Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 16 July 2015 [1]

Case C-319/14

B&S Global Transit Center BV
v
Staatssecretaris van Financiën
(Request for a preliminary ruling

from the Hoge Raad der Nederlanden (Netherlands))

(Reference for a preliminary ruling — Community Customs Code — Regulation (EEC) No 2913/92 — Articles 203 and 204 — External transit procedure — Incurrence of a customs debt — Unlawful removal from customs supervision — Non-fulfilment of an obligation — Failure to end the external transit procedure — Removal of goods placed under the procedure from the customs territory of the European Union)

1. The Court has already, on several occasions, addressed the issue of a customs debt being incurred due to failure to comply with the obligations arising from use of the external transit customs procedure, but a situation such as that in the present case constitutes a precedent. The Court will therefore have the opportunity to further clarify its case-law on the matter.

Legal context

2. The legal context of the present case is formed by the provisions of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, [2] as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 ('the Customs Code'), and of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, [3] as amended by Commission Regulation (EC) No 214/2007 of 28 February 2007 ('the implementing regulation'), in the versions applicable until 30 June 2008. [4]

1 — Original language: French.

2 — OJ 1992 L 302, p. 1.

3 — OJ 1993 L 253, p. 1.

4 — Those versions were the ones applicable to the facts in the main proceedings. Since some of the decisions at issue in the main proceedings were adopted after 30 June 2008, the order for reference suggests that the version of the implementing regulation subsequent to that date might also be taken into account by the national courts. In any event, the differences between the versions, so far as the provisions relevant for the present case are concerned, are purely editorial (see also footnote 5).

3. Articles 37, 91(1)(a), 92, 203(1) and 204(1)(a) of the Customs Code provide:

‘Article 37

1. Goods brought into the customs territory of the Community shall, from the time of their entry, be subject to customs supervision. They may be subject to customs controls in accordance with the provisions in force.

2. They shall remain under such supervision for as long as necessary to determine their customs status, if appropriate, and in the case of non-Community goods and without prejudice to Article 82(1), until their customs status is changed, they enter a free zone or free warehouse or they are re-exported or destroyed in accordance with Article 182.

…

Article 91

1. The external transit procedure shall allow the movement from one point to another within the customs territory of the Community of:

(a) non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures;

…

Article 92

1. The external transit procedure shall end and the obligations of the holder shall be met when the goods placed under the procedure and the required documents are produced at the customs office of destination in accordance with the provisions of the procedure in question.

2. The customs authorities shall discharge the procedure when they are in a position to establish, on the basis of a comparison of the data available to the office of departure and those available to the customs office of destination, that the procedure has ended correctly.

…

Article 203

1. A customs debt on importation shall be incurred through:

— the unlawful removal from customs supervision of goods liable to import duties.

…

Article 204

1. A customs debt on importation shall be incurred through:

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed …

…

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

…’

4. Articles 361(1), 363, 365(1), (2) and (3), 859(6) and 860 of the implementing regulation provide:

‘Article 361

1. The goods and copies No 4 and No 5 of the transit declaration shall be presented at the office of destination.

…

Article 363

The customs authorities of the Member State of destination shall return copy No 5 of the transit declaration to the customs authorities in the Member State of departure without delay and at most within one month of the date when the procedure ended.

…

Article 365

1. If copy No 5 of the transit declaration is not returned to the customs authorities of the Member State of departure within two months of the date of acceptance of the declaration, those authorities shall inform the principal and ask him to furnish proof that the procedure has ended.

…

2. The proof referred to in paragraph 1 may be furnished to the satisfaction of the customs authorities in the form of a document certified by the customs authorities of the Member State of destination identifying the goods and establishing that they have been presented at the office of destination or, where Article 406 applies, to the authorised consignee.

