OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 7 March 1996 *

I — Introduction

1. How has the importation into France in 1985 and 1986 of steel products from the German Democratic Republic, but falsely declared to have originated in Yugoslavia, been affected by German unification? The Cour de Cassation has interpreted the principle of French criminal law, retroactively applying later more favourable provisions, as applying to Mr André Allain's conviction for the importation of prohibited goods. The Cour d'Appel, Paris, has now referred a consequential question on the implications of a reclassification of the facts of the case, with a view to Mr Allain's prosecution for making a false customs declaration, assuming the importations took place after German unification.

II — The factual and legislative background

2. Article 414 of the French Customs Code fixes the penalties which may be imposed for any acts of smuggling or the activity of importing or exporting prohibited goods without a declaration. Articles 423 to 427 define behaviour which constitutes importing or exporting without a declaration. Article 38 defines 'prohibited goods' as those whose importation or exportation for whatever reason is prohibited, or subject to restrictions, rules regarding the quality or packaging of the goods or particular formalities; where the import or export is subject to the presentation of a licence or authorization, the goods are deemed to be prohibited if they are not accompanied by a valid authorization or if they are presented with an authorization relating to other goods.

3. Article 410 fixes the penalties for certain less serious irregularities, i.e. those which are not punished more severely by virtue of other provisions of the Customs Code. In particular, Article 410(2)(a) covers any omission or inaccuracy regarding the information which customs declarations must contain in so far as they are not relevant to the application of duties or prohibitions. Whereas an infringement of Article 410 is a *contravention douanière* (first class), which is punishable by a fine of between FF 2 000 and FF 20 000, an infringement of Article 414 is a *délit douanier* (first class), which can attract penalties of up to three years' imprisonment, confiscation of the goods fraudulently traded

* Original language: English.

and a fine of up to twice the value of the goods. [1]

4. By a notice of 20 March 1983 [2] from the Ministry of Foreign Trade, France imposed a quota of 55 000 tonnes for 1983 on the importation from the German Democratic Republic (hereinafter the 'GDR') of listed iron and steel products. Similar quotas were in force at the material time; these were set at 53 500 tonnes for 1985 and 55 000 tonnes for 1986. [3]

5. In accordance with Article 112-1 of the Penal Code, new legislative provisions which are less severe than those they replace apply to offences committed before the new provisions enter into force which have not yet been the subject of a definitive judgment. This is, presumably, a specific application of the principle of *la loi la plus douce*. [4]

6. At the time of the facts giving rise to the main proceedings, Mr Allain was the manager of Steel Trading France SARL (hereinafter 'the company'); in this capacity, he acted as a broker for the importation into France of iron and steel products, mainly from Austria and Yugoslavia. At various dates in 1985 and 1986, steel beams and plates, purportedly originating in Yugoslavia, were imported into France; on investigation, the French customs authorities determined that they had in fact originated in the GDR. The false declaration of origin had facilitated the evasion of the quotas which applied at the time for importations of these products from the GDR. [5]

7. While it appears that the last of 30 sets of minutes of evidence (*procès-verbaux*) was drawn up on 1 December 1987, the legal proceedings against Mr Allain (hereinafter 'the appellant') and the company were not commenced until 20 November 1990. [6] In the meantime, however, the former GDR had been united with the Federal Republic of Germany (hereinafter the 'FRG'), in accordance with the Treaty between the FRG and the GDR of 31 August 1990 on the Establishment of German Unity; as from 3 October 1990, the former GDR in effect became part of the European Community.

8. By judgment of the Tribunal de Grande Instance, Nantes, of 21 March 1991, the appellant was found guilty of the *délit douanier* of the importation without a decla-

1 — Since the gradation between *contravention douanière* and *délit douanier* is not easy to reproduce in English, I will retain the French formulation.

2 — Hereinafter 'the notice of 20 March 1983', *Journal Officiel de la République Française* (hereinafter 'JORF'), 20 March 1983, p. 2951.

3 — JORF of 29 December 1984, p. 12168, and JORF of 5 March 1986, p. 3452, respectively; as these are substantially identical to the notice of 20 March 1983 for the purposes of the present proceedings, only this notice will be discussed.

4 — A more vivid and mellifluous rendering than the usual translation 'retroactive effect of more lenient new legislation'.

5 — Both the national court and the parties have also referred to the payment of duties, but this matter does not appear to be material to the question referred.

