OPINION OF ADVOCATE GENERAL MISCHO

delivered on 1 July 1999 *

1. In proceedings between the Hauptzollamt Neubrandenburg and the company Lensing & Brockhausen GmbH (hereinafter 'Lensing & Brockhausen'), the Bundesfinanzhof has submitted to the Court two preliminary questions concerning the interpretation of Article 36 of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit, [1] as amended by Council Regulation (EEC) No 474/90 of 22 February 1990, [2] and of Article 11*a* of Commission Regulation (EEC) No 1062/87 of 27 March 1987, on provisions for the implementation and for certain simplifications of the Community transit procedure, [3] as amended by Commission Regulation (EEC) No 1429/90 of 29 May 1990 [4].

The main proceedings

2. On 8 July 1992, Lensing & Brockhausen, customs agents, asked the Hauptzollamt (Principal Customs Office) at Neubrandenburg to clear a consignment of steel sections from Poland for the external Community transit procedure. The T 1 declaration gave as consignee Ateliers Metalgroup de Marcinelle, Belgium, and as office of destination Charleroi, Belgium.

3. The consignment was to be produced by 16 July 1992 at the latest. By letter of 22 January 1993 the Hauptzollamt informed Lensing & Brockhausen that the transit procedure had not been completed and asked for help in clarifying the situation. An inquiry notice sent to the office of destination on 3 May 1993 was not answered, and the office also failed to react to a formal reminder of 12 October 1994. The Hauptzollamt therefore, on 19 January 1995, issued a tax assessment for customs duty and VAT on import.

4. On 5 February 1995, Lensing & Brockhausen objected, relying on a CMR waybill as proof that Ateliers Metalgroup had received and paid for the steel sections.

5. By letter of 6 September 1995, the Belgian authorities confirmed that the consignment had not been produced to the office of destination and reported that

* Original language: French.

1 — OJ 1977 L 38, p. 1.

2 — OJ 1990 L 51, p. 1.

3 — OJ 1987 L 107, p. 1.

4 — OJ 1990 L 137, p. 21.

Ateliers Metalgroup had stated that the goods in question had been delivered to DVL Industries (hereinafter 'DVL'). According to the Belgian authorities' information, it was not possible to establish whether the goods declared on the transit document had in fact been the subject of customs formalities. DVL was said to have been declared bankrupt in the meantime.

6. By decision of 2 January 1996, the customs duty and VAT on import were reduced by the German authorities to DEM 6 544.90, the remainder of the objection being rejected.

7. In the course of proceedings before the Finanzgericht (Finance Court), Lensing & Brockhausen argued that a receipt for the goods had been given by Ateliers Metalgroup on 9 July 1992, within the time-limit prescribed for their production, as was shown by the CMR waybill. In their submission, the right to recover duty belonged exclusively to the Member State on whose territory the offence had been detected; it was thus irrelevant that the Belgian customs authorities had not been able to recover the duty from the consignee. This argument was accepted, the Finanzgericht holding that it was for the Belgian customs authorities, not the German authorities, to require payment of the duty.

8. The Hauptzollamt appealed on a point of law to the Bundesfinanzhof, arguing in particular that the conditions for a refund under the third subparagraph of Article 36(3) of Regulation No 222/77 were not satisfied.

9. The purpose of Article 36 of Regulation No 222/77, on which the Hauptzollamt relied, is to determine the competent State for recovery of duty on entry where an offence or irregularity has been committed in the course of a Community transit operation. Article 36(1) states that, where the offence or irregularity 'has been committed in a particular Member State, the recovery of duties or other charges which may be chargeable shall be effected by that Member State in accordance with its provisions laid down by law, regulation or administrative action, without prejudice to the institution of criminal proceedings'.

10. For cases in which the place of the offence or irregularity cannot be established, Article 36(2) and (3) sets out a series of presumptions which enable conflicts of jurisdiction to be avoided.