3. The Community transit procedure shall also be considered as having ended where the principal presents, to the satisfaction of the customs authorities, a customs document issued in a third country entering the goods for a customs-approved treatment or use, or a copy or photocopy thereof, identifying the goods. Copies or photocopies must be certified as being true copies by the body which certified the original documents, by the authorities of the third countries concerned or by the

authorities of one of the Member States. [5]

…

Article 859

The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204(1) of the Code, provided:

— they do not constitute an attempt to remove the goods unlawfully from customs supervision,

— they do not imply obvious negligence on the part of the person concerned, and

— all the formalities necessary to regularise the situation of the goods are subsequently carried out:

…

6. in the case of goods in temporary storage or entered for a customs procedure, removal of the goods from the customs territory of the Community … without completion of the necessary formalities;

…

Article 860

The customs authorities shall consider a customs debt to have been incurred under Article 204(1) of the Code unless the person who would be the debtor establishes that the conditions set out in Article 859 are fulfilled.'

The facts giving rise to the main action, the proceedings and the questions referred for a preliminary ruling

5. B&S Global Transit Center BV, a company governed by Netherlands law, is a provider of logistical services. On 2 July 2006 and 13 August and 18 December 2007, it submitted customs declarations for goods (foodstuffs) to be placed under the external Community transit procedure. In those declarations Moerdijk (Netherlands) was indicated as the customs office of departure and Bremerhaven (Germany), Antwerp (Belgium) and Bremerhaven, respectively, were indicated as the customs offices of destination.

5 — This version of Article 365 of the implementing regulation was applicable until 30 June 2009. In parallel, the new version of Article 366, contained in Commission Regulation (EC) No 1192/2008 of 17 November 2008 amending Regulation (EEC) No 2454/93 (OJ 2008 L 329, p. 1), was applicable from 1 July 2008. It provides:

'1. The proof that the procedure has ended within the time limit prescribed in the declaration may be furnished by the principal to the satisfaction of the customs authorities in the form of a document certified by the customs authorities of the Member State of destination identifying the goods and establishing that they have been presented at the office of destination or, where Article 406 applies, to an authorised consignee.

2. The Community transit procedure shall also be considered as having ended where the principal presents, to the satisfaction of the customs authorities, one of the following documents:

(a) a customs document issued in a third country entering the goods for a customs-approved treatment or use;

(b) a document issued in a third country, stamped by the customs authorities of that country and certifying that the goods are considered to be in free circulation in the third country concerned.

3. The documents mentioned in paragraph 2 can be replaced by copies or photocopies, certified as true copies by the body which certified the original documents, by the authorities of the third countries concerned or by the authorities of one of the Member States.'

The overlapping of the periods of application is probably due to a mistake in setting the various dates for the entry into force of the amendments made to the implementing regulation by Regulation No 1192/2008.

6. On 4 August 2006, 26 September 2007 and 24 January 2008 the customs authorities of the office of departure notified the appellant in the main proceedings that they had not received the return copy of the declaration and requested it to provide proof that the customs procedure had ended. In response, the appellant in the main proceedings supplied commercial documentation, such as the bills of lading drawn up by the carrier, but no customs document. The customs authorities therefore sent enquiry notices to the offices of destination in accordance with Article 366 of the implementing regulation. The offices of destination reported that neither the goods nor the accompanying documentation had been presented to them.

7. Taking the view that the documents submitted by the appellant in the main proceedings did not constitute proof that the transit procedure had ended and that, as a consequence, a customs debt had been incurred under Article 203 of the Customs Code, the Netherlands customs authorities sent the appellant in the main proceedings demands for payment on 24 May 2007 and 1 July and 4 November 2008. During the objection procedure, the appellant in the main proceedings produced acknowledgments of receipt for the goods in question, issued by the consignees of those goods, namely United Nations (UN) forces stationed in Abidjan (Côte d'Ivoire), North Atlantic Treaty Organisation (NATO) forces stationed in Kabul (Afghanistan) and UN forces stationed in Port-au-Prince (Haiti). As the customs authorities were not satisfied with those new documents, they upheld the demands for payment.