6 — In its observations, the French Government gives 8 November 1990 as the date of the initiation of the proceedings, but the difference is not material in the proceedings before this Court.

ration of prohibited goods, in accordance with Articles 414(1), 423, 424, 426, 427 and 38 of the Customs Code. He was given a suspended sentence of three months' imprisonment, and, together with the company, was ordered to pay a fine of FF 73 551 080, in addition to an identical sum in lieu of confiscation of the imported goods. The judgment was upheld by the Cour d'Appel, Rennes, on 21 January 1992.

9. The judgment of the Cour d'Appel, Rennes, was quashed in its entirety by the Criminal Chamber of the Cour de Cassation on 2 June 1993. The Cour de Cassation held that, at the date on which the proceedings had been commenced, 'the Community provisions concerning the free movement of goods within the customs territory of the European Economic Community' had become applicable to the territory of the former GDR. The Cour de Cassation intimated, in effect, that the Cour d'Appel should have verified whether the character of the goods as 'prohibited goods' had been modified by virtue of the application of more favourable Community provisions, and whether the facts of the case should be reclassified under the Customs Code, as constituting a *contravention douanière* rather than a *délit douanier*. The case was remitted to the Cour d'Appel, Paris.

10. The Cour d'Appel, Paris, has referred the following question to the Court of Justice 'pursuant to Article 177 of the Treaty of Rome':

'Does the accession of the German Democratic Republic to the Federal Republic of Germany, which appears, by reason of the retroactive effect of the more lenient new legislation, to have had the consequence of rendering inoperative the criminal proceedings brought under domestic French law against André Allain for the importation of prohibited goods, preclude, in the light of the resultant Community customs provisions, a reclassification of the facts under national law, in particular reclassification as a false declaration of goods, as argued by the French customs authorities, or does it, as the defence contends, entitle those authorities only to require payment of the duties avoided, without any other financial implications?'

III — Observations submitted to the Court

11. The French Government and the Commission presented both written and oral observations, while the appellant in the main proceedings made oral submissions only. Their observations may be summarized as follows.

12. According to the French Government, the national court is requesting a ruling on the conditions in which the Cour de Cassation, in a leading case, admitted the applica-

tion of the principle of the retroactivity of a more lenient criminal provision adopted after the facts giving rise to the offence had occurred. This is, in its view, entirely a matter for national law, the interpretation of which falls outside the jurisdiction of the Court. [7] The question of the consequences, for the reclassification of the facts, of the extension of the customs territory of the Community so as to include the territory of the former GDR is similarly a matter of national law. If the reference merely seeks guidance on whether the GDR is now part of the Community's customs territory, it is superfluous, as the Cour de Cassation (a court of final instance for the purposes of the third paragraph of Article 177 of the Treaty) did not consider such guidance necessary. The Government concluded that the Court should not answer the question posed, as it raises matters within the exclusive competence of the national courts. At the oral hearing, however, it indicated that, in the light of the Court's judgments in *Bordessa and Others* and *Sanz de Lera and Others*, [8] the request might be considered admissible, in which case it could accept the approach suggested by the Commission.

13. The Commission does not contest the Court's jurisdiction to answer the question posed, which it interprets as seeking to clarify whether the French authorities would still be entitled to require a declaration of origin in the context of intra-Community trade, particularly as regards products coming from the former GDR. It therefore proposes that the question be reformulated as follows:

'What consequences did the unification of the GDR and the FRG have in Community law on trade in goods between the territory of the ex-GDR and the rest of the Community's customs territory, not only at the time unification took place but also at present and in the intervening period(s)? Are these findings liable to affect a possible reclassification in national law of facts relating to trade carried out before this accession?'

14. After describing the various stages of the integration of the former GDR into the Community's customs territory, the Commission too concludes that the possibility of reclassifying facts in national law is exclusively a matter for the national courts. The Cour de Cassation had based itself on its own previous case-law, which had interpreted the Court's judgment in *Donckerwolcke* [9] as not precluding a national judge from reclassifying an unintentional false declaration of origin as a *contravention douanière*, provided the sanctions laid down by the relevant articles of the Customs Code were not disproportionate.

7 — Case 75/63 *Hoekstra* v *Bedrijfsvereniging Detailhandel* [1964] ECR 177, paragraph 3 of the judgment.

8 — Respectively, Joined Cases C-358/93 and C-416/93 [1995] ECR I-361, and Joined Cases C-163/94, C-165/94 and C-250/94 [1995] ECR I-4821.

9 — Case 41/76 [1976] ECR 1921.

