OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 3 May 2007 [1]

I — Introduction

1. In the present proceedings the Portuguese Supremo Tribunal Administrativo (Supreme Administrative Court) has submitted to the Court five questions for a preliminary ruling on the interpretation of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties [2] which has since been repealed.

2. In the main proceedings, the undertaking ZF Zefeser — Importação e Exportação de Produtos Alimentares L^{da} ('ZF Zefeser') and the Portuguese tax authorities disagree on the lawfulness of an adjusted customs assessment which requires ZF Zefeser to make ex post payment of customs duties not collected. Whereas ZF Zefeser takes the view that post-clearance recovery of import levies is precluded by the fact that the general three-year limitation period contained in Article 2(1) of the regulation has meanwhile expired, the tax authorities refer to the derogation provided for in Article 3 according to which that period does not apply when the competent authorities find that it is following an act that could give rise to criminal court proceedings that the competent authorities were unable to determine the exact amount of the import duties or export duties legally due on the goods in question. Accordingly, the 10-year limitation period provided for by national law applies instead.

3. At issue, in essence, is the question of which instance is competent with legal effect for Community law to determine whether particular conduct of a debtor must be considered 'an act that could give rise to criminal court proceedings' within the meaning of Article 3 of Regulation No 1697/79. That competence is claimed by the Portuguese customs authorities who rely on the wording and scheme of the provisions mentioned. ZF Zefeser contests that claim, arguing that such interpretation is incom-

1 — Original language: German.
2 — OJ 1979 L 197, p. 1.

patible with the principles of legal certainty and the presumption of innocence which presuppose final conviction by a criminal court.

However, such action may not be taken after the expiry of a period of three years from the date of entry in the accounts of the amount originally required of the person liable for payment or, where there is no entry in the accounts, from the date on which the customs debt relating to the said goods was incurred.'

II — Legal framework

A — *Community law*

5. Article 3 of Regulation No 1697/79 provided for a derogation from that general three-year limitation period:

1. The provisions applicable prior to entry into force of the Community Customs Code

4. For the period between 1 July 1980 and 31 December 1993, limitation periods applicable to actions seeking post-clearance recovery of import levies were determined in accordance with Article 2(1) of Regulation No 1697/79 which was worded as follows:

'When the competent authorities find that it is following an act that could give rise to criminal court proceedings that the competent authorities were unable to determine the exact amount of the import duties or export duties legally due on the goods in question, the period laid down in Article 2 shall not apply.

'Where the competent authorities find that all or part of the amount of import duties or export duties legally due on goods entered for a customs procedure involving the obligation to pay such duties has not been required of the person liable for payment, they shall take action to recover the duties not collected.

Under these circumstances, the competent authorities shall take action for recovery in accordance with the provisions in force in this respect in the Member States.'

2. The Customs Code

6. Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [3] ('CCC'), which entered into force on 1 January 1994 and by which Regulation No 1697/79 was repealed, [4] provides in Article 221(3) as follows:

'Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. However, where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due, such communication may, in so far as the provisions in force so allow, be made after the expiry of such three-year period.'

B — *National law*

7. According to Article 34(1) of the Código de Processo Tributário (Code on tax procedure) in force at the time when the events giving rise to the main proceedings occurred, as amended by Decree-Law No 154/91 of 23 April 1991, the Portuguese tax authorities had a period of 10 years in which to pursue post-clearance recovery of import levies, if, as a result of a fraudulent act, it had not been possible to determine correctly the amount of the tax debt.

III — Facts, main proceedings and questions referred for a preliminary ruling

8. In October 1993, a vessel originating in Turkey unloaded in the Portuguese harbour of Setúbal a certain volume of oil which was for delivery to the undertaking ZF Zefeser, whilst the remainder of the oil consignment on board was declared vis-à-vis the customs authorities as goods in transit. The vessel then continued its journey towards Ceuta (Spain) where that remaining oil was to be unloaded. According to information provided by the Spanish authorities, however, that ship arrived there without the stated cargo.

