authorities to notify the existence of an irregularity on the last day of that period for it to be materially impossible for the guaranteeing association to furnish that proof.

67 It was moreover in line with the interpretation suggested by Advocate General Mischo in his Opinion in the *Met-Trans and Sagpol* case that the implementing regulation was amended by Regulation No 2787/2000, with an express statement in recital 12 that 'certain corrections should be made to the content with regard to references to the TIR Convention'.

68 It is possible that the period of three months is the one which should be taken into consideration. A period of three months from the date of the claim to the guaranteeing association for payment is mentioned in Article 11(3) of the TIR Convention, to which the first subparagraph of Article 454(3) of the implementing regulation refers, if the amendments made by Regulation No 2787/2000 are taken into account. A period of three months had, moreover, been recognised as applicable by an administrative agreement concluded by the Member States and accepted by the Community transit committee (see on this point the Opinion of Advocate General Mischo in *Met-Trans and Sagpol*). Finally, a short period appears preferable here in order to determine swiftly the Member State responsible for requiring payment of the customs duties and thus to avoid difficulties relating to limitation periods for debts.

69 However, it must be remembered that the amendment introduced by Regulation No 2787/2000 did not enter into force until 1 July 2001. It does not therefore apply to the case in the main proceedings.

70 Moreover, Article 11(3) of the TIR Convention contains two separate sentences referring to periods of different length. The first period mentioned, a period of three months, is a period for payment, while the second period mentioned, a period of two years from the claim for payment by the customs authorities to the guaranteeing association, relates to proof that there was no irregularity in connection with the transport operation in question. It is not therefore certain that the reference to that provision relates only to the first period mentioned.

71 Since the provisions applicable to the case in the main proceedings are manifestly erroneous and provide for several periods which could be taken into consideration, it should be recalled that the principle of legal certainty constitutes a general principle of Community law, requiring in particular that rules imposing charges on a taxpayer be clear and precise so that he may be able to ascertain unequivocally what his rights and obligations are and take steps accordingly (Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931, paragraph 17; Joined Cases 92/87 and 93/87 *Commission* v *France and United Kingdom* [1989] ECR 405, paragraph 22; and Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27).

72 In those circumstances, the period to be taken as applicable to the guaranteeing association is the one which is most favourable to it out of those which may be identified by the various references made in Articles 454 and 455 of the implementing regulation, as applicable at the material time, namely the period of two years running from the date of the claim for payment made to the guaranteeing association.

73 The answer to part (b)(i) of Question 1 must therefore be that the first paragraph of Article 454(3) and Article 455 of the implementing regulation must be interpreted as meaning that the guaranteeing association has available, to furnish proof of the place where the offence or irregularity was actually committed, a period of two years running from the date of the claim for payment made to it.

Question 2(a) on the existence of an obligation on the Member State to investigate

74 By part (a) of Question 2, the national court essentially asks whether Articles 454 and 455 of the implementing regulation require the Member State which detects an offence or irregularity in connection with a transport operation under cover of a TIR carnet, in addition to making the notifications prescribed in Article 455(1) of that regulation and an enquiry to the office of destination, to investigate the place where the offence or irregularity was actually committed and the identity of the customs debtors, by seeking the administrative assistance of another Member State for elucidation of the facts.

Observations submitted to the Court

75 BGL and PFA submit that there exists an obligation on the part of the Member State to investigate the place where the irregularity was committed. The basis of that obligation may be found in the principle of investigation of the authorities'

own motion in German law, Articles 454 and 455 of the implementing regulation, and the TIR Convention, in particular Article 37.

76 They point out that the Member States have the necessary instruments available for ensuring compliance with their obligation to make a thorough investigation, in particular Regulation No 1468/81. Thus Article 9 of that regulation gives the German customs authorities the possibility of making a request for assistance to the United Kingdom authorities so that all necessary investigations may be undertaken, in particular of FFS as the holder of the TIR carnet and the driver of the lorry, in order to determine the Member State in which the offence or irregularity was committed and the persons who owe the customs debt as a result of the offence or irregularity.