15. The Commission proposes that the Court rule that the unification of Germany from 3 October 1990 entailed the automatic and immediate application to trade between the former GDR and the rest of the Community customs territory of the prohibitions on customs duties, quantitative restrictions, and measures of equivalent effect to either; [10] the application of these provisions did not preclude the imposition of import formalities for certain purposes, until these latter were abolished from 1 January 1993. The national judge is alone competent to evaluate the effect these developments may have on any reclassification for the application of criminal law of facts occurring before the GDR became part of the Community.

16. The appellant in the main proceedings sought in his oral argument to interpret the question referred as raising two distinct issues. The first is whether the French authorities may pursue an alleged offence in the light of German unification in the present case, a question he submits is within the exclusive jurisdiction of the national courts. The second question is whether the remit of the national authorities, on the basis of an *a posteriori* control, can legitimately extend beyond that of recovering duties which have been evaded; in this regard, he sought to rely upon *Amministrazione delle Finanze* v *Acampora*. [11]

IV — The question referred by the national court

17. This is not the first time that the imposition of restrictions by a Member State on importations originating in the territory of the GDR has given rise to proceedings before the Court. The Protocol to the EEC Treaty on German Internal Trade and Connected Problems, of 25 March 1957, recognized that, since trade between the FRG and 'the German territories in which the Basic Law does not apply is a part of German internal trade, the application of this Treaty in Germany requires no change in the treatment currently accorded this trade' (paragraph 1). In *Norddeutsches Vieh- und Fleischkontor* v *Hauptzollamt Hamburg-Jonas*, the Court noted that the provisions of the Protocol 'aim only at exonerating the Federal Republic of Germany from applying the rules of the Community law to German internal trade ... [and that though] products originating in the German Democratic Republic are entitled to circulate freely in the Federal Republic of Germany without customs clearance, they are not regarded by reason of this as having an origin in the Federal Republic of Germany'. [12] More recently, the Court found in *Schäfer Shop* that the Protocol did not permit Member States to create an absolute bar to the entry into their territory of goods originating in the GDR, but did allow the establishment of a prior authorization system, provided such a system 'constitutes in practice the only appropriate means of tackling any disturbances arising for the economies of the other Member States as a result of German internal trade'. [13]

10 — The Commission was presumably referring to the relevant provisions of the EEC Treaty, as Article 4(a) of the ECSC Treaty does not prohibit measures having equivalent effect to quantitative restrictions.

11 — Case 827/79 [1980] ECR 3731.

12 — Case 14/74 [1974] ECR 899, paragraph 6 of the judgment.

13 — Case 12/88 [1989] ECR 2937, paragraph 21 of the judgment.

18. The ECSC Treaty contained no such protocol. In accordance with the first paragraph of Article 79, it applies to 'the European territories of the High Contracting Parties [and] ... European territories for whose external relations a signatory state is responsible'. The only reference to the situation in Germany is in Article 22 of the Convention on the Transitional Provisions. Described as a 'special provision', this provides that 'trade in coal and steel between the Federal Republic of Germany and the Soviet Zone of Occupation shall be regulated, as far as the Federal Republic is concerned, by the Federal Government in agreement with the High Authority'. Prior to unification, the GDR was treated like any other third country for the purposes of trade in ECSC products with Member States other than the FRG.

(a) The interpretation of the question

19. The question posed by the national court is based on the express assumption that the French legal principle of the 'retroactive effect of the more lenient new legislation' applies to the prosecution of the appellant for the importation of prohibited goods, and an implicit assumption that French law allows the facts to be reclassified so as to allow him to be prosecuted instead for the lesser offence of false declaration of origin. The question should thus be interpreted as asking if, as a result of German unification, Community law applies to the facts of the main proceedings and would preclude their being classified under national law as a *contravention douanière*.

20. Clearly, the Court has no jurisdiction to rule on whether the national court may, as a matter of national law, reclassify the facts of the main proceedings to take account of the integration of the territory of the former GDR into the customs territory of the Community. It follows from the established case-law of the Court that 'it is not for the Court, in proceedings [for a preliminary ruling] to adjudicate upon the compatibility of existing or proposed national rules with Community law but only on the interpretation and validity of Community law.' [14] The only indication in the question referred as to which provisions of Community law may be relevant for the purposes of deciding the case before the national court [15] is its reference to 'the resultant Community customs provisions', i.e. those provisions as they result from the 'accession of the German Democratic Republic to the Federal Republic of Germany'.