8. In an action brought by the appellant in the main proceedings before the Rechtbank te Haarlem (District Court, Haarlem), that court set aside the decisions of the customs authorities, holding that the alleged failures on the part of the appellant in the main proceedings fell within Article 204 of the Customs Code, read in conjunction with Article 859(6) of the implementing regulation, with the result that no customs debt had been incurred. After that ruling was subsequently set aside by the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) on appeal, the appellant in the main proceedings lodged an appeal on a point of law before the court making the present reference.

9. It was in those circumstances that the Hoge Raad der Nederlanden decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 203 and 204 of the Customs Code, read in conjunction with Article 859 (in particular paragraph 6) of the implementing regulation, be interpreted as meaning that, where the [transit] procedure has not ended, but documents have in fact been produced which make it possible to assume that the goods have left the customs territory of the European Union, the fact that that procedure has not ended does not lead to the incurring of a customs debt by reason of a removal of the goods from customs supervision within the meaning of Article 203 of the Customs Code but, in principle, to the incurring of a customs debt on the basis of Article 204 of that code?

(2) Must Article 859(6) of the implementing regulation be interpreted as meaning that that provision concerns exclusively the non-performance of (one of) the obligations associated with the (re)exportation of goods as set out in Articles 182 and 183 of the Customs Code? Alternatively, should the clause "without completion of the necessary formalities" be taken to mean that the "necessary formalities" also include the formalities that must be completed prior to the (re)exportation in order to bring to an end the customs procedure under which the goods have been placed?

(3) If the answer to Question 2 is in the affirmative, must the third indent of Article 859 of the implementing regulation be interpreted as meaning that the fact that the formalities referred to in Question 2 have not been completed does not, in a situation such as that in the present case — in which, on the basis of documentation, it has been shown that the goods left the

customs territory of the European Union subsequent to transit within the European Union — preclude the condition that "all the formalities necessary to regularise the situation of the goods are subsequently carried out" from being deemed to have been satisfied?'

10. The request for a preliminary ruling was received at the Court Registry on 3 July 2014. Written observations were submitted by the appellant in the main proceedings, the Italian and Netherlands Governments and the European Commission. The appellant in the main proceedings, the Netherlands Government and the Commission were represented at the hearing which took place on 20 May 2015.

Analysis

11. It is appropriate to answer the questions referred for a preliminary ruling in the order in which they were asked. I should state from the outset that, in view of the answer that I propose the Court should give to the first question, I shall analyse the second and third questions only in the alternative.

First question

12. As Article 204(1) of the Customs Code states, that provision applies 'in cases other than those referred to in Article 203' of that code. It is therefore necessary, first of all, to answer the question whether Article 203 of the Customs Code is applicable, and then, if appropriate, analyse the applicability of Article 204 of the code.[6]

13. By its first question, the referring court thus asks, in essence, whether Article 203 of the Customs Code must be interpreted as meaning that a customs debt is incurred under that article, by reason of unlawful removal from customs supervision, where goods placed under the external Community transit procedure leave the customs territory of the European Union without being presented at the customs office of destination of such transit and without the holder under that procedure being able to produce customs documents issued in a third country, as referred to in Article 365(3) of the implementing regulation.

Preliminary remark

14. It should be noted first of all that the referring court appears to start from the premiss that in the main proceedings the transit procedure did not end, since, first, it is common ground that the goods were not presented at the various customs offices of destination and, secondly, the documents produced by the appellant in the main proceedings, inter alia the acknowledgments of receipt issued by the consignees of the goods, namely UN and NATO armed forces, cannot be regarded as satisfying the conditions laid down in Article 365(3) of the implementing regulation.

15. That finding appears to me to be correct, in particular as regards the classification of the acknowledgments of receipt mentioned above. Article 365(3) of the implementing regulation constitutes a measure making the customs transit procedure less rigid, allowing the procedure to be regarded as having ended, in the absence of proof from the Member States, where documents are submitted certifying that the goods have left the customs territory of the European Union. However, the arrival of the goods in a third country must be certified by the customs authorities of that country. Thus, the supervision carried out by the customs authorities of the third country replaces to a certain extent that carried out by the customs authorities of the Member States.

