OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 19 JUNE 1984

My Lords,

A dispute has arisen between, on the one hand, the French customs authorities and, on the other, a wholesaler, Diffusion Marketing International (DMI) and its customs agent Les Rapides Savoyards (RS) (whose Manger is Mr Dejussel) as to the rate of customs duty payable on three types of ball-point pen imported into France from Switzerland in June 1977. These three parcels comprising 13 170 pens, are taken as typical examples of a much larger number of consignments and eventually a substantial sum is in issue.

The pens are made up of a number of component parts. The cartridge of ink was made in the United States, imported into France where duty was paid and sent to Switzerland under outward processing arrangements. The cap, and where used, a clip and a plastic plug were made in the United States and imported into Switzerland. It seems that the barrel of the pens was made in Switzerland. The pens were not only assembled in Switzerland, but the metal parts of most of the pens, certainly the more expensive ones, were coated with chrome there. The reason why DMI had the pens made in Switzerland rather than in France was partly that the cost of manufacturing in Switzerland was lower, and partly that the pens could then be sold under a trade name owned by the Swiss manufacturer.

The importation of the pens was made under cover of a certificate of circulation (EUR 1) with the intention that the pens should benefit from a preferential rate of duty as being of Swiss origin pursuant to an Agreement made in 1972 between the Community and Switzerland (Official Journal L 300, 31. 12. 1972, p. 189). The preferential rate, if the goods are to be treated as originating in Switzerland was 2.6% of the value for customs purposes; if this is not applicable the appropriate rate was 13%.

That Agreement, providing for the progressive abolition by 1 July 1977 of customs duties on imports between the Community and Switzerland, was declared to apply, *inter alia*, to "products originating in the Community or Switzerland" which fall within Chapters 25 to 99 of the Brussels Nomenclature, save where expressly excluded. The pens in question fall under heading 98.03. By virtue of Article 11 of the Agreement rules of origin are to be found in Protocol No 3 to the Agreement. Article 1,2 of the Protocol provides that products to be considered as originating in Switzerland are

"(a) products wholly obtained in Switzerland,

(b) products obtained in Switzerland in the manufacture of which products other than those referred to in (a)

are used, provided that the said products have undergone sufficient working or processing within the meaning of Article 5. This condition shall not apply, however, to products which within the meaning of this Protocol originate in the Community."

By virtue of Article 5 of the Protocol, "sufficient working or processing" for this purpose includes "working or processing specified in List B annexed to the Protocol". That list was amended, pursuant to Article 28 of Protocol No 3 by Decision 10/74, dated 31 October 1974 (Official Journal L 352, 28. 12. 1974, p. 7) of the Joint Committee set up under Article 29 of the Agreement. The amendment provided that incorporation of non-originating materials and parts in the products contained in customs heading 98.03 "does not make such products lose their status of originating products, provided that the value of these products does not exceed 5% of the value of the finished product".

By Article 6 of the Protocol the values to be taken for the purposes of determining whether the value of the products worked or processed does not exceed a given percentage of the value of the goods obtained are to be (a) as regards products whose importation can be proved, their customs value at the time of importation and (b) the ex-works price of the goods obtained less internal taxes refunded or refundable on exportation. The Explanatory Notes, incorporated into Protocol No 3 by Article 20, provide that in Article 6 "ex-works price" means the price paid to the manufacturer in whose undertaking the last working or processing is carried out, provided that the price includes the value of all the products used in manufacture, and "customs value" is the customs value laid down in the Convention concerning the Valuation of Goods for Customs Purposes signed in Brussels on 15 December 1950.

That value by Article 1 of Annex 1 to the Convention is "the price which (the goods) would fetch at the time when the duty becomes payable on a sale in the open market between" independent buyer and seller. By Note 4 to Article 1, where the determination of the value or the price paid "depends on factors which are expressed in a currency other than that of the country of importation, the foreign currency shall be converted into the currency of the importing country at the official rate of exchange of that country."

