JUDGMENT OF THE COURT (Second Chamber)
7 May 1986 *

In Case 156/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal de grande instance [Regional Court], Mulhouse (France), for a preliminary ruling in the criminal proceedings pending before that court between

Procureur de la République [Public Prosecutor]

and

(1) **Perles Eurotool,** a company incorporated under Swiss law, whose registered office is in Pieterlen (Switzerland),

(2) **Perles France,** a company incorporated under French law, whose registered office is in Paris,

(3) **Lesage & Cie,** a company incorporated under French law, whose registered office is in Mulhouse,

(4) **Jacques Roth**

(5) **Alfred Faller**

on the interpretation of Protocol 2, concerning the definition of the concept of 'originating products' and methods of administrative cooperation, to the Interim Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia on trade and trade cooperation, signed on 6 May 1980

* Language of the Case: French.

(Official Journal 1980, L 130, p. 2) and approved by Council Regulation No 1272/80 of 22 May 1980 (Official Journal 1980, L 130, p. 1),

THE COURT (Second Chamber)

composed of: K. Bahlmann, President of Chamber, O. Due and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Perles Eurotool and Perles France, by M. Menant, of the Paris Bar,

Lesage & C^ie, J. Roth and A. Faller, by Mr Lesage, of the Mulhouse Bar,

the Commission of the European Communities, by G. Campogrande, a member of its Legal Department,

after hearing the Opinion of the Advocate General delivered at the sitting on 12 March 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 23 April 1985 which was received at the Court on 23 May 1985 the tribunal de grande instance, Mulhouse, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 5 of Protocol 2 concerning the definition of the concept of originating products and methods of administrative cooperation, annexed to the Interim Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia on trade and trade cooperation, signed on 6 May 1980 and approved by Council Regulation No 1272/80 of 22 May 1980 in order to establish whether the re-invoicing in a third country of goods originating in Yugoslavia affects the application of the Interim Agreement to those goods.

2 That question was raised in criminal proceedings instituted against the companies Perles Eurotool, Perles France and Lesage & C[ie] and against J. Roth and A. Faller for use of a false certificate to obtain in France the preferential treatment provided for by an international agreement, a category I offence defined in and punishable under Article 426-5 and Article 414 of the code des douanes [Customs Code].

3 In 1981, on five occasions, the customs agents Lesage & C[ie], Mulhouse, acting on behalf of Perles France, Paris, a subsidiary of Perles Eurotool, Pieterlen (Switzerland), imported into France machine tools declared as originating in Yugoslavia. Relying on EUR. 1 movement certificates as contained in Annex 5 to

Protocol 2, issued by the Yugoslav authorities at the request of the manufacturing company Iskra Commerce, which is the Yugoslav parent company of Perles Eurotool, Lesage and C^ie requested and obtained the remission of customs duties. It appears from the EUR. 1 movement certificate that the machine tools were indeed intended for Perles France, but that they had first been invoiced by Iskra Commerce to Perles Eurotool, prior to being re-invoiced by Perles Eurotool, during their storage under customs surveillance in Switzerland, to Perles France.

4 In the course of a subsequent inspection carried out on 20 April 1982 the French customs authorities discovered that the re-invoicing had occurred and they took the view that this meant that the machine tools had entered into commerce in Switzerland. The authorities noted that in order to benefit from the arrangements under the Interim Agreement the imported goods must not have entered into commerce in a territory other than that of the Contracting Parties. They therefore issued a writ against Perles Eurotool, Perles France and Lesage and C^ie together with Mr Roth and Mr Faller (hereinafter referred to as 'the accused'), since the latter were responsible for the declarations made to the customs authorities for the purposes of importing the goods, summoning them to appear before the tribunal de grande instance in connection with the above-mentioned offence.