6 — See to that effect, inter alia, judgments in *Hamann International* (C-337/01, EU:C:2004:90, paragraphs 28 to 30), and *X* (C-480/12, EU:C:2014:329, paragraphs 31 to 33).

16. Article 365(3) of the implementing regulation is very clear on this point: only documents drawn up by the customs authorities of the third country, and no other document, enable the transit procedure to be regarded as ended. The new version of that provision, contained in the new Article 366(2) of the implementing regulation,[7] does not amend that rule, since involvement of the customs authorities of the third country in the drawing up of the document providing proof that the transit procedure has ended is still required. That strict interpretation is confirmed by the Commission's 'Transit Manual',[8] which states that '[s]uch alternative proof can only be … customs documents or data (e.g. a customs declaration placing the goods under a customs procedure), issued in a third country, which enables the competent authorities of the country of departure to establish that it does in fact cover the goods in question and that those goods have therefore actually left the territory of the Contracting Parties/Community'.[9] That is an expression of a certain level of confidence in the documents of foreign customs authorities, which are in a position to verify and certify satisfactorily the identity of the goods, whether or not they are intact (including their packaging and seals) and whether they are in conformity with the customs documents of the Member States.

17. The appellant in the main proceedings appears to suggest in its written observations that it was shortcomings in the way in which the customs authorities in the countries of destination operated which allowed the goods at issue to be brought into their territories without customs inspection and that, for that reason, the documents issued by the international forces to which the consignments were sent should be regarded as being as probative as, indeed more probative than, customs documents. However, even assuming that to be the case, Article 365(3) of the implementing regulation does not permit documents issued by the consignee of the goods to be accepted as proof that the transit procedure has ended in the same way as customs documents issued by the third country, even where the consignee is an official entity such as international armed forces.[10] Nor can the privileges and immunities normally enjoyed by such forces alter that finding, since customs privileges allow goods to be imported duty-free but not without the knowledge of the customs authorities.

18. The argument put forward by the appellant in the main proceedings at the hearing that the goods in question had in fact been presented at the offices of destination but the latter had failed to record them or issue the required documents must also be rejected. The appellant in the main proceedings is a professional operator from which greater care can be required. It was incumbent on it therefore to ensure that all the necessary formalities — of which it is fully aware — were carried out. In any event, the national courts in the main proceedings regard it as an established fact that the goods were not presented at the offices of destination.

19. The referring court was right therefore to regard the documents presented by the appellant in the main proceedings as insufficient to prove that the transit procedure came to an end.[11]

Interpretation of Article 203 of the Customs Code

20. It should now be asked whether the removal from the customs territory of the European Union of the goods subject to the transit procedure, in the circumstances of the main proceedings, constitutes unlawful removal from customs supervision within the meaning of Article 203 of the Customs Code.

7 — See footnote 5.

8 — Document TAXUD/801/2004, available on the Commission's website in all the official languages. The purpose of that manual is to guarantee uniform application of the customs rules throughout the European Union.

9 — Paragraph 3.4.2.2, second subparagraph, of the Transit Manual (p. 270).

10 — The position could be otherwise only if those forces had the task of standing in for the customs authorities of the host country. In that case, however, they would in fact be acting as customs authorities and not as consignees of the goods.

11 — The Commission, when questioned on this at the hearing, also confirmed that in its view the transit procedure at issue in the main proceedings did not come to an end.

21. The Customs Code does not define the concept of 'unlawful removal from customs supervision'. However, Article 4(13) of the code defines the term 'supervision by the customs authorities' as meaning 'action taken in general by those authorities with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed'. That term, used only a few times in the implementing regulation, must in my view be regarded as being equivalent in meaning to 'customs supervision'.

