JUDGMENT OF THE COURT (Fifth Chamber)
7 December 1993 *

In Case C-12/92,

REFERENCE to the Court under Article 177 of the EC Treaty by the Hof van Cassatie van België for a preliminary ruling in the criminal proceedings pending before that court against

Edmond Huygen and Others

on the interpretation of the Agreement between the European Economic Community and the Republic of Austria signed in Brussels on 22 July 1972 and concluded and approved on behalf of the Community by virtue of Council Regulation (EEC) No 2836/72 of 19 December 1972 (OJ, English Special Edition 1972 (31 December) L 300, p. 3) and of Protocol 3 annexed thereto,

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, R. Joliet and G. C. Rodríguez Iglesias, Judges,

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

after considering the written observations submitted on behalf of:

— the Belgian Government, by Ignace Claeys Bouuaert, Advocate at the Hof van Cassatie van België,

* Language of the case: Dutch.

— the Commission of the European Communities, by Marie-Josée Jonczy, Legal Adviser, and Ben Smulders, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of E. Huygen and Others, represented by Ch. Kremer, of the Luxembourg Bar, from the Belgian Government and from the Commission at the hearing on 1 April 1993,

after hearing the Opinion of the Advocate General at the sitting on 18 May 1993,

gives the following

Judgment

1 By order of 7 January 1992, received at the Court on 13 January 1992, the Hof van Cassatie van België (Belgian Court of Cassation) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of the Agreement between the European Economic Community and the Republic of Austria signed in Brussels on 22 July 1972 and concluded and approved on behalf of the Community by virtue of Council Regulation (EEC) No 2836/72 of 19 December 1972 (OJ, English Special Edition 1972 (31 December) L 300, p. 3) (hereinafter 'the EEC-Austria Agreement') and in particular of Protocol 3 annexed thereto, concerning the definition of the concept of 'originating products' and methods of administrative cooperation. That protocol was amended by the Agreement in the form of an exchange of letters, brought into force in the Community by Council Regulation (EEC) No 3386/84 of 3 October 1984 concerning the conclusion of the Agreement in the form of an exchange of letters consolidating and modifying the text of Protocol 3 to the Agreement between the European Economic Community and the Republic of Austria (OJ 1984 L 323, p. 1).

2 These questions arose in the course of criminal proceedings brought by the Belgian State against the director of a Belgian company which had imported from Austria

in 1985 a machine for gluing cardboard boxes and against two company employees who had carried out the import formalities.

3 The machine in question had been manufactured by the German undertaking Jagenberg Werke and exported to Austria following its purchase in 1970 by the Austrian undertaking Ernst Schausberger & Co. In 1985 the machine was purchased by the Belgian company Grafimat, which imported it into Belgium. The import formalities were carried out by the Belgian company E. Depaire SA.

4 On 7 March 1985, Mr Huygen and Mr Verraes, employees of E. Depaire SA, and Mr Blockeel, manager of Grafimat, declared the goods to customs at Courtrai (Belgium). They presented for that purpose EUR.1 certificate No D 0326846 issued by the Austrian customs — which stated that the machine originated in West Germany — in order to obtain exemption from customs duty under the preferential arrangements established by the EEC-Austria Agreement.

5 On the basis of the provisions of Protocol 3 annexed to that agreement, the Belgian authorities, for the purpose of verifying the data given on the EUR.1 certificate, asked the Austrian authorities for information as to the origin of the machine. The Austrian authorities replied by letter of 26 March 1987 that specific proof of the origin of the goods could no longer be supplied by the German exporter at the material time and that consequently the goods must be regarded as a product of unknown origin to which the certificate could no longer apply.

6 The Belgian authorities thereupon decided that the preferential arrangements could not be applied and that the duties prescribed in the event of the importation of goods of unknown origin had to be imposed on the goods in question; consequently the Belgian authorities decided to demand payment of the relevant customs duties. In addition, Mr Huygen, Mr Verraes and Mr Blockeel were prosecuted before the Correctionele Rechtbank (Criminal Court) Kortrijk for infringement, on the one hand, of Articles 202(1) and (2) and 259 of the General

Law on Customs and Excise, consolidated by Royal Decree of 18 July 1977, confirmed by the Law of 6 July 1978 and, on the other hand, of Articles 8(1)(a), 9(1) and (2) and 10(2) of Protocol 3 to the EEC-Austria Agreement. The companies E. Depaire and Grafimat were summoned to appear as parties with civil liability.