5 The tribunal de grande instance found that the importations in question had been effected under the Interim Agreement and referred to Article 5 of Protocol 2 according to which the benefit of the arrangements under the Interim Agreement is accorded to products which have been transported through territories other than those of the Contracting Parties only 'provided that . . . the goods . . . have not entered into commerce . . . nor been delivered for home use . . . '. Finding itself in some doubt as to the significance of the re-invoicing of the goods in relation to the interpretation of the expression 'entered into commerce', the national court considered that the matter should be referred to the Court of Justice for a preliminary ruling on the following question:

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

6 Written observations were submitted and oral argument presented only by the accused and the Commission. They maintain that a simple commercial operation such as re-invoicing, where the goods are not cleared through customs, released into free circulation or processed in any way, cannot constitute an entry into commerce. The Commission adds that Article 5 of Protocol 2 is intended, in the first place, to ensure that no substitution occurs during the transport of the goods and, secondly, to prevent third countries from taking advantage of the preferential treatment agreed upon by re-exporting to the Community goods which were originally intended for the market of the third country. Moreover the Interim Agreement is not concerned with purely financial advantages connected with importation or any other commercial transaction.

7 In order to reply to the question referred to the Court, it should first be noted that, according to Article 1 of Protocol 2, the Interim Agreement applies only to products originating in the two Contracting Parties which have been transported directly from one territory to the other. By virtue of Article 5 (1) goods are to be regarded as transported directly where their transport is effected without entering into territory other than that of the Contracting Parties. That provision however extends the concept of direct transport to goods which are transported through territory other than that of the Contracting Parties but have remained under the surveillance of the customs authorities in the country of transit and have not entered into commerce in that country or been delivered for home use there. Moreover, according to the second recital in the preamble to the Interim Agreement, the agreement is intended to 'strengthen, consolidate and diversify the relations established' between the Contracting Parties and its object is, in the terms of Article 1, 'to promote trade between the Contracting Parties' in particular 'with a view to improving the conditions of access for Yugoslav products to the Community market'.

8 It is clear from those provisions and from the object of the Interim Agreement that the preferential treatment under the agreement must be accorded only in respect of products originating in the two Contracting Parties to the exclusion of those from third countries. It also follows that where the goods are transported through a third country it is necessary to ensure that their final destination, namely the territories of the Contracting Parties, is not changed. Such a change of destination would jeopardize the aim of the Interim Agreement which is to limit the pref-

erential treatment solely to trade between the two Contracting Parties. It follows finally that during their transport the goods must not have been cleared through customs, released into free circulation or processed in any way which might undermine the concept of originating products.

9 On the other hand, legal or commercial operations which, although not directly related to the transport of the goods, do not change the destination of the goods and are not such as to affect their origin do not conflict with the rule of direct transport laid down in the said Article 5. A commercial operation such as the re-invoicing of goods which are under the surveillance of the customs authorities of the country of transit cannot in itself have any effect in relation to the destination of the goods or their origin. That proposition is supported by the fact that, according to Article 5 (2) of Protocol 2, evidence that the provisions referred to in Article 5 (1) have been fulfilled is to be supplied by the production of documents which have no connection with any commercial operations which may be effected during the transport of the goods.

10 In reply to the question referred to the Court by the tribunal de grande instance, Mulhouse, it should therefore be stated that the re-invoicing of goods originating in a Contracting Party to the Interim Agreement between the European Economic Commmunity and the Socialist Federal Republic of Yugoslavia on trade and trade cooperation, where those goods have remained under the surveillance of the customs authorities of a third country whilst in transit in that country, does not in itself constitute an entry into commerce or delivery for home use in that third country within the meaning of Article 5 of Protocol 2 concerning the definition of the concept of originating products and methods of administrative cooperation annexed to that agreement.

Costs

11 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the question referred to it by the tribunal de grande instance, Mulhouse, by an order of 23 April 1985, hereby rules:

The re-invoicing of goods originating in a Contracting Party to the Interim Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia on trade and trade cooperation, where those goods have remained under the surveillance of the customs authorities of a third country whilst in transit in that country, does not in itself constitute an entry into commerce or delivery for home use in that third country within the meaning of Article 5 of Protocol 2 concerning the definition of the concept of originating products and methods of administrative cooperation annexed to that agreement.

Bahlmann Due O'Higgins

Delivered in open court in Luxembourg on 7 May 1986.

P. Heim
Registrar

K. Bahlmann
President of the Second Chamber