22. The task of defining specifically the concept of 'unlawful removal from customs supervision' therefore falls to the Court. According to the wording established hitherto, that concept must be interpreted as covering any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Article 37(1) of the Customs Code. [12] It is therefore necessary to determine whether the facts of the main proceedings are covered by that definition.

23. Although in its judgment in *Honeywell Aerospace* [13] the Court appears to have regarded it as evident that failure to present the goods placed under the transit procedure at the office of destination gives rise to a customs debt under Article 203 of the Customs Code, [14] that case concerned goods that had disappeared and whose fate remained unknown. It is necessary, in my view, to determine whether the same conclusion applies to goods which have probably left the customs territory of the European Union, and to develop more fully the reasoning in that regard and determine whether recent case-law provides new guidance.

24. According to Article 37(1) of the Customs Code, 'goods brought into the customs territory of the [European Union] shall … be subject to customs supervision. They may be subject to customs controls'. The purpose of such controls, according to the definition contained in Article 4(14) of the Customs Code, is 'to ensure the correct application of customs rules and other legislation governing the entry, exit, transit, transfer and end-use of goods' subject to customs supervision. That provision has the same objective of ensuring correct application of the rules that is also present in the definition of 'supervision by the customs authorities' mentioned in point 21 above. Accordingly, although such controls may take place at any time, customs supervision must, however, take the form mainly of customs controls at certain 'key' times for the correct application of the rules.

25. So far as goods placed under the external transit procedure are concerned, such key times are above all the beginning and end of the procedure. It is by inspecting at those two times the goods and the documents accompanying them, and comparing the data, that the customs authorities make sure that the procedure has operated and ended properly, that is to say, that the rules have been correctly applied. In the case of the transit procedure, those controls are carried out at the offices of departure and destination. If the goods have not been presented at the office of destination and the principal has not furnished other proof that the procedure has ended as provided for in Article 365(3) of the implementing regulation, the aim of the customs controls, and hence of customs supervision, is not met.

26. Thus, failure to present the goods at the office of destination prevents the customs authorities from carrying out the control at a time that is crucial for the operation of the transit procedure, and therefore constitutes unlawful removal from customs supervision.

12 — See, inter alia, judgments in *D. Wandel* (C-66/99, EU:C:2001:69, paragraph 47), and *X* (C-480/12, EU:C:2014:329, paragraph 34).

13 — C-300/03, EU:C:2005:43.

14 — See paragraph 20 of the judgment.

27. The fact that those goods were probably [15] outside the customs territory of the European Union is not relevant, since *customs* supervision (indeed also referred to as 'supervision by the customs authorities') is meaningless unless it is the *customs authorities* which monitor what happens to the goods subject to their supervision. To state that there has been no unlawful removal from customs supervision on the ground that the carrier or the consignee of the goods certifies, without any customs control, that they have left the customs territory of the European Union would be a contradiction in terms.

28. For this reason, I cannot support the view put forward by the Commission in its written observations that there was no unlawful removal from customs supervision in the main proceedings because the customs authorities were not prevented from carrying out any control for so long as the goods at issue were located in the customs territory of the European Union. What counts is not the theoretical possibility of carrying out a control at any time, but the impossibility of doing so at the time when it was essential in order to ensure that the rules were applied correctly, that is to say, at the end of the procedure. Thus, contrary to the argument put forward by the Commission at the hearing, in the case of the transit procedure the fact that the procedure has not ended properly because the goods were not presented at the office of destination amounts to unlawful removal of those goods from customs supervision.