9. On the basis of that information, on 9 April 1997, that is to say, three years after the events which had led to the customs debt

3 — OJ 1992 L 302, p. 1.

4 — See Article 251(1) of Regulation No 2913/92.

arising, the customs authority of Setúbal issued an adjusted customs assessment to ZF Zefeser. As a result of a criminal complaint of 18 March 1997 brought by the customs authority, criminal investigations concerning the undertaking's members were opened also in relation to smuggling, falsification of documents, fraud and criminal conspiracy.

10. Alongside the criminal proceedings, ZF Zefeser contested the customs assessment in the Portuguese tax courts, arguing, inter alia, that the tax debt was time-barred. The competent Portuguese court, the Tribunal Tributário de Primeira Instância (First Instance Fiscal Court), dismissed the application on the ground that the relevant limitation period amounted to 10 and not three years, since acts that could give rise to criminal court proceedings had been committed.

11. On 12 October 2004, that judgment was set aside by the Tribunal Central Administrativo (Central Administrative Court), which reinstated the original position. The court justified its decision by reason of the applicability of the three-year limitation period following the judgment in the intervening period of the Supremo Tribunal de Justiça (Supreme Court of Justice) confirming and declaring as final the criminal judgment of the Tribunal Judicial de Setúbal (Setúbal Criminal Court) of 10 January 2001, by which the accused were acquitted for lack of evidence.

12. The Portuguese Finance Ministry then lodged an appeal with the Supremo Tribunal Administrativo against the administrative judgment of the Tribunal Central Administrativo.

13. The referring court wishes to know whether it is permitted as a matter of Community law to derogate from the general three-year limitation period, when factors merely point to the existence of a criminal offence, as a result of which criminal investigations were opened, which did not, however, lead to a conviction by a court. In particular, the question arises whether a broad interpretation of Article 3 of the regulation could restrict the rights of the debtor in the sense that it could permit administrative authorities by way of lodging a criminal complaint to extend excessively the period in which to bring proceedings for post-clearance recovery of import levies.

14. Considering the interpretation of the said Article 3 of Regulation No 1697/79 to be contested, the Supremo Tribunal Administrativo decided, therefore, to refer the following questions to the Court for a preliminary ruling:

'(1) For the purposes of Article 3 of Council Regulation (EEC) No 1697/79 of

24 July 1979, is classification by the customs authority as "an act that could give rise to criminal court proceedings" sufficient, or is it instead necessary that that classification should be made by the competent criminal court?

(2) In the latter hypothesis, is it sufficient for the competent criminal justice authority (in the case of Portugal, the Ministério Público (Public Prosecutor's Office)) simply to lay a charge, or is it instead necessary that the debtor should be convicted in the relevant criminal proceedings?

(3) Also in the latter hypothesis, are different conclusions to be drawn from the fact that the court acquits the debtor by virtue of the application of the principle *in dubio pro reo*, or acquits him because it has been proved that the debtor did not commit the offence in question?

(4) What consequences follow if the Public Prosecutor's Office does not lay a charge against the debtor, holding that there is no evidence of an act that could give rise to criminal court proceedings? Will such a decision preclude any action to recover the duty not collected?

(5) If the Public Prosecutor's Office or the criminal court itself closes the case because the criminal proceedings are time-barred, does such a decision make it impossible to bring the corresponding action to recover the duty not collected?'

IV — Procedure before the Court

15. The application of 11 January 2006 was registered at the Court Registry on 6 February 2006.

16. Written observations were submitted, within the period prescribed for the purpose by Article 23 of the Statute of the Court, by ZF Zefeser, the Portuguese Government, Ireland and by the Commission.

17. At the hearing on 1 March 2007, the representatives of the parties submitting written observations appeared in order to present oral argument.

V — Main arguments of the parties

A — *First and second questions*

18. The Portuguese Government, Ireland and the Commission rely on the provision in Article 2 of the regulation according to which it is incumbent on the national customs authorities alone to classify conduct as 'an act that could give rise to criminal court proceedings'. Together with the schematic context of those provisions that interpretation is supported also by the wording of Article 3 of the regulation which does not require the person concerned to be convicted. Moreover, they make reference to *Meico-Fell*,[5] in which the Court declared customs authorities competent to pursue post-clearance recovery of import levies.