77 The Hauptzollamt, the German Government and the Commission submit that Articles 454 and 455 of the implementing regulation do not impose on the Member State which detects the offence or irregularity any obligation towards the guaranteeing association to investigate, in addition to making the notifications prescribed in Article 455(1) and an enquiry to the office of destination, the actual place where the offence or irregularity was committed.

78 The Hauptzollamt and the Commission observe that the burden of proving the regularity of the transport operation or the place where the offence or irregularity was committed is essentially on the operators. The customs authorities have only a secondary role in relation to the operators. Offences are investigated with a view to punishing irregularities, not in the interests of the customs debtor. Such a requirement for those authorities would, moreover, be contrary to the fundamental concept which underlies the system of transit under the TIR Convention, which was created in the interests of the haulage industry and provisionally exempts the participants from customs duties on import. The

customs authorities cannot, however, help participants in that system to escape those duties definitively, and must leave them to bear the burden of proof.

79 As regards Regulation No 1468/81, the Commission considers that it does not create any right for economic operators. The regulation recognises the need to coordinate action by the customs authorities in order to preserve the Community's own resources, but not in order to enable those operators to escape their obligations. The balance of the obligations of the various parties involved in the TIR system would be upset by the creation of an obligation to investigate on the part of the customs authorities, to the benefit of operators, which was clearly not intended by the Community legislature.

Findings of the Court

80 Articles 454 and 455 of the implementing regulation do not lay down any obligation towards the guaranteeing association for the Member State which detects an offence or irregularity in connection with a transport operation under cover of a TIR carnet to investigate the actual place where the offence or irregularity was committed and the identity of the customs debtors.

81 Both the TIR Convention and the implementing regulation establish presumptions as to the existence of an offence or irregularity and the place where it was committed. Consequently, the operator required to pay the customs debt claimed on the basis of that presumption or the association guaranteeing payment of that debt bears the burden of proof both of the regularity of the transport operation and of the place where the offence or irregularity was committed.

82 The fifth subparagraph of Article 454(3) of the implementing regulation provides that the customs administrations of the Member States are to take the necessary measures to deal with any offence or irregularity and to impose effective penalties. However, that provision does not create an obligation on the part of those administrations towards the guaranteeing association.

83 As regards Regulation No 1468/81, it too regulates only relations between the Member States and between them and the Commission.

84 The answer to part (a) of Question 2 must therefore be that Articles 454 and 455 of the implementing regulation do not require the Member State which detects an offence or irregularity in connection with a transport operation under cover of a TIR carnet, in addition to making the notifications prescribed in Article 455(1) of that regulation and an enquiry to the office of destination, to investigate the actual place where the offence or irregularity was committed and the identity of the customs debtors, by seeking the administrative assistance of another Member State for elucidation of the facts.

Question 2(b)

85 Since part (b) of Question 2 was put only in the case of part (a) of that question being answered in the affirmative, it need not be answered.

Costs

86 The costs incurred by the German Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesgerichtshof by order of 11 January 2001, hereby rules:

1. **The first subparagraph of Article 454(3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code does not preclude a guaranteeing association against which proceedings are brought by a Member State for payment of customs duties on the basis of the guarantee contract it has concluded with that State in accordance with the Customs Convention on the International Transport of Goods under cover of TIR Carnets from being able to furnish proof of the place where the offence or irregularity was committed, provided that that proof is furnished within the period laid down in that provision, that time-limit being peremptory.**

2. The first paragraph of Article 454(3) and Article 455 of Regulation No 2454/93 must be interpreted as meaning that the guaranteeing association has available, to furnish proof of the place where the offence or irregularity was actually committed, a period of two years running from the date of the claim for payment made to it.

3. Articles 454 and 455 of Regulation No 2454/93 do not require the Member State which detects an offence or irregularity in connection with a transport operation under cover of a TIR carnet, in addition to making the notifications prescribed in Article 455(1) of that regulation and an enquiry to the office of destination, to investigate the actual place where the offence or irregularity was committed and the identity of the customs debtors, by seeking the administrative assistance of another Member State for elucidation of the facts.

Rodríguez Iglesias Wathelet Schintgen

Timmermans Gulmann La Pergola

Skouris Macken Colneric

Cunha Rodrigues Rosas

Delivered in open court in Luxembourg on 23 September 2003.

R. Grass G.C. Rodríguez Iglesias

Registrar President