29. In my view, doubt is not cast on that interpretation by the judgment in *X*. [16] That judgment concerns a situation completely different from the situation in the main proceedings, namely one in which the goods subject to the transit procedure are in fact presented at the office of destination but with considerable and unjustified delay. The Court held in that judgment that in such circumstances return of the goods intact to customs supervision, by removing the risk of those goods entering the economic network of the European Union without having been cleared through customs, precludes a customs debt from being incurred pursuant to Article 203 of the Customs Code. [17]

30. However, it is not possible to infer from the judgment in *X* a general rule that the application of Article 203 of the Customs Code always requires actual materialisation of the risk of the goods in question entering the economic network. Proof of this is to be found in the judgment in *SEK Zollagentur*, [18] delivered barely a month after the judgment in *X*, in which the Court found that a customs debt was incurred due to the mere separation of the goods from the customs documents accompanying them, without those goods having even left the warehouse in which they had been placed and therefore without the slightest risk of their entering the economic network.

31. As regards whether the fact that the goods have probably left the customs territory of the European Union would not eliminate the risk of their entering the economic network in the same way as their return to customs supervision, thereby precluding application of Article 203 of the Customs Code, it should be noted that Advocate General Tizzano put forward a similar argument in his Opinion in *Hamann International*. [19] However, his proposition was not followed by the Court in its judgment [20] although in that case the customs authorities had been able to ascertain formally that the

15 — In the main proceedings the Rechtbank te Haarlem held that that fact had been established, and I have no intention of casting doubt on this.

16 — C-480/12, EU:C:2014:329.

17 — See judgment in *X* (C-480/12, EU:C:2014:329, paragraph 37).

18 — C-75/13, EU:C:2014:1759.

19 — See Opinion of Advocate General Tizzano in *Hamann International* (C-337/01, EU:C:2003:344, points 48 to 62).

20 — See judgment in *Hamann International* (C-337/01, EU:C:2004:90, paragraphs 31 and 32).

goods had actually left the territory of the European Union.[21] Therefore, it seems to me that the proposition would be even less capable of succeeding in the circumstances in the main proceedings, where the departure of the goods from that territory is, from the point of view of customs supervision, established only informally.

32. Finally, I am not convinced by the Commission's assertion at the hearing that, in the event of a contrary interpretation, there would be no risk of operators failing on a regular basis to present goods intended for re-export at the offices of destination since it would always be easier for them to complete the formalities than to prove before the courts that the goods had left the customs territory of the European Union.

33. First, that assertion disregards interpretation of Article 204 of the Customs Code. Even if the Court does not find that unlawful removal of goods from customs supervision is involved, that does not prejudge the possibility of finding that a customs debt has been incurred on the basis of Article 204.[22]

34. Secondly, even if the Commission's argument is considered *in abstracto*, it does not appear to me to be well founded. If the Court were to find in the present case that there is no unlawful removal from customs supervision, that interpretation would be binding not only on the national courts of the Member States, but also on their customs authorities, which would then be bound in practice to accept the various types of proof of the removal of goods provided by the persons concerned. The transit procedure would thus become meaningless, in any event so far as goods intended for re-export are concerned.

35. In the light of the foregoing, I propose that the answer to the first question referred should be that Article 203 of the Customs Code must be interpreted as meaning that a customs debt is incurred, by reason of unlawful removal from customs supervision, where goods placed under the external Community transit procedure leave the customs territory of the European Union without being presented at the customs office of destination of such transit and without the holder under that procedure being able to produce customs documents issued in a third country, as referred to in Article 365(3) of the implementing regulation.

Second and third questions

36. In case the Court decides not to adopt my proposal regarding the answer to be given to the first question, I shall also analyse the second question. The answer to the third question is closely linked to the answer that is given to the second question. I shall therefore address the third question only briefly, for the sake of completeness.

Second question

37. By its second question, the referring court asks in essence whether Article 859(6) of the implementing regulation, read in conjunction with Article 204 of the Customs Code, must be interpreted as covering the situation of goods placed under the external Community transit procedure which have left the customs territory of the European Union without that procedure having ended.

21 — In the case that gave rise to the judgment in *Hamann International* (C-337/01, EU:C:2004:90), the goods had left the territory of the European Union in compliance with all the rules applicable with regard to exports. The unlawful removal from customs supervision recorded had taken place earlier, namely during their carriage to the border.

22 — See my proposed answer to the second question.