7 The judgment given at first instance, by which the accused had been acquitted and the civil actions dismissed, was upheld by judgment of the Hof van Beroep (Appeal Court), Gent, given on 20 September 1989. It appears from the order for reference that in that judgment the Hof van Beroep found that the Austrian customs had not in fact made contact with the Austrian undertaking Schausberger, a finding based on information supplied by that company and on the fact that the prosecution produced during the proceedings an invoice dated 25 February 1970 addressed to that undertaking by the German manufacturer Jagenberg showing West Germany as the place of origin of the machine. The Hof van Beroep determined that the fact that verification of the origin of the machine was not conclusive was manifestly attributable to the negligence of the Austrian customs authorities. It therefore decided that the failure of the Austrian authorities to take action constituted a case of *force majeure* so far as the accused were concerned.

8 The Belgian State appealed against that judgment to the Hof van Cassatie van België, which took the view that the pleas put forward on appeal raised certain points concerning the interpretation of Community law and referred the following questions to the Court of Justice for a preliminary ruling:

'The Agreement between the EEC and Austria (Regulation No 2836/72 of 19 December 1972 together with Protocol 3 appended thereto) grants a preferential tariff to goods originating in Austria or in the Community. The application of that preferential system is dependent on the origin of the goods and hence verifying the origin of goods forms a necessary part of the system.

1. If the State granted the preferential tariff (in this case, Austria), which is asked to check the "EUR.1" certificate of origin, cannot determine the correct origin of the goods, must it decide that the goods are of unknown origin, which would mean that the "EUR.1" certificate and the preferential tariff were wrongly granted?

2. In the present case, must the importing Member State (Belgium) then demand payment of the customs duties which were not paid upon importation?

3. Does the fact that it was impossible for the Austrian authorities, owing to their own neglect, "wilful" or otherwise, to establish that the origin notified on the "EUR.1" certificate issued by them was correct constitute a situation of *force majeure* for the importer in the Member State into which the goods were imported (in this case, Belgium)?'

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case and the legislative background, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The rules of origin under the system established by the EEC-Austria Agreement

10 Before an answer is given to the questions referred to the Court of Justice by the national court, it is appropriate to begin by recalling the function and content of the fundamental rules of the EEC-Austria Agreement and of the protocol as regards determination of the origin of goods and subsequent verification.

11 The Agreement, which lays down a free-trade system for goods, applies, according to Article 2 thereof, subject to certain exceptions, 'to products originating in the Community or Austria.' Article 11 of the Agreement provides that 'Protocol 3 lays down the rules of origin.'

12 According to Articles 1(1) and (2) of Protocol 3, 'products wholly obtained in the Community,' amongst others, are to be regarded as products originating in the Community and 'products wholly obtained in Austria', amongst others, are to be regarded as products originating in Austria.

13 According to Article 8(1) of Protocol 3, originating products within the meaning of Article 1 of the protocol are, on importation into the Community or into Austria, to benefit from the Agreement upon submission of a movement certificate referred to as 'an EUR.1 certificate'. According to the second subparagraph of Article 9(3), that certificate is to be issued 'by the customs authorities of each of the countries concerned where the goods have either been held before their re-exportation in the same state or undergone the working or processing referred to in Article 2 of this protocol, upon presentation of the EUR.1 certificates issued previously'.

14 According to Article 10(3) of the protocol, 'since the EUR.1 certificate constitutes the documentary evidence for the application of the preferential tariff and quota arrangements laid down in the Agreement, it shall be the responsibility of the customs authorities of the exporting country to take any steps necessary to verify the origin of the goods and to check the other statements on the certificate'.

15 Apart from that check carried out by the authorities of the exporting State at the time of the issue of the EUR.1 certificate, Article 17 of Protocol 3 envisages the possibility of a subsequent verification of EUR.1 certificates 'at random or whenever the customs authorities of the importing State have reasonable doubt as to the authenticity of the document or the accuracy of the information regarding the true origin of the goods in question'. Subsequent verification is carried out, on request by the customs authorities of the importing State, by the customs authorities of the exporting State, which are to inform the customs authorities of the importing State of the results.