21. The national court asks essentially whether the facts giving rise to the main proceedings relating to events which occurred in 1985 and 1986 can be treated as if they had taken place after German unification on 3 October 1990, and specifically whether Community law precludes any such power of reclassification of the facts for the purposes of national law. The national court's question at once raises an issue as to whether any provision of Community law governs these facts, or whether the French quotas, which appear to me to have been national measures, were outside the scope of application of Community law.

14 — Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 8 of the judgment.

15 — Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraph 26 of the judgment.

22. In its initial written observations, the Commission described the national import restrictions in question as having been adopted 'in the context of' Council Regulation (EEC) No 1765/82 of 30 June 1982 on common rules for imports from State-trading countries, [16] which would have brought the French measures within the framework of the common commercial policy of the European Economic Community. In its reply to a written question from the Court, the Commission indicated, however, that the measures were based on a 1977 Commission recommendation within the framework of the ECSC Treaty; [17] at the oral hearing the Commission's agent accepted that the 1982 Regulation, and, by implication, many of the references in the Commission's written observations to the EEC Treaty and to legislation adopted on the basis of that Treaty, were not relevant to the present proceedings.

23. The 1982 Regulation does not appear to me to be in any way germane to the present case, if for no other reason than that the CCT heading numbers and Nimexe references listed in its annex, which determine the categories of products covered, do not correspond to those set out in the notice of 20 March 1983, and repeated in subsequent notices for 1985 and 1986. [18] The only provisions of Community law which fall to be considered are therefore those of the ECSC Treaty and legislation adopted on the basis of this Treaty, as they applied to the importation of steel beams and plates in 1985 and 1986.

16 — OJ 1982 L 195, p. 1, hereinafter 'the 1982 Regulation'.

17 — Examined at paragraphs 32 to 35 and 38 to 40 of the present Opinion.

18 — See paragraph 4 of the present Opinion.

(b) The legal foundation for the Court's jurisdiction

24. At this point I think I should digress from the main question in order to examine a question of importance, though not raised by any of the parties, namely, the existence and the extent of the Court's jurisdiction to answer the question referred by the Cour d'Appel, Paris. The question referred is explicitly founded on Article 177 of the EC Treaty, while the only provisions of Community law which might be relevant to the situation of fact in the main proceedings arise under the ECSC Treaty. If it is not to be construed as being confined to the issue of whether the EC Treaty has any bearing on the facts, the national court's request should, in principle, also have been submitted pursuant to Article 41 of the ECSC Treaty.

25. The first question which arises in this regard is whether the Court has any jurisdiction under Article 41 of the ECSC Treaty to consider the present request for a preliminary ruling submitted solely pursuant to Article 177 of the EC Treaty. There are powerful arguments for saying that it has, though a formalist approach to jurisdiction might say otherwise. The need for a uniform interpretation of Community law, and the duty of close cooperation between the Court and the courts of the Member States, should lead

the Court, consistently with its case-law, [19] to this result. The incorrect identification by a national court of the Treaty article on which the Court's interpretative jurisdiction is founded does not, in my view, deprive the Court of that jurisdiction, provided the conditions laid down in the relevant article of the applicable Treaty are fulfilled. The Court has recognized that it has jurisdiction, in an annulment action based on Article 173 of the EEC Treaty, to examine a claim that the EAEC or ECSC Treaties had been infringed, grounded on the 'need for a complete and consistent review of legality'. [20] The same need for a uniform application of Community law fully justifies, in my view, the Court's exercising jurisdiction to interpret the ECSC Treaty and legislation based thereon in the present case. It seems all the more imperative to avoid excessive formalism in a procedure which is founded, like that of Article 177 of the EC Treaty, on reciprocal duties of cooperation which bind the referring court and the Court. [21]

26. In *Busseni*, the Court found that, while the terms of Article 41 of the ECSC Treaty were different from those of Article 177 of the EC Treaty and Article 150 of the EAEC Treaty, 'all express a twofold need: to ensure the utmost uniformity in the application of Community laws and to establish for that purpose effective cooperation between the Court of Justice and national courts'. [22]

Noting the close link between interpretation and validity, and the necessity for cooperation between the national and Community courts under the ECSC Treaty, the Court found that:

'[It] would be contrary to the objectives and the coherence of the Treaties if the determination of the meaning and scope of rules deriving from the EEC and EAEC Treaties were ultimately a matter for the Court of Justice ... [while] jurisdiction in respect of rules deriving from the ECSC Treaty were to be retained exclusively by the various national courts, whose interpretations might differ, and the Court of Justice were to have no power to ensure that such rules were given a uniform interpretation'. [23]

27. This approach would also, in my view, be consistent with that adopted by the Court in a number of cases where the request for a preliminary ruling concerned the application of legislation adopted under the EEC Treaty to trade in ECSC products. In *Gerlach*, [24] for instance, the reference was submitted to the Court under Article 41 of the ECSC Treaty, though the Court was asked to interpret provisions coming within the ambit of both the EEC and ECSC Treaties. Conversely, in *Deutsche Babcock*, [25] a reference under Article 177 of the EEC Treaty, the Court was led to interpret Article 72 of the ECSC Treaty, as

19 — See especially Case C-221/88 *Busseni* [1990] ECR I-495, paragraph 13 of the judgment, and order of 13 July 1990 in Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-3365, paragraph 23.