By Article 8 of the Protocol, originating products are on importation into the Community to benefit from the provisions of the Agreement upon submission of a movement certificate (initially A.CH 1 and subsequently EUR 1) (Decision No 10/73 of the Joint Committee (Official Journal L 365, 31. 12. 1973, p. 136)). The movement certificate, issued by the customs authorities of the exporting State must be submitted to the customs authorities of the importing State.

By Article 19 of Decision No 3/73 of the Joint Committee, importing Member States which have reasonable doubt as to the authenticity of the document or the accuracy of the information regarding the true origin of the goods in question, may verify the movement certificate and, if disputes as to this cannot be settled by the customs authorities of the importing and exporting States, they are to be referred to the Customs Committee of the Joint Committee.

The French authorities did not accept that these pens were products originating in Switzerland. They applied Article 35-8 of the French Customs Code, which requires that where the values used to determine the normal prices are expressed in a foreign currency, they must be converted at the official rate of exchange prevailing on the date on which the declaration is registered. Converting the value in US dollars and Swiss francs of the constituent parts of the pens which had not originated in Switzerland into French francs at the rate of exchange applying on the date of importation into France (but making a deduction for duties paid on the cartridges on importation from France into Switzerland) they found that the percentage of non-originating materials comprised in the completed product was between 6.04% and 23.68% of the value of the various completed products.

So they demanded the full rate of duty.

RS took the matter before the Commission de Conciliation et d'Expertise Douanière which upheld the decision of the customs authorities. Liability to pay this duty was raised by the French authorities before the Tribunal d'Instance in Saint-Julien-en-Genevois which, on 19 June 1979, confirmed the earlier decision. On appeal, the Court of Appeal in Chambéry on 11 May 1981 took the same view.

The matter came before the French Cour de Cassation, which on 29 June 1983, referred the following questions to the Court:

"(1) Must the Agreement of 22 July 1972 concluded between the European Economic Community and the Swiss Confederation, Protocol No 3 thereto and the Community regulations be construed as meaning that, where the values adopted in order to determine the customs value of a product are expressed in a currency other than that of the Member State in which the evaluation is made, these must be converted at the official rate of exchange prevailing on the date on which the declaration is registered?

(2) If not, how, according to Community law, must that rate of exchange be calculated?"

It appears from the judgment of the Court of Appeal that the French customs authorities took the value of the cartridges at the time of their temporary importation from France into Switzerland. They took the value of the plugs and the clips which was accepted when they were imported into Switzerland. They also took the ex-works price for the finished product. So far it seems to me that they clearly observed the provisions of the Agreement between Switzerland and the Community. The essential question, which seems to me clearly to fall within the two questions raised by the Cour de Cassation, is thus whether they were right to take the further step of converting these values into French francs at the date of importation of the finished product into France and at the rate of exchange then prevailing in order to decide whether the parts constituted more than 5% of the value of the finished goods.

The French authorities contend that they were entitled to do so under the

provisions of the French customs code referred to. Moreover, it is argued that, only if the customs authorities of the State of importation of the final product are allowed to proceed in this way, can what is done be consistent with international law, in particular with the Vienna Convention on the Interpretation of Treaties, and with those provisions of Community law dealing with the valuation of goods for customs purposes, in particular Article 12 of Council Regulation No 803/68 of 27 June 1968 (Official Journal L 148, p. 6). Any other result, which permits a Swiss manufacturer to buy when the rate against the dollar is favourable and to incorporate the parts into a final product when currency rates change, leads to speculation. It is argued that the value of the parts must be taken at the date of importation of the final product at the rate prevailing for the currency of the State of importation.

It is important to bear in mind that the essential question raised is one of the origin of goods and not simply of valuation for customs purposes. The answer to this question is to be found in the present case in the Protocol to the Agreement with Switzerland and not in Community regulations dealing with customs value such as Regulation No 803/68.