11. Thus, under Article 36(3),

'When the consignment has not been produced at the office of destination and the place of the offence or irregularity cannot

be established, such offence or irregularity shall be deemed to have been committed:

— in the Member State to which the office of departure belongs, or

— in the Member State to which the office of transit at the point of entry into the Community belongs and to which a transit advice note has been given,

unless, within a period to be determined, proof is furnished to the satisfaction of the competent authorities of the regularity of the transit operation or of the place where the offence or irregularity has actually been committed.

If, in the absence of such proof, the said offence or irregularity remains deemed to have been committed in the Member State of departure or in the Member State of point of entry as referred to in the second indent, the duties and other taxes relating to the goods concerned shall be levied by that Member State in accordance with its laws, regulations and administrative provisions.

If, before expiry of a period of three years from the date of registration of the T 1 declaration, the Member State where the said offence or irregularity was actually committed is determined, that Member State shall, in accordance with its laws, regulations and administrative provisions, recover the duties and other taxes (apart from those levied, pursuant to the second subparagraph, as own resources of the Community) relating to the goods concerned. In this case, once the proof of such recovery is provided, the duties and other taxes initially levied (apart from those levied as own resources of the Community) shall be refunded.

...'

12. The Bundesfinanzhof was uncertain as to the interpretation of Article 36 of Regulation No 222/77 in conjunction with Article 11*a* of Regulation No 1062/87. Article 11*a* further elucidates the procedure to be followed where a consignment has not been produced to the office of destination:

'1. Where a consignment has not been produced at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure shall notify the principal of this fact as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration.

2. The notification referred to in paragraph 1 must indicate, in particular, the time-limit by which the proof of the regularity of the transit operation or of the place where the offence or irregularity has actually been committed must be furnished to the office of departure to the satisfaction of the competent authorities.

This time-limit shall be three months from the date of the notification referred to in paragraph 1. If the required proof has not been produced by the end of this period, the competent Member State shall take steps to recover the duties and other charges involved. In cases where this Member State is not the one in which the office of departure is located, the latter shall immediately inform that Member State.'

13. In this case the national court states that the office of departure omitted to fix, with regard to the principal, the time-limit referred to in Article 11*a* within which proof could be furnished of the regularity of the transit operation or the place where the offence was actually committed.

14. In those circumstances, since it was uncertain as to the inferences to be drawn from failure to comply with the procedure under Article 11*a*, in particular where, because of the expiry of the limitation period, the duty on import can no longer be levied in the Member State where the offence is eventually proved to have been committed, the Bundesfinanzhof stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Is the first subparagraph of Article 36(3) of Regulation (EEC) No 222/77 in conjunction with Article 11a(2) of Regulation (EEC) No 1062/87 to be interpreted as meaning that, in the event of failure to produce a consignment at the office of destination, the Member State of departure has jurisdiction to recover duty on import only where the period of three months laid down in the second subparagraph of Article 11*a*(2) of Regulation (EEC) No 1062/87 has previously been set for the principal and he has not furnished the proof required by that provision?

2. If Question 1 is to be answered in the affirmative: Is the third subparagraph of Article 36(3) of Regulation (EEC) No 222/77 to be interpreted as being applicable also in a case in which a customs office of the Member State of departure has recovered duty due in respect of goods cleared for the transit procedure without having set a time-limit in accordance with the second subparagraph of Regulation (EEC) No 1062/87, with the result that the Member State of departure may refund the duty which it has assessed and levied without jurisdiction only if it is proved that the Member State in which the offence or irregularity was actually committed has recovered the duty? Is a

distinction to be drawn between duty levied as own resources of the Community and other (national) taxes?'

Preliminary observations

15. Lensing & Brockhausen question the relevance of the questions for the outcome of the main proceedings. They submit that the facts of the case must be assessed in the light of Article 36(1) of Regulation No 222/77, not of the provisions to which the questions relate.

16. In their submission, Article 36(1) applies where there has been a breach of the rules of the Community transit procedure and the Member State in which the offence was committed is known, while Article 36(3) applies where there has been an offence and it is not known in which Member State it was committed. In the present case the offence can only have been committed in Belgium, where the consignee was, and Article 36(1) should consequently be applied.