20 — Case C-62/88 *Greece* v *Council* [1990] ECR I-1527, paragraph 8 of the judgment.

21 — Case 16/65 *Schwarze* v *Einfuhr-und Vorratsstelle Getreide* [1965] ECR 877, third paragraph of the judgment.

22 — Case C-221/88, cited in footnote 19 above, paragraph 13 of the judgment.

23 — Ibid., paragraph 16 of the judgment.

24 — Case 239/84 *Gerlach* v *Minister for Economic Affairs* [1985] ECR 3507.

25 — Case 328/85 *Deutsche Babcock* v *Hauptzollamt Lübeck-Ost* [1987] ECR 5119, paragraph 12 of the judgment.

well as legislation adopted under the EEC Treaty.

28. Assuming that the request for a preliminary ruling may be treated as if it had been submitted under Article 41 of the ECSC Treaty, the second matter which arises is the extent of the Court's jurisdiction under this provision, which is expressed in terms rather different from those of Article 177 of the EEC Treaty. On its face, the Court's jurisdiction under Article 41 of the ECSC Treaty is limited to ruling on 'the validity of acts of the Commission and the Council where such validity is in issue in proceedings brought before a national court or tribunal'. In the present case, the question referred by the national court arises in the context of the importation of ECSC products and, consequently, must be interpreted as requesting a ruling on the interpretation of the ECSC Treaty and legislation adopted under this Treaty.

29. In my view, the Court's interpretation in *Busseni* may be applied to the present case, and the Court should therefore interpret the relevant provisions of the ECSC Treaty and legislation adopted thereunder. If the Court accepts this view, however, it appears to me to be important that it apply the same limitations on its jurisdiction as obtain under Article 177 of the EC Treaty, in particular the rule that the Court may not provide consultative opinions on general or hypothetical questions, or on questions which would not assist the national court in resolving the issue before it. [26] It now becomes necessary to identify the provisions of Community law which may be relevant to the present proceedings.

(c) The 'customs provisions' of the ECSC Treaty

30. At the time of the facts giving rise to the main proceedings, the importation into France of steel products originating from the GDR was, from the point of view of the European Coal and Steel Community, a matter of commercial policy. The provisions of the ECSC Treaty in this regard, unlike those of the EC Treaty, explicitly reserve extensive powers to the Member States. Article 71, first paragraph, of the ECSC Treaty provides that '[the] powers of the Governments of the Member States in matters of commercial policy shall not be affected by this Treaty, save as otherwise provided therein'. The rates of customs tariffs on coal and steel as against third countries are determined by the Member States, subject to maximum and minimum rates fixed by the Council (Article 72). Similarly, Article 73 provides that the governments of the Member States are responsible for the administration of import and export licences for trade with third countries, subject to the possibility of Commission supervision; the Commission may make recommendations, which are the equivalent of EC Directives, 'to ensure that the arrangements in this connection are not more

26 — Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 17 of the judgment; Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25; Case C-412/93 *Leclerc-Siplec* v *TF1 Publicité and M6 Publicité* [1995] ECR I-179, paragraph 12.

restrictive than the circumstances governing their adoption or retention require, and to secure the coordination of measures taken under the third paragraph of Article 71 [concerning mutual assistance between the Member States for the implementation of Commission measures] or under Article 74'.

31. The only reference to quantitative restrictions on the import of ECSC products into the Community is in Article 74 of the ECSC Treaty. This article empowers the Commission to adopt recommendations for the introduction of such restrictions in three sets of circumstances:

— where third countries or third-country undertakings are engaged in 'dumping or other practices condemned by the Havana Charter' (Article 74(1));

— where third-country undertakings benefit from unfair conditions of competition (Article 74(2)); and

— 'if one of the products referred to in Article 81 of this Treaty is imported into the territory of one or more Member States in relatively increased quantities and under such conditions that these imports cause or threaten to cause serious injury to production within the common market of like or competing products' (Article 74(3)).