The arguments advanced by the French authorities seem to me to conflict with the clear purpose and effect of Article 6 of the Protocol read with the relevant provisions of List B which are dealing with rules as to origin. In order to decide whether products imported into Switzerland exceeded 5% of the ex-works price of the goods obtained in Switzerland, it is necessary to take first the customs value of the imported products at the time of importation. By virtue of Note 4 to Article 1 of Annex 1 to the Convention, in order to decide that value where the imported products are sold or valued in a currency other than Swiss francs, it is necessary to convert the price or value into Swiss francs as of that date. Accordingly the value or the price of the clips and the plugs, if expressed in US dollars, must be converted into Swiss francs at the date of importation from the United States: that of the cartridges must be converted into Swiss francs at the date of importation into Switzerland from France, in cach case at the rate of exchange prevailing on those dates. The ex-works price must also be taken in Swiss francs. The exercise of deciding whether the value of these parts exceeds 5% of the value of the finished product (i.e. the ex-works price less taxes refunded or refundable) is thus to be carried out in Swiss francs. This will decide whether the duty was 2.6% (now 0) or 13%.

When the pens are imported into France, the French customs authorities apply those rates. If the value for customs purposes of the pens is expressed in French francs there is no problem. If the price or value is expressed in Swiss francs, it is for the French authorities to convert these into French francs at the rate prevailing at the date of importation of the pens. This, however, is for the purpose of calculating the amount of the duty and not for deciding the rate of the duty.

If it were otherwise it is plain that an exporter could never know, until the goods were actually exported, what the

rate of duty was going to be. The rate of duty would be subject to fluctuations of exchange rates between the currencies of the country from which the parts had been obtained and the country of exportation on the one hand, and the currency of the importing State on the other up to the date of importation. To quote firm prices would be difficult unless margins likely to render the product uncompetitive were fixed. To quote on the basis of a 2% or O duty and to find that, because of exchange rate changes, 13% applied (perhaps even because of a one or two point change in the percentage of the parts to the whole) could eat up the entire profit margin, as it is said that it would do here. It would also mean, as the Italian Government argues, that the applicable rate of duty for the same products could vary between different Member States and Switzerland according to the exchange rates applicable in the different Member States. Such results seem to me to be contrary to the whole purpose of the Agreement with Switzerland and to violate the concept of the Community as far as possible as one large market.

The rule would apply, of course, equally in the converse direction. It is for a Member State, applying the rules set out above, to convert the value of the price of parts imported from outside into its currency at the date of importation and to calculate the percentage accordingly. The Swiss customs authorities would then have to calculate the duty in Swiss francs on the importation of the final product, applying the rate determined previously in the currency of the Member State of manufacture.

This result seems to me to be consistent with the object of the EUR 1 movement certificate. In this case that was completed by the Swiss authorities after they had carried out the appropriate exercise in Swiss francs. The holder of the certificate was entitled to benefit from the preferential rate unless verification was required by the importing State pursuant to Article 19 of Joint Committee Decision No 3/73 (now Article 17 of Decision No 1/77) in which case if the dispute could not be resolved, it would fall to be referred to the Customs Committee of the Joint Committee for an advisory opinion, subject always to review by the courts.

It is argued by the French customs authorities that this result encroaches in an unacceptable or unlawful way on their sovereignty. In my view it does not do so. The Community has accepted these reciprocal rules for trade between Member States and Switzerland which must be applied by Member States. It remains for the French customs authorities to calculate the duty, but not the rate, according to the rate of exchange prevailing on importation into France of the finished product.

Accordingly, in my view, the questions raised fall to be answered on the lines that:

For the purpose of deciding whether goods within heading 98.03 of the Common Customs Tariff on importation from Switzerland into a Member

State are to be treated as originating in Switzerland, the value of any materials or parts not originating in Switzerland is to be calculated at the date of their importation into Switzerland, and where such materials or parts are priced or valued in a currency other than Swiss francs, that currency is to be converted into Swiss francs at the rate of exchange applicable on the date of importation into Switzerland. The value of such materials or parts expressed in Swiss francs must then be taken as a percentage of the ex-works price of the finished product (less any taxes refunded or refundable) expressed in Swiss francs. Such a percentage determines whether the finished product is to be considered as originating in Switzerland, regardless of the parity between the currency of the State of origin of such materials and parts, or of Switzerland, on the one hand, and the currency of the Member State of importation of the finished product on the date of importation into that Member State on the other.

The costs of the parties to the main proceedings fall to be dealt with by the court seised of those proceedings. The Commission and the Italian Government, which intervened, should bear their own costs.