19. ZF Zefeser counters that argument, stating that an act can only be described as a criminal offence once it has been determined as such by way of a final judgment. Only in those circumstances may post-clearance recovery of charges be based on alleged breaches of criminal law. The principles of legal certainty and the presumption of innocence preclude the legal assessments made by the customs authorities and the Public Prosecutor's Office from serving as a basis for post-clearance recovery.

B — *Third question*

20. As regards the consequences to be drawn in the event of an acquittal, the Portuguese Government and Ireland argue that what is decisive is simply the commission of an act that could give rise to criminal court proceedings and not the outcome of a criminal trial.

21. On the contrary, the Commission takes the view that the time-limit in Article 3 of the regulation cannot be applied in the present case because in the criminal proceedings at issue against the members of ZF Zefeser no act that could give rise to criminal court proceedings could be proven.

22. ZF Zefeser shares that view and argues, in addition, that the principle of unity within the legal system precludes the acceptance of two contradictory decisions, that is to say, acquittal within the sphere of criminal law and conviction within the field of customs law.

5 — Case C-273/90 [1991] ECR I-5569.

C — *Fourth and fifth questions*

23. The Portuguese Government, Ireland and the Commission refer to their answer to the first question, according to which the decision of the customs authorities alone is decisive. Accordingly, non-pursuit of criminal charges or the closure of a case does not preclude the post-clearance recovery of import levies after expiry of the general three-year limitation period.

24. ZF Zefeser takes the view that the fourth question is unnecessary for a decision in the main proceedings, since in the present case investigations were opened. As regards the fifth question, it proposes that having regard to the principle of presumption of innocence that the answer to that question must be that closure of criminal proceedings precludes the post-clearance recovery of import levies.

VI — Legal appraisal

A — *Introductory observations*

25. Articles 2(1) and 3 of Regulation No 1697/79 and Article 221(3) and (4) of the CCC constitute provisions of Community law which set time-limits within which the competent authorities may recover from the debtor ex post any charges not collected. Thus, they do not constitute mere procedural rules; they contain, instead, substantive limitation periods the expiry of which has substantive consequences as a matter of Community customs law, that is to say, extinction of the customs debt. [6]

26. More generally, it should be noted that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force. [7] In order to determine which provisions govern post-clearance recovery, the date on which the customs declaration was accepted is decisive. Thus, if the declaration was accepted before 1 January 1994, post-

6 — Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, paragraphs 39 to 41.

7 — Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 22; Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 13; Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraph 29; and *Molenbergnatie*, cited in footnote 6, paragraph 31.

clearance recovery is governed by Article 2 of Regulation No 1697/79.[8] That is the situation applicable in the present case, since at the date when the facts underlying the main proceedings occurred, that is to say, when the oil was originally imported into the harbour of Setúbal in October 1993 and the remainder of the vessel's consignment was declared to the Portuguese customs authorities as goods in transit, the said regulation was still in force.

27. With regard to the dispute in the main proceedings, reference must be made, therefore, on the one hand, to the substantive rules contained in the legislation in force prior to the application of the CCC and, on the other hand, to the procedural rules contained in the CCC.

B — *Analysis of the questions referred for a preliminary ruling*

1. First question

28. By way of its reference for a preliminary ruling, the referring court provides the opportunity to examine fundamental aspects of national procedural law and on the organisation of the State. The main question at issue concerns the legal effects of decisions taken by organs of the national criminal justice system on Community customs law, a field of law which nowadays following completion of the Community customs union falls mainly within its exclusive legislative competence,[9] but which within the scope of the direct administrative implementation of Community law by Member States is applied first and foremost by the national authorities.[10]

(a) Admissibility

29. First, it is necessary to recall that the permissible subject-matter of a reference within the framework of a preliminary ruling under Article 234 EC may exclusively concern the question raised by the national court judge on the validity or interpretation of Community law. On the contrary, the Court is precluded from providing an answer