38. It will be recalled that, under Article 204 of the Customs Code, a customs debt is to be incurred in principle in respect of goods through failure to fulfil one of the obligations arising from the use of the customs procedure under which the goods in question have been placed. The position can be otherwise only if it 'is established that those failures have no significant effect on the correct operation of the … customs procedure in question'. Article 859 of the implementing regulation clarifies that provision of the Customs Code by giving an exhaustive list of the failures considered to have no significant effect on the operation of the various procedures.

39. Thus, Article 859 of the implementing regulation must be interpreted in the light of Article 204 of the Customs Code. It is true that the categorical wording of Article 859 — '[t]he following failures shall be considered to have no significant effect' — may at first sight be misleading. However, it seems clear to me that Article 859 of the implementing regulation cannot introduce a rule which conflicts with that in Article 204 of the Customs Code, of which it is an implementing provision, or amend that article.[23] Therefore, if Article 204 of the Customs Code deals with failures that have no significant effect on the correct operation of the customs procedure, Article 859 of the implementing regulation cannot be interpreted as including within its scope failures that do have such an effect.

40. As I have explained in points 14 to 19 above, a failure such as that at issue in the present case undeniably has an effect on the correct operation of the transit procedure, since it prevents it from ending correctly. That failure cannot therefore fall within Article 859(6) of the implementing regulation without infringing Article 204 of the Customs Code.

41. Should the Court decide not to adopt my proposal regarding the answer to be given to the first question referred, I would therefore suggest that the answer to the second question should be that Article 859(6) of the implementing regulation, read in conjunction with Article 204 of the Customs Code, must be interpreted as not covering the situation of goods placed under the external Community transit procedure which have left the customs territory of the European Union without that procedure having ended.

Third question

42. By its third question, the referring court asks in essence whether the third indent of Article 859 of the implementing regulation must be interpreted as meaning that the condition laid down therein is satisfied where goods placed under the Community external transit procedure have left the customs territory of the European Union without that procedure having ended.

43. Article 859 of the implementing regulation, in addition to a list of failures covered by that provision each with its own conditions, contains in the three indents of its introductory wording the general conditions for its applicability. Two of them concern, as it were, the reasons for the failure. They relate to whether or not the failure constituted an attempt to remove goods unlawfully from customs supervision and whether or not it was due to obvious negligence on the part of the person concerned. If one of those situations is found to exist — and it is for the national courts to decide on this — the failure cannot be covered by the exemption provided for in Article 204 of the Customs Code.

44. According to the condition laid down in the third indent of Article 859 of the implementing regulation, that article applies only if 'all the formalities necessary to regularise the situation of the goods are subsequently carried out'. As the question here is whether the failure must be considered to have no significant effect on the operation of the customs procedure in question, it can only be a matter of regularisation from the point of view of that procedure.

23 — See also, to that effect, judgment in *Söhl & Söhlke* (C-48/98, EU:C:1999:548, paragraphs 36 and 38).

45. In a situation where a failure prevents the procedure from ending, that condition cannot be met. Regularisation of that situation will take place, but by means of a finding that a customs debt has been incurred and has been recovered (or, possibly, remitted or repaid under Article 239 of the Customs Code), which does not constitute regularisation within the meaning of the third indent of Article 859 of the implementing regulation.

46. As a consequence, in view of my proposed answer to the second question referred, the answer to the third question can only be in the negative.

Conclusion

47. In the light of all the foregoing considerations, I propose that the Court should give the following answer to the questions referred for a preliminary ruling by the Hoge Raad der Nederlanden:

Article 203 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006, must be interpreted as meaning that a customs debt is incurred, by reason of unlawful removal from customs supervision, where goods placed under the external Community transit procedure leave the customs territory of the European Union without being presented at the customs office of destination of such transit and without the holder under that procedure being able to produce customs documents issued in a third country, as referred to in Article 365(3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, as amended by Commission Regulation (EC) No 214/2007 of 28 February 2007.