17. How should we react to this argument? It is clear, I think, that Article 36(1) lays down a general principle whereby duties are to be recovered by the Member State in which an offence or irregularity was committed once that Member State has been identified. This is borne out by the fact that Article 36(3) also assigns jurisdiction to that Member State in cases where, following a period of investigation and uncertainty as to the place where the offence occurred, it is found to have been committed in a Member State other than the one in which the office of departure is situated.

18. On the other hand, it must not be overlooked that Article 36(1) deals with offences or irregularities of any kind, whereas Article 36(3) refers to a specific situation in which, as in the present case, the consignment has not been produced at the office of destination.

19. Moreover, the purpose of this paragraph is to make provision for cases such as the present, where the place where the offence was committed is not known at the outset but is determined subsequently.

20. Article 36(3) must therefore be regarded as *lex specialis* in relation to Article 36(1), and it is the former which must therefore be interpreted, together with Article 11a of Regulation No 1062/87, so that the appeal court can decide the case pending before it.

The first question

21. By its first question, the national court asks essentially whether Article 36(3) of Regulation No 222/77 in conjunction with Article 11*a*(2) of Regulation No 1062/87 must be interpreted as meaning that the Member State to which the office of departure belongs may recover duty on import only if it has indicated to the principal that he has three months in which to prove where the offence or irregularity was actually committed and such proof has not been provided within that period.

22. Lensing & Brockhausen argue that the provisions of Article 36(3), first subparagraph, of Regulation No 222/77 and Article 11*a* of Regulation No 1062/87 mean, in conjunction, that for a Member State lawfully to recover duty on entry the following conditions must be met: it must be doubtful whether the consignment was regularly produced; the place where the offence was committed must be as yet unidentified; the office of departure must give the principal formal notice to furnish proof within three months of the consignment having been produced or of the place where the offence was committed.

23. In their submission, jurisdiction will be shared among Member States depending on the outcome of the formal notice. If the principal proves where the offence occurred, the Member State on whose territory it occurred will have jurisdiction to recover the duty.

24. According to Lensing & Brockhausen, this procedure will be compulsory in a case covered by Article 36(3), first subparagraph, of Regulation No 222/77. If it were decided that Member States are not obliged to comply with the procedure this would confer on Article 36(3), first subparagraph, of Regulation No 222/77, and especially on Article 11*a* of Regulation No 1062/87 an effect exactly contrary to their true meaning and to the intended purpose, which is to ensure a clear allocation of responsibility among the Member States and thus avoid conflicts of jurisdiction.

25. Thus, in their submission, because the Member State concerned failed to put the principal on notice to furnish proof within the three-month time-limit of the place where the offence was committed, it is not entitled to take action to recover import duty.

26. The German Government observes that the provisions of Article 36(3), first subparagraph, of Regulation No 222/77, in conjunction with Article 11*a* of Regulation No 1062/87, are intended to determine which Member State has jurisdiction to levy customs duties and other taxes at short notice where there has been a breach of the Community transit rules. In order to recover these duties, even when the place where the offence was committed cannot be clearly established, Article 36(3), first subparagraph, establishes the presumption

that the offence was committed in the Member State to which the office of departure belongs. By this means, it is possible to ensure that non-recovery does not take place simply because the place of the offence could not be determined.

27. According to the German Government, the only purpose of the time-limits laid down in Article 11a of Regulation No 1062/87 is to regulate in a formal sense the administrative procedure for determining the actual place of the offence, in order to determine which Member State has jurisdiction to recover duty, to expedite the recovery process and thereby guarantee collection of the Community's own resources. If Article 11*a* of Regulation No 1062/87 were interpreted as meaning that notice of the time-limit must be given as a mandatory condition for establishing the presumption that the offence was committed in the Member State of departure and so recognising the jurisdiction of that State, it would mean that, where such a period was not fixed, no Member State would be competent to recover customs duty and other taxes, so that recovery would not be ensured, which would be contrary to the intention of the Community legislature.