8 — Hampel, H., 'Die Nacherhebung von Einfuhr- oder Ausfuhrabgaben nach dem Zollkodex', *Zeitschrift für Zölle und Verbrauchsteuern*, No 3 (2000), p. 110. Scheuer, P., 'Die Verjährung im gemeinschaftlichen Versandverfahren', *Recht der internationalen Wirtschaft*, No 12 (1994), p. 1038, points out that neither the CCC nor Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the CCC (OJ 1993 L 111, p. 88) have retrospective effect. Existing cases must be resolved, therefore, in accordance with the principle of '*tempus regit actum*'. That principle implies that assessment of the legal consequences of a situation is to be determined in accordance with the legal provisions in force at the time of the events in question.

9 — Sack, J., in Dauses, M. (ed.), *Handbuch des EU-Wirtschaftsrechts*, Section C. II., point 13.

10 — Streinz, R., *Europarecht*, 5th edition, Heidelberg, 2001, point 479; Galera Rodrigo, S., *Derecho aduanero español y comunitario*, Madrid, 1995, pp. 167 to 175; Stettner, R., in Dauses, M., cited above in footnote 9, Section B. III., point 11; Voß, R., in Grabitz and Hilf, *Das Recht der Europäischen Union*, Article 135 EC, point 4 (updated January 2004); Schütz, H.-J., Bruha, T. and König, D., *Casebook Europarecht*, Munich, 2004, p. 294.

to questions on the interpretation or validity of national law. [11]

30. Regulation No 1697/79, at issue in the case, is without doubt subject to the Court's interpretative authority. That follows from the fact that according to point b in the first paragraph of Article 234 EC Community law includes the acts of the institutions of the Community, which must be taken also as meaning the whole of Community secondary law created by the institutions. On the other hand, the indeterminate legal concept of 'an act that could give rise to criminal court proceedings' contained in Article 3 of Regulation No 1697/79 raises the question whether that concept is at all amenable to interpretation by the Court or, instead, on account of its schematic connection with the substance or procedure of criminal law it falls within the interpretative authority of national courts.

31. In *Meico-Fell*, [12] the Court held that the concept of 'an act that could give rise to criminal court proceedings' refers only to acts which, under the legal system of the Member State whose competent authorities are seeking the post-clearance recovery of duties, are classified as offences under national criminal law. [13] In reaching that conclusion, the Court essentially adopted the view of Advocate General Van Gerven, who considered that provision to make implicit reference [14] to national law. In his Opinion in that case, the Advocate General pointed out that the concept of 'an act that could give rise to criminal court proceedings' must be determined on the basis of the applicable national law. In making that point, he emphasised that such determination must ensue, however, in the light of uniform interpretative criteria provided by the Court. [15]

32. As the Court of Justice has consistently held, the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent interpretation, which must take into account the context of the provision and the purpose of the relevant regulations. In the absence of an express reference, the application of Community law may sometimes necessitate a reference to the laws of the Member States where the Community Court cannot identify in Community law or in the general prin-

11 — That conclusion follows from the task accorded to the Court by the first paragraph of Article 220 EC, within its jurisdiction, to ensure that in the interpretation and application of the EC Treaty the law is observed. See Case 6/64 *Costa* v *ENEL* [1964] ECR 585, 592, and Case 107/83 *Klopp* [1984] ECR 2971, paragraph 14.

12 — Cited in footnote 5 above, paragraph 13.

13 — Ibid., paragraph 12.

14 — Fabian, F., 'Erstattung, Erlass und Ausfuhrabgaben der Europäischen Gemeinschaft', *Studien zum internationalen Wirtschaftsrecht und Atomenergierecht*, Volume 91, p. 130, considers also that concept to make tacit reference to national law with the result that national law produces interpretative effects within Community law.