The first question

16 It follows from the provisions of the Agreement and of the protocol mentioned above that only goods originating in the EEC or Austria benefit from the preferential arrangements laid down by the Agreement and that the EUR.1 certificate constitutes proof of such origin. The main purpose of the subsequent verification procedure is to check whether the statement of origin in a certificate which has been issued is correct.

17 It follows that, when such a check does not make it possible to confirm the origin of the goods indicated in the EUR.1 certificate, the conclusion must be drawn that the certificate was wrongly issued by the exporting State and that accordingly those goods cannot benefit from the preferential arrangements laid down by the Agreement.

18 The answer to the first question must therefore be that Protocol 3 to the EEC-Austria Agreement is to be interpreted as meaning that where the exporting State, having been requested to check the EUR.1 certificate of origin, does not succeed in establishing the correct origin of the goods, it must conclude that they are of unknown origin and therefore that the EUR.1 certificate and the preferential tariff have been wrongly granted.

The second question

19 The first point to note is that, in principle, if the outcome of subsequent verification proves negative the normal consequence is for the importing State to demand payment of the customs duties not paid at the time of importation.

20 However, the question raised by the national court must be understood in the light of the circumstances of the main proceedings.

21 Those circumstances are characterized, on the one hand, by the finding of fact made by the Hof van Beroep, Gent, which is binding on the national court, that there is a document establishing the Community origin of the goods in question and, on the other, by the impossibility, as pointed out by the Commission in its observations, of furnishing the usual proof of the origin of the goods envisaged by Article 9(3) of Protocol 3, namely the EUR.1 certificate issued previously, on the ground that the goods were exported from Germany to Austria before the Agreement entered into force and accordingly it had not been possible to issue such a certificate.

22 The second question must therefore be understood as asking essentially whether, in circumstances such as those of this case, the importing State is definitively bound, for the purpose of demanding payment of unpaid customs duties, by the negative result of subsequent verification or whether it is possible to take account of other evidence of the origin of the goods.

23 Article 16(1) of Protocol 3 to the EEC-Austria Agreement provides, in order to ensure the proper application of the protocol, that the parties to the Agreement are to assist each other in checking the authenticity and accuracy of EUR.1 certificates. Article 17(3) provides that the customs authorities of the importing State are to be informed of the results of the subsequent verification, which must be such as to make it possible to determine whether the disputed certificate applies to the goods actually exported and whether the goods can in fact qualify for application of the preferential arrangements. Moreover, the second subparagraph of Article 17(3) provides that where such disputes cannot be settled between the customs authorities of the importing State and those of the exporting State, or where they raise a question as to the interpretation of the protocol, they are to be submitted to the Customs Committee.

24 As the Court stated in the context of the interpretation of the free-trade Agreement between the European Economic Community and the Swiss Confederation signed in Brussels on 22 July 1972 and concluded and approved on behalf of the Community by virtue of Council Regulation (EEC) No 2840/72 of 19 December 1972 (OJ, English Special Edition 1972 (31 December) L 300, p. 286), which contains a Protocol 3 similar to that appended to the EEC-Austria Agreement, the determination of the origin of goods is based on a division of powers between the customs authorities of the parties to the Agreement inasmuch as origin is established by the authorities of the exporting State and the proper working of that system is monitored jointly by the authorities concerned on both sides (Case 218/83 *Les Rapides Savoyards* [1984] ECR 3105, paragraph 26).

25 In that judgment the Court pointed out that that system is justified by the fact that the authorities of the exporting State are in the best position to verify directly the facts which determine origin and that the system is based on a division of duties

between the customs authorities of the parties to the free-trade Agreement and on the reliance which must be placed on the acts of those authorities in the exercise of their powers, since the mechanism envisaged can function only if the customs authorities of the importing State accept the determinations legally made by the authorities of the exporting State.

26 It should be noted, however, that the purpose of subsequent verification is to check the accuracy of EUR.1 certificates. It is in particular in cases where the customs authorities of the importing State have reasonable doubt as to the authenticity of the document or the accuracy of the information regarding the true origin of the goods in question that verification must be carried out by the exporting State (Article 17(1)). The third subparagraph of Article 17(3) provides that for the purposes of subsequent verification of EUR.1 certificates, the customs authorities of the exporting State must keep the export documents or copies of EUR.1 certificates used in place thereof for not less than two years.