28. Thus, in the view of the German Government, the presumption that the offence was committed in the Member State of departure is correct, even if the actual place of the offence has not been established and no time-limit has been fixed in accordance with Article 11a(2) of Regulation No 1062/87. Independently of the rules for determining which Member State has jurisdiction to recover duty, this leaves the rights of the principal unaffected, since he remains responsible for paying the charges by virtue of his obligation to discharge customs debt.

29. According to the Commission, it is evident from the wording and purpose of Article 36(3), first and second subparagraphs, of Regulation No 222/77, in conjunction with Article 11*a* of Regulation No 1062/87, that the presumptive effect of Article 36(3), first subparagraph, and thus the jurisdiction of the office of departure according to the second subparagraph, apply only when the principal has been given a time-limit of three months to furnish proof of the place where the offence or irregularity occurred and no such proof has been supplied. The Commission explains that Article 36(3), first subparagraph, of Regulation No 222/77, which enables this presumption to be rebutted ('unless'), clearly shows that a time-limit has to be given, and refers in this connection to Article 11*a* of Regulation No 1062/87. The Commission also explains the reasons underlying this provision. This question will be dealt with below.

30. The Commission therefore considers that, in the circumstances of the present case, the presumption could not operate in favour of the Member State of departure, so that the German customs authorities were not entitled to recover the duties and other taxes.

31. The Danish Government has some sympathy for the doubts expressed by the Bundesfinanzhof and the arguments of the German Government, but it too holds the view that the office of departure may not recover duty if it has not set the three-month time-limit for the principal.

32. As for myself, I have to agree with the viewpoint of the Commission, the Danish Government and Lensing & Brockhausen.

33. The wording of Article 11*a*(2) of Regulation No 1602/87 undeniably makes plain that the requirement to state the three-month time-limit is compulsory. The text stipulates that the notification 'must indicate, in particular, the time-limit ...' and that 'this time-limit shall be three months ...'.

34. I agree with the Commission that this method was chosen in order to achieve the following objectives.

35. It should ensure a more rapid conclusion of the investigation procedure and determine which State has jurisdiction, thus recovering duty promptly, by encouraging the principal to cooperate actively in clarifying the situation in the knowledge that he will otherwise have to pay duty in the Member State of the office of departure.

36. By successfully showing that the procedure has been regularly completed the principal can be sure of avoiding the customs debt, which will become the responsibility of the consignee of the goods.

37. Likewise, by showing that an irregularity has been committed in another Member State it will be possible for the principal to avoid the customs debt, as the Member State concerned can seek out the persons involved (who are jointly and severally liable) and claim the duty from them.

38. If the VAT rate is lower in that Member State, a principal who is unable to avoid payment of customs duty will at least be able to benefit from the lower rate.

39. Moreover, determining the place where the offence was committed will make it possible to ensure that the duties and other taxes are collected by the Member State to which they are logically due, since the place of the offence will normally be in the Member State where the goods have been consumed.

40. The rule on fixing a time-limit of three months is therefore intended both to ensure as far as possible that the duties and other taxes are levied by the Member State which

actually has jurisdiction and that they are paid by the consignee of the goods.

41. One is therefore entitled to conclude that the three-month period is not merely a procedural time-limit, but a mandatory condition which must be fulfilled to enable the office of departure to levy the duties and other taxes (if at the end of this period the principal has not proved that the operation has been regularly completed or that the offence was committed in another Member State).

42. Finally, in response to the contention of the German Government, I feel bound to point out that if no three-month time-limit has been fixed, this will not necessarily mean that no Member State has jurisdiction.

43. If it can be established by some means, before a period of three years has elapsed, that the offence was committed either in the Member State of the office of departure, or in the Member State to which the goods were sent, or in another Member State through which the goods have transited, that Member State will collect the duties and other taxes.

44. In fact, the Bundesfinanzhof has confirmed that Lensing & Brockhausen, within this three-year time-limit, successfully 'proved by appropriate documents that the offence ... had taken place in Belgium'.

45. The result of this proof was that the Member State where the offence occurred, in this case the Kingdom of Belgium, definitively acquired sole jurisdiction to levy the relevant duties.

46. The fact that this Member State is apparently no longer able to exercise its jurisdiction because of the time bar does not in any way impair its sole jurisdiction.