Recommendations for the introduction of quantitative restrictions under Article 74(3) may only be made under the conditions laid down in Article 58, i.e. following the declaration of a manifest crisis by the Commission and after the Consultative Committee has been consulted on, and the Council has given its assent to, the establishment of 'a system of production quotas accompanied to the necessary extent by the measures provided for in Article 74'.

32. The French Government and the Commission both consider the national safeguard measures in question to have been adopted 'on the basis of' Commission Recommendation 77/328/ECSC of 15 April 1977 relating to protection against imports which constitute or threaten to constitute a serious danger to production in the common market of similar or directly competitive products. [27]

27 — Hereinafter 'the 1977 Recommendation'; OJ 1977 L 114, p. 4.

33. The Commission referred to this Recommendation for the first time in its answer to the written question of the Court; at the oral hearing, it proposed the Recommendation, rather than the 1982 Regulation, as the basis for the French quotas. The Commission explained the background to its adoption and implementation as follows.

The Davignon Plan of 1977 was the Community response to growing difficulties in the steel market beginning in 1974. Internally, it involved voluntary limits on production by the principal steel manufacturers. Externally, it involved a series of Recommendations, including the one now referred to, based on Articles 74 and 86 of the ECSC Treaty. Contemporaneously, arrangements were made with the principal third-country suppliers to keep imports to their traditional level and thus to stabilize prices. Even these measures did not suffice, and a state of manifest crisis pursuant to Article 58 of the ECSC Treaty was declared in 1980. Certain European third countries, including the GDR, refused to negotiate any such arrangement with the Community; as a result, France took national protective measures, with the agreement of the Commission, in the form of an annual quota for imports from the GDR of certain ECSC products commencing in 1983. These quotas were implemented by notices published in the *Journal Officiel de la République Française*. [28]

28 — See paragraph 4 of the present Opinion.

34. The 1977 Recommendation is premised on the finding that, where importations of ECSC products threaten Community production, 'in view of the existence of the common market in coal and steel, the introduction of national measures could not, even in the event of mutual assistance, provide an effective and adequate defence against such imports but might, on the contrary, interfere with the functioning of the common market and jeopardize its achievements, particularly the unified customs tariff applicable to non-member countries' (second recital in the preamble). In such a situation, the third recital in the preamble contemplates that 'for these reasons, the Commission *may* avail itself of the powers conferred on it by Article 74(3) of the Treaty' (emphasis added).

35. Article 1 of the 1977 Recommendation obliges the Member States to 'notify the Commission of any danger from trends in imports which appear to call for safeguard measures'. The Commission must then inform the other Member States and within a brief period organize consultations with them concerning the import situation and possible remedial measures (Articles 1(2), 2 and 3). If the Commission considers 'following the consultation referred to ... that it must invoke Article 74(3) of the Treaty', it must inform the Member States within ten working days (Article 4(1)); failing any such notification 'the Member State or States concerned may take national measures', after

consulting the other Member States and the Commission (Article 4(2)).

36. The French Government and the Commission have also cited as relevant in the present proceedings Commission Recommendation No 41/85/ECSC of 4 January 1985 on Community surveillance in respect of the importation of certain iron and steel products covered by the ECSC Treaty and originating in certain non-member countries other than Spain. [29] In order 'to ensure fuller information on both expected imports and the terms under which they are made', Article 1(1) of the Recommendation subjects the importation of the iron and steel products listed in Annexes III A and III B to the Recommendation to the issue of an import licence; the licence 'shall be issued or endorsed by the Member States, free of charge and for any quantities requested ... within not more than ten working days from the submission of the completed application' (Article 1(3)). In accordance with Article 1(4) '[paragraph] 1 shall apply without prejudice to the maintenance of existing quantitative restrictions imposed by certain Member States on certain iron and steel products in respect of certain non-member countries'. Article 2 specifies the information which the application for an import licence must contain, and provides that the importer must make certain declarations. Article 3 obliges the Member States to provide the Commission with certain specified information concerning prices of the goods imported, and Article 4 provides that 'the country of consignment is deemed to be the last intermediate non-member country in which the product in question was the subject of entrepôt operations or legal transactions not connected with its transportation'.

37. Commission Recommendation No 41/85/ECSC applied from 9 January 1985 to 31 December 1985, and was replaced by Commission Recommendation No 3658/85/ECSC of 23 December 1985. [30] This is largely identical in its wording, except that Article 1(1) subjects the 'free circulation in the Community', rather than the importation, of the listed ECSC products to the issue of an import licence.

