OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 12 March 1986 *

Mr President,
Members of the Court,

A — Having heard the oral argument on the question submitted by the tribunal de grande instance, Mulhouse, this morning, I shall present my views immediately, because I consider the answer to be clear.

The facts of the case may be briefly outlined as follows:

In 1981 the French company Perles France, a subsidiary of the Yugoslav company Iskraa Commerce, which markets goods produced by the Yugoslav manufacturing company Iskraa, ordered from the parent company machine tools for importation into France. For that purpose, at the request of the Yugoslav company (which named the French company as consignee), declarations of origin (namely EUR I Movement certificates) were issued by the Yugoslav authorities. Those certificates were supposed to ensure that on importation into the Community the goods were accorded the preferential treatment (suspension of duty) provided for in the Interim Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia on Trade and Trade Cooperation (see Regulation No 1272/80, Official Journal 1980 No L 130, p. 1 *et seq.*). At first that preferential treatment was accorded even though the goods were imported via Switzerland where they were stored in a customs warehouse in the free port of Basle.

However, in the course of inspections, the French customs authorities discovered that new invoices for the goods had been issued by the Swiss firm, Perles Eurotool (also a subsidiary of Iskraa Commerce), and they took the view that the goods had entered '*into commerce*', within the meaning of Article 5 of Protocol 2 to the Interim Agreement, *in Switzerland.* According to that provision, for the purposes of the agreement, originating products whose transport is effected without entering into territory other than that of the Contracting Parties are considered as transported directly from Yugoslavia to the Community. In addition, goods originating in Yugoslavia may be transported through territory other than that of the Contracting Parties provided that, *inter alia,* the goods have not entered into commerce in such countries or been delivered for home use there. In consequence proceedings were instituted against the accused for use of false documents with a view to obtaining the benefit of the preferential rules laid down in the Interim Agreement, an offence under the French customs code. In those proceedings the accused companies and individuals put forward two arguments in their defence. They contended in the first place that the invoicing in Switzerland did not mean that the goods had 'entered into commerce' in Switzerland. Secondly, they argued that the goods could also have been imported under Commission Regulation (EEC) No 3510/80 on the definition of the concept of originating products for purposes of the application of tariff preferences granted by the

* Translated from the German.

European Economic Community in respect of certain products from *developing countries* and that, according to Article 5 (1) (c) of that regulation, in respect of goods transported via Switzerland the only condition is that the goods have 'not been *delivered for home use*' in that country.

The court before which the criminal proceedings are pending considers that in view of the *special* agreement between the Community and Yugoslavia the second argument is not relevant. It is however of the opinion that an interpretation is required of the expressions 'entered into commerce' and 'delivered for home use' within the meaning of Article 5 of Protocol 2 to the Interim Agreement with Yugoslavia with regard to the re-invoicing to which I have referred.

Accordingly, by a judgment of 23 April 1985 it stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'In the framework of the preferential arrangements between the European Economic Community and Yugoslavia can the re-invoicing, in a third country, of goods originating in Yugoslavia be regarded as an entry into commerce or delivery for home use within the meaning of Article 5 of Protocol 2 concerning the definition of the concept of originating products and methods of administrative cooperation?'

B — The accused in the main proceedings and the Commission both consider that the answer to that question must be 'no'. I share that view.

As far as '*delivery for home use*' is concerned, there can be no doubt. It is clear that goods are delivered for home use only if all the necessary import formalities are completed so that the goods may be disposed of on the *internal market*. In this case it is clear that that did not happen because the goods remained under customs seal in Switzerland. That is the only relevant consideration and 're-invoicing' is immaterial for determining whether there has been 'delivery for home use'.

Moreover the same applies for the expression '*entry into commerce*'.

Admittedly the arguments put forward on behalf of the accused in the main proceedings on that point are by no means decisive. The fact that the transaction in question was between two subsidiaries of a parent company and that it involved practically no profit because the amount invoiced by the parent company to the Swiss subsidiary was almost identical to the amount appearing in the new invoice can hardly be regarded as material. Such operations are not necessarily conducted purely for reasons of internal administration; they may in fact involve real commercial transactions. Similarly no conclusive argument may be derived from Regulation No 3510/80 precisely because special provisions — a *lex specialis* — apply to Yugoslavia.

On the other hand the arguments developed by the Commission relating to the object of the Interim Agreement and its protocols — the promotion of trade between the Contracting Parties — and to the scheme of that regulation, are persuasive.

According to that argument it is essential that preferential treatment should be accorded only to products originating from the economies of the Contracting Parties and it is, therefore, necessary to ensure that no substitution occurs during the transport of the goods to the importing country and that the market processes of third countries are not affected. That is why the principle of direct transport applies: goods must be transferred directly from the market of the country of origin to the market of the

importing country. Provided that that requirement is complied with, there is nothing to prevent the goods from being the subject of business transactions during transportation (for example whilst they are on the high seas). In that respect any change in the ownership of the goods, the nationality of the parties, the currencies involved and the place of payment is irrelevant. That is the only reasonable approach where goods are transported through a third country for geographical reasons. The only decisive consideration is that when the goods are exported, it must be established that they are destined for the Contracting Party. On the other hand, business transactions which take place in a third country are irrelevant if the original destination is not altered and the goods are not in economic terms brought on to the market of a third country. Additional support for that proposition is to be found in the rule on *evidence* in Article 5 (2) of protocol 2, which is binding on the customs authorities. The fact that, according to that provision, the production of certain documents is to be regarded as evidence that the conditions referred to in Article 5 (1) have been fulfilled can only mean that no importance is then attached to whether any commercial transactions have taken place during transport.

C — Accordingly, as the Commission suggests, in reply to the question submitted by the tribunal de grande instance, Mulhouse, it should be stated as follows:

'The fact that a product originating in Yugoslavia is re-invoiced in a third country, through which the goods are transported in accordance with Article 5 of Protocol 2 to the Interim Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, does not constitute an entry into commerce or delivery for home use within the meaning of that provision where it is established that the product was never destined for a market other than that of the Community.'