47. During the oral proceedings, the Agent for the Danish Government provided some clarification about the 11-month time-limit mentioned in Article 11*a*(1). This is the period 'before the end of which' the office of departure must notify the principal that the consignment has not been produced at the office of destination and that the place where the offence or irregularity occurred cannot be established.

48. According to the Danish Government, this time-limit (unlike the three-month time-limit) is a procedural requirement and the office of departure should be able to require recovery of the customs duty even if the principal has been notified of the three-month time-limit after the end of the eleven-month period.

49. The Commission has stated that it agrees with this interpretation, although the Agent for Lensing & Brockhausen has argued the contrary position.

50. Since this question was raised only during the oral proceedings and is not the subject of the questions put by the Bundesfinanzhof, I do not think it is necessary to address it.

51. Returning to the first question put to us, I think the answer should be, as the Commission proposes, that Article 36(3), first subparagraph, of Regulation No 222/77, in conjunction with Article 11a(2) of Regulation No 1062/87, is to be interpreted as meaning that the Member State to which the office of departure belongs cannot recover the import duties if the consignment has not been produced at the office of destination, unless the principal has previously been set the time-limit prescribed in Article 11*a*(2), second subparagraph, of Regulation No 1062/87, and has failed to furnish the proof required by that article.

The second question

52. As the first question put by the Bundesfinanzhof is to be answered in the affirmative, we must also consider the second question, in which the appeal court requests an interpretation of Article 36(3), third subparagraph, of Regulation No 222/77.

53. This provision provides that, if the place of the offence or irregularity is determined before the end of a three-year period, the Member State in question is to recover the duties and other taxes (except for those levied, in accordance with the second subparagraph, as own resources of the Community). In this case, once the proof of such recovery is provided, the duties and taxes initially levied according to the presumption that the Member State to which the office of departure belongs has jurisdiction (apart from those levied as own resources of the Community) are to be refunded.

54. We are asked whether this provision permits a Member State which has levied import duty without having jurisdiction to do so to refuse to refund the duty until the principal has furnished proof that the duty has been levied in the Member State which did have jurisdiction.

55. Lensing & Brockhausen observe that the purpose of Article 36(3), first subparagraph, of Regulation No 222/77, which is to resolve conflicts of jurisdiction among Member States, would be put at risk if a given Member State could take action under it to recover duty and then require payment of the duty while awaiting proof

that the Member State which actually has jurisdiction has received the duty.

56. On the contrary, according to Lensing & Brockhausen, it seems that equity and the rule-of-law principle require that a Member State which has been shown to lack competence should at least refrain from receiving outstanding duty if it has not complied with the procedure for identifying the competent State.

57. Lensing & Brockhausen add that, although the rule-of-law principle requires that all legally prescribed duties are to be recovered, it also requires that the recovery be effected through proper legal process. This principle would be defeated if any Member State, even those which lack competence, could set about recovering such duties.

58. If the view were taken that every State has jurisdiction to recover duties on entry, several Member States without jurisdiction could be regarded as being entitled to do so under the same transit procedure. When the Member State which does have jurisdiction can no longer recover the duty, for example because of the expiry of the limitation period as in the main proceedings, the principal will be unable to obtain a refund of the import duty from any of the Member States without jurisdiction which have intervened, even though he will have paid the duty several times over.

59. This will be true regardless of whether it is a matter of the Community's own resources or other (national) duties.

60. The German Government argues that the general purpose of Article 36(3), third subparagraph, of Regulation No 222/77 is to guarantee the recovery of duties and other taxes, even when the Member State which has levied them lacked jurisdiction. In this light, it is immaterial whether the determination of the Member State with jurisdiction to recover the duty was vitiated by procedural flaws arising, as in this case, from the failure to fix the time-limit in accordance with Article 11*a* (2), second subparagraph. The actual place of the offence can also be established through proofs submitted at a later stage, and not only on the basis of investigations by the customs authorities.