15 — Opinion of Advocate General Van Gerven in Case C-273/90 *Meico-Fell* [1991] ECR I-5569, point 5.

ciples of Community law criteria enabling it to define the meaning and scope of such a provision by way of independent interpretation. [16]

33. References of that nature are, in particular, indispensable in those situations where the Community by reason of non-exercise [17] or even the lack of legislative competence has not created uniform terminology in a specific area of Community law. They arise as a consequence, therefore, of the principles of limited legal competence and subsidiarity [18] which, in accordance with Article 5 EC, are inherent in Community law. Accordingly, in the previously mentioned judgment of *Meico-Fell*, the Court — acknowledging the risk that the concept of 'an act that could give rise to criminal court proceedings' could lead to differing results on account of the content of the criminal law provisions of the Member States — held that according to the state of Community law prevailing at that time the classification of a certain kind of conduct for the purposes of criminal law was not harmonised and was governed, therefore, by national law. [19]

34. In assessing the present case, the second statement of Advocate General Van Gerven, according to which in interpreting national law national bodies are bound by the criteria provided by the Court, [20] appears to me to be of greater relevance.

35. I understand that statement as meaning that the fact that a provision of Community

16 — Case T-43/90 *Díaz García* v *Parliament* [1992] ECR II-2619, paragraph 36. In that judgment, the Court of First Instance held in paragraph 37 as regards the concept of 'a legal responsibility to maintain' contained in Article 2(4) of Annex VII to the Staff Regulations that neither Community law nor the Staff Regulations provide the Community Court with any guide as to how it should define, by way of independent interpretation, the meaning and scope of the concept of a legal responsibility to maintain, whose existence enables an official to receive a dependent child allowance under Article 2(4) of Annex VII to the Staff Regulations. It was necessary, therefore, to determine the national legal system to which the applicant was subject and to ascertain whether that system imposed on him a legal responsibility to maintain, within the meaning of the Staff Regulations, in relation to the children of his partner.

17 — Fabian, F., cited above in footnote 14, points out with regard to the law on refunds/waiver and on post-clearance recovery that although the Community in the form of regulations has provided for uniform Community rules governing the matter, the differing laws of the Member States nevertheless produce effects on certain aspects of Community law on refunds/waiver and on post-clearance recovery. In that context, two forms by which national law produces effects within areas subject to regulation must be distinguished. National law can produce effects by way of specific reference and it can also produce supplemental effects by way of a general reference. Both forms can exist also cumulatively, as is the case with regard to the law on refunds/waiver and on post-clearance recovery. The author cites by way of example Article 3 of Regulation No 1697/79 and the successor provision in the second sentence of Article 221(3) of the CCC. Gellert, L., 'Anwendbarkeit der nationalen Abgabenordnung auch nach In-Kraft-Treten des Zollkodexes', *Zeitschrift für Zölle und Verbrauchsteuern*, Volume 80 (2004), No 6, p. 187, takes the view that the CCC permits the body applying the law the continued possibility to apply the provisions of national tax codes. That possibility arises both by way of a direct reference in provisions of the CCC and by way of the power conferred on customs authorities to regulate certain details themselves and finally by way of exercising administrative discretion in those cases in which the CCC permits customs authorities to take discretionary decisions. A further opportunity to apply national tax codes arises in those cases in which the CCC relies on indeterminate legal concepts whose content cannot be determined from the CCC itself.

18 — Witte, P. and Wolffgang, H.-M., *Lehrbuch des europäischen Zollrechts*, 4th edition, Herne and Berlin, 2003, p. 35, make the reference to the fact that the Council and the Commission constitute executive organs which may act only within the scope of narrow Treaty authority and which do not possess the broad scope for action enjoyed by national legislatures.

19 — *Meico-Fell*, cited in footnote 5 above, paragraph 12.

20 — Opinion in *Meico-Fell*, cited in footnote 15 above, point 5.

law makes reference to national law cannot result in national law being wholly removed from the influence of Community law. Rather, I take the view that national law has to keep within the limits imposed on it by way of the implicit reference made by Community law. In my view, that principle is particularly applicable in situations such as the present case where at issue is not the substance of criminal law but solely the meaning in procedural terms attached to the concept of 'an act that could give rise to criminal court proceedings'. That concept concerns, in fact, the legal consequences of decisions taken during the criminal justice process by the Public Prosecutor's Office or the courts on the practical implementation of post-clearance recovery by Member State authorities.