27 In a situation of the kind which has arisen in this case, where the customs authorities of the exporting State are not in a position duly to carry out the subsequent verification envisaged by the protocol, none of its provisions prohibits the authorities of the importing State from achieving the purpose pursued by such verification — that is, checking the authenticity and the accuracy of the EUR.1 certificate — by taking account of other evidence as to the origin of the goods.

28 The answer to the second question must therefore be that Protocol 3 to the EEC-Austria Agreement is to be interpreted as meaning that, in circumstances such as those of this case, the importing State is not definitively bound, for the purpose of demanding payment of unpaid customs duties, by the negative result of subsequent verification, but may take account of other evidence as to the origin of the goods.

The third question

29 The third question asks whether an importer may plead *force majeure* where it is impossible for the customs authorities of the exporting State, by reason of their own negligence, to establish the correct origin of goods by means of subsequent verification.

30 The Court has consistently held that, since the concept of *force majeure* does not have the same scope in the various spheres of application of Community law, its meaning must be determined by reference to the legal context in which it is to operate (see, most recently, Case C-124/92 *An Bord Bainne Co-operative & Compagnie Inter-Agra SA* [1993] ECR I-5061, paragraph 10).

31 On the one hand, *force majeure* is expressly referred to in Protocol 3 only in Article 12 thereof regarding the time-limit for submission of the EUR.1 certificate and, on the other, neither the Agreement nor the protocol makes provision for the consequences of irregularities of the kind determined by the national court. In the absence of specific provisions, recognition of circumstances constituting *force majeure* presupposes that the external cause relied on by individuals has consequences which are inexorable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations (Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 140). The concept of *force majeure* must be understood as meaning abnormal and unforeseeable circumstances beyond the control of the trader concerned, whose consequences could not have been avoided despite the exercise of all due care, so that conduct of the public authorities may, according to the circumstances, constitute a case of *force majeure* (see, in particular, Case C-50/92 *Firma Molkerei-Zentrale Süd* [1993] ECR I-1035).

32 In the context of Protocol 3 and, more particularly, of subsequent verification, the fact that the customs authorities of the exporting State are not in a position to establish the correct origin of goods constitutes in principle an abnormal, unforeseeable circumstance beyond the control of the importer.

33 As regards the condition that the conduct of the authorities of the exporting State must have had consequences for the importer in that, despite the exercise of all due care, they could have been avoided only at the cost of excessive sacrifices, it is for the national court to check whether the efforts allegedly made by the trader concerned were genuine, regard being had to the obligations incumbent on him under Protocol 3.

34 Although, under the arrangements laid down by the Agreement and Protocol 3, both the exporter and the importer are accountable to the customs authorities for the genuine nature of their transactions and the truth of their declarations, the fact remains that, as both the Commission and, in point 29 of his Opinion, the Advocate General have correctly emphasized, the obligation to be in possession of the documents evidencing the origin of the goods rests upon the exporter alone.

35 The answer to the third question must therefore be that an importer may, in certain circumstances, rely upon *force majeure* where it is impossible for the customs authorities of the exporting State, by reason of their own negligence, to establish the correct origin of goods by means of subsequent verification. It is for the national court to assess all the facts relied upon in that respect.

Costs

36 The costs incurred by the Belgian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Hof van Cassatie van België, by order of 7 January 1992, hereby rules:

1. **Protocol 3 to the EEC-Austria Agreement signed in Brussels on 22 July 1972, and concluded and approved on behalf of the Community by virtue of Council Regulation (EEC) No 2836/72 of 19 December 1972, is to be interpreted as meaning that where the exporting State, having been requested to check the EUR.1 certificate of origin, does not succeed in establishing the correct origin of the goods, it must conclude that they are of unknown origin and therefore that the EUR.1 certificate and the preferential tariff have been wrongly granted.**

2. **Protocol 3 to the EEC-Austria Agreement is to be interpreted as meaning that, in circumstances such as those of this case, the importing State is not definitively bound, for the purpose of demanding payment of unpaid customs duties, by the negative result of subsequent verification, but may take account of other evidence as to the origin of the goods.**

3. **An importer may, in certain circumstances, rely upon *force majeure* where it is impossible for the customs authorities of the exporting State, by reason of their own negligence, to establish the correct origin of goods by means of subsequent verification. It is for the national court to assess all the facts relied upon in that respect.**

Moitinho de Almeida Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 7 December 1993.

J.-G. Giraud — Registrar

J. C. Moitinho de Almeida — President of the Fifth Chamber