61. The words 'once the proof of such recovery is provided ...' clearly show that refund of duty levied by a Member State which lacked jurisdiction is only possible if the Member State which does have jurisdiction has actually received the sums in question. So procedural flaws committed in the determination of the place of the offence for the purpose of designating the competent Member State will not result in failure to recover sums due as customs duty altogether.

62. The Commission points out that during the three-year period it remains possible at

any time to rebut the presumption that the Member State of departure has jurisdiction. Once this period has elapsed, it is desirable, for the sake of legal certainty, to apply the principle that it is the Member State of departure which recovers the duties and other taxes. It follows from the wording of the provision in question, which refers to the recovery prescribed in the second subparagraph, and from the context of the first and second subparagraphs, that application of the third subparagraph presupposes that a competent authority within the meaning of the second subparagraph (that is, on the basis of the presumption laid down in the first subparagraph) has recovered the duties.

63. The Commission states that, in principle, non-recovery or reimbursement of the duties and other taxes levied by a Member State of departure which lacks jurisdiction will not affect the customs debt of the principal. Unless the customs debt is extinguished, the Member State in which the offence was committed would be bound to recover the duties and taxes in accordance with Article 36(1) of Regulation No 222/77.

64. The Commission concludes from this that Article 36(3), third subparagraph, of Regulation No 222/77 does not apply in the circumstances of the main proceedings.

65. In my opinion, the Commission's conclusion is correct, and the second question put to us by the Bundesfinanzgericht should be answered on that basis.

66. As we have seen from our analysis of the first question, in the circumstances of the main proceedings, the authorities of the Member State to which the office of departure belongs were not entitled to recover the duties and other taxes.

67. It is also clear that Article 36(3), third subparagraph, of Regulation No 222/77 lays down the conditions for the refund of duties by a Member State which was initially entitled to collect them in the light of presumptions established in the first and second subparagraphs of that article.

68. If, on the other hand, the Member State of the office of departure had not acquired jurisdiction to levy the duties (because it had not fixed the three-month time-limit), it cannot object to a refund on the grounds that the duties were not levied in the country where the offence was committed.

69. Indeed, it is inconceivable that the authorities of a Member State could impose conditions for the reimbursement of sums which they were not entitled to collect.

70. This also implies that a distinction has to be drawn between duties levied as own resources of the Community and other (national) duties and taxes.

71. If the authorities of the Member State to which the office of departure belongs were not entitled to levy duty, they would also not be entitled to levy duty representing own resources of the Community. They must therefore refund that portion of the sums collected.

72. The answer to the second question put by the Bundesfinanzhof shouldtherefore be that Article 36(3), third subparagraph, of Regulation No 222/77 is to be interpreted as meaning that it does not apply to a case where a customs office of the Member State of departure has taken steps to recover duties relating to goods subject to the Community transit regime without having given the principal a time-limit to furnish proof of the place of the offence or the irregularity, in accordance with Article 11a(2), second subparagraph, of Regulation No 1062/87.

Conclusion

73. I therefore propose that the Court should answer the questions referred to it as follows:

(1) Article 36(3), first subparagraph, of Council Regulation No 222/77 of 13 December 1976 on Community transit, as amended by Council Regulation No 474/90 of 22 February 1990, in conjunction with Article 11*a*(2) of Commission Regulation (EEC) No 1062/87 of 27 March 1987 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure, as amended by Commission Regulation (EEC) No 1429/90, should be interpreted as meaning that the Member State to which the office of departure belongs cannot recover duties on import, where a consignment has not been produced at the office of destination, unless the principal has first been given the three-month time-limit prescribed in Article 11a(2), second subparagraph, of Regulation No 1062/87, as amended by Regulation No 1429/90, and has not provided the proof required by that article.

(2) Article 36(3), third subparagraph, of Regulation No 222/77, as amended by Regulation No 474/90, is to be interpreted as meaning that it does not apply to a case in which a customs office of the Member State of departure has taken steps to recover duty on goods subject to the Community transit regime without having given the principal a time-limit for providing proof of the place where the offence or irregularity was committed, in accordance with Article 11a(2), second subparagraph, of Regulation No 1062/87, as amended by Regulation No 1429/90.