(d) Does Community law apply to the facts of the present proceedings?

38. It is fundamental to the answers to be given to the Cour d'Appel, Paris, to establish whether these facts are enough to demonstrate that the French quotas were measures of a Community character. The Court has very little information about the extent to which the procedure laid down in the 1977 Recommendation was applied before the notice of 20 March 1983 was adopted. It sèems reasonable to assume from the background information supplied by the French Government and the Commission that

29 — OJ 1985 L 7, p. 5.

30 — OJ 1985 L 348, p. 32.

consultations of the sort envisaged by Articles 1 to 3 took place, and, indeed, the notice purports expressly to apply the Recommendation. This does not, in my view, have the effect of bestowing on that notice the character of a Community measure.

39. The 1977 Recommendation envisages the possible application by the Commission of Article 74(3) of the ECSC Treaty, which empowers it to adopt or recommend *Community* import restrictions in certain circumstances, and under a specified procedure. To this end, the Recommendation imposes certain notification and consultation obligations on the Member States. It does not appear in the present case that the Commission, following consultation with the Member States as required by Article 4(1) of the Recommendation, considered that it should invoke Article 74(3) of the Treaty or that any of the other steps were taken to that end. Above all, there is no suggestion that the procedure required by Article 58 of the Treaty, including the assent of the Council, was followed with a view to the adoption of measures under Article 74(3). I do not consider that the French restrictions can be deemed in any sense to be Community measures merely by reason of consultations with the Commission and the other Member States, and the prior agreement of the Commission, pursuant to the 1977 Recommendation. The fact that a Community procedure might have been followed prior to its adoption does not imply that the annual quota was based on the 1977 Recommendation or, *a fortiori*, on Article 74(3) of the ECSC Treaty.

40. This analysis is confirmed by the language of the Recommendation itself; where the Commission either decides not to act under Article 74 of the ECSC Treaty, or does not inform the Member States of its position within ten working days, 'the Member State or States concerned may take *national* measures' (Article 4(2), emphasis added). At most, the French quotas at issue in the present proceedings seem to me to be just such national measures.

41. I do not consider the 1985 Recommendations cited above [31] to have any bearing on the character of the French import restrictions at issue either. Commission Recommendation No 41/85/ECSC merely requires the Member States to subject certain imports, or, in the case of Commission Recommendation No 3658/85/ECSC, the free circulation of certain goods, to the issue of an import licence, and establishes the information required for the issue of the licence. In imposing quantitative restrictions on the importation of iron and steel products from the GDR, and in punishing the breach of such restrictions, the French Republic could not be said to have been implementing these recommendations.

42. This appears to correspond to the view of the competent national authorities; section 4 of the notice issued by the *Ministère du redéploiement industriel et du commerce*

31 — Paragraphs 36 and 37 of the present Opinion.

extérieur of 7 March 1985, [32] which explicitly purports to implement Commission Recommendation No 41/85/ECSC, provides that the regime established by the notice of 29 December 1984 [33] will continue to apply for imports from the GDR of the iron and steel products concerned. Furthermore, the autonomous character of the French quota does not offend the text of the Recommendations, each of which recognizes in Article 1(4) that the obligations under Article 1(1) on the Member States to require an import licence and, by implication, to issue such a licence automatically (Article 1(3)) apply 'without prejudice to the maintenance of existing [national] quantitative restrictions'.

43. In the light of these circumstances, and of the limits to the Community powers in relation to commercial policy matters contained in Article 71 of the ECSC Treaty, I am of the opinion that the imposition by France of the quantitative restrictions on imports of ECSC products from the GDR at issue in the present proceedings was a national measure proceeding from the exercise of national powers. It follows that the punishment of alleged violations of national customs law which enforced these restrictions is not a matter within the scope of either the ECSC or EEC Treaties. The possible application of any principle giving retroactive effect to more lenient new legislation is therefore entirely a question for the national court, on which Community law has no bearing. No question of the existence of any such equivalent principle in Community law, which would require the application of more favourable Community provisions to a situation of fact falling within national law at the time it occurred, has been raised in the present proceedings; such a question would in any case be hypothetical, given the clearly expressed intention of the referring court to apply such a principle as a matter of national law.

44. For the sake of completeness, and though, strictly speaking, it is not relevant to the issue at hand, I should say that I am of the opinion that the unification of Germany cannot be deemed, as a matter of Community law, to have any retroactive effect of the kind adverted to by the national court. It is clearly established in the Court's case-law that 'the principle of legal certainty requires that a regulation should not be applied retroactively, regardless of whether such application might produce favourable or unfavourable effects for the persons concerned, unless a sufficiently clear indication can be found, either in the terms of the regulation or in its stated objectives, which allows the conclusion to be drawn that the regulation was not merely providing for the future'. [34]

45. The integration of the GDR into the customs territory of the Community is dealt with in the Treaty of 31 August 1990 between the FRG and the GDR on the

32 — JORF of 8 March 1985, p. 2848.

33 — This set the annual quota for 1985 (JORF of 29 December 1984, p. 12168).

34 — Case 234/83 *Gesamthochschule Duisburg* v *Hauptzollamt München-Mitte* [1985] ECR 327, paragraph 20 of the judgment.

Establishment of German Unity by Article 10(1) and (2). [35] These provide as follows:

'(1) Upon the accession taking effect, the Treaties on the European Communities together with their amendments and supplements as well as the international agreements, treaties and resolutions which have come into force in connection with those Treaties shall apply in the territory [of the *Länder* of the GDR].

(2) Upon the accession taking effect, the legislative acts enacted on the basis of the Treaties of the European Communities shall apply in the territory [of the *Länder* of the GDR] unless the competent institutions of the European Communities enact exemptions. These exemptions are intended to take account of administrative requirements and help avoid economic difficulties.'

46. From the perspective of the Community, the integration of the former GDR into the European Coal and Steel Community was effected by a reinterpretation, though not a modification, of the terms of the first paragraph of Article 79 of the ECSC Treaty; as a result of the Treaty on German Unity, the *Länder* of the former GDR became part of the European Territory of the Federal Republic of Germany. While the case-law on the absence of any retroactive effect of Community law in general refers to measures adopted by the institutions, the principle of legal certainty would, in my view, equally militate against according such effect to the reinterpretation of the Treaty to take account of the unification of Germany.

47. In its original written observations, the Commission suggested that the national court could, in deciding on the possible reclassification of the facts in national law, usefully refer to the description of the various stages of the integration of the former GDR into the Community's customs territory as set out in those observations. I am not convinced that the Court's role in requests for preliminary rulings is to provide the national court with information of this kind, which, in the circumstances of the present case, seems to partake almost of the character of an exercise in legal research. In particular, not only have the relevant provisions been significantly amended during the period in question, but the national court has not specifically asked the Court for any interpretation of 'the resultant Community customs provisions', nor provided any indication as to how these might have an impact on the case pending before it; [36] it has not indicated what reclassification of facts it has in mind, at which of a number of possible dates the importations should be assumed to

35 — Doeker and Meyer, *The Federal Republic of Germany and the German Democratic Republic in International Relations*, Oceana Publications Inc., Dobbs Ferry, NY, 1992, Second series, Vol. III, pp. 42 to 85.

36 — It is tempting to observe, although this is emphatically a matter for the national court, that, for a prosecution such as that envisaged, Mr Allain is presumably to be considered as having been involved in the perfectly lawful activity of importing steel from the newly-united FRG, but at the same time to have made, for no apparent reason, a false declaration that the goods originated in Yugoslavia.

have taken place, or what type of false declaration should be presumed.

48. Furthermore, the debate in the present case was, at first, conducted on the assumption that the EEC/EC Treaty applied to the products at issue, [37] and it was only following the written question from the Court that the parties submitted observations on the ECSC measures which might have been relevant. No question concerning the interpretation of a particular provision of the ECSC Treaty or measures based on this Treaty has been raised in this context. In the absence of a sufficiently clear question from the national court, any answer which the Court would seek to give would, in my view, run the risk of being speculative. I therefore do not propose that the Court examine of its own motion the issue of which provisions of Community law might have applied to the importations at issue had they taken place in the period following German unification.

49. It follows from the views expressed above that, in so far as the question submitted by the national court seeks to establish whether Community law would preclude the reclassification in national law of the facts in the main proceedings as a *contravention douanière*, the answer should be in the negative. In so far as any issue of the compatibility with Community law of the prosecution of the appellant for false declaration is concerned, it is not possible, on the basis of the material available to the Court, to provide any more precise answer.

V — Conclusion

50. In the light of the foregoing, I am of the view that the question of the Cour d'Appel, Paris, in the present proceedings should be answered as follows:

No provision of Community law would preclude the reclassification under national law of the facts as these appear from the Order for Reference.

37 — This is clear, in particular, from the judgment of the Cour de Cassation and the written observations of the Commission (see paragraphs 9, 14 and 15 of the present Opinion).