36. Contrary to what was at issue in *Meico-Fell*, in the present proceedings interpretation of that concept by the Court is not hindered by the Community's lack of authority to impose criminal penalties (*ius puniendi*), [21] but by the Member States' organisational and administrative sovereignty in implementing Community law. That notion includes the authority of the Member States, in the absence of a general Community law of procedure, to determine those administrative bodies [22] and jurisdictions [23] with competence to apply Community law at a Member State level. However, that administrative sovereignty does not release Member States from their duty to observe certain obligations imposed by Community law, above all, ensuring the principle of efficiency in the sense of achieving in its transposition the greatest practical effectiveness for Community law. [24]

21 — As Advocate General Ruiz-Jarabo Colomer sets out in his Opinion in Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, point 27 et seq., it is a matter of common ground that Community law contains no express or implicit general power to impose criminal penalties. In support of that view, he refers to Case 203/80 *Casati* [1981] ECR 2595, paragraph 27, which states that, in principle, the power to impose criminal penalties constitutes a matter for the Member States. The Court held also in Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 19, and Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 17, that, in principle, criminal legislation and the rules of criminal procedure are matters for the Member States. On the other hand, it is acknowledged that in accordance with the principle of loyal cooperation set out in Article 10 EC the Community can require Member States to impose criminal penalties on conduct which infringes the Community legal order. On case-law developments concerning the duty of Member States to penalise infringements of Community law, see Case 50/76 *Amsterdam Bulb* [1977] ECR 137; Case 68/88 *Commission* v *Greece* [1989] ECR 2965; and Case C-186/98 *Nunes and de Matos* [1999] ECR I-4883, paragraph 14.

22 — Voß, R., cited above in footnote 10, Article 135 EC, points 4 and 9; Kahl, W., *Kommentar zum EUV/EGV*, 1st edition (1999), Article 10, p. 377, point 24, refers to the 'principle of applying national procedural rules and codes of judicial procedure' to which, unless Community law has made provision to the contrary, national law, in particular national law on administrative procedure and organisation, refers when implementing Community law.

23 — Lenaerts, K., Arts, D. and Maselis, I., *Procedural Law of the European Union*, 2nd edition, London, 2006, p. 83, point 3-001, point out that Community law is mainly applied by Member State courts. Since the Community has no procedural law of its own, it is for the legal order of each Member State to determine questions of jurisdiction and procedural rules for enforcing the individual rights accorded by Community law. See on that point Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49; and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 39.

24 — The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see, to that effect, inter alia, *Peterbroeck*, cited in footnote 23 above, paragraph 12; Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31; Case C-201/02 *Wells* [2004] ECR I-723, paragraphs 65 and 67; and *Unibet*, cited in footnote 23 above, paragraph 43.

37. Uniform application of customs law is not only necessary in the light of the customs union's great integrative and economic importance to the Community, [25] but also of importance in ensuring that the rule of law applies as between authorities and individuals. Time-limits and limitation periods apply in the interests of legal certainty and are designed to protect both debtors and the authorities. [26] In my opinion, having regard to those weighty considerations and also the need to ensure uniform application of Community law and equal treatment of debtors, one of the objectives of Regulation No 1697/79 (above, point 4), Member States' procedural autonomy must be diminished in order to arrive at a uniform set of rules for Community customs law. [27]

38. Accordingly, having regard to the importance in procedural law terms of the indeterminate legal concept of 'an act that could give rise to criminal court proceedings', the Supremo Tribunal Administrativo has referred a question on the interpretation of Community law which the Court is competent to answer within the framework of a preliminary ruling under point b in the first paragraph of Article 234 EC.

(b) Interpretation of the regulation

(i) Literal interpretation

39. As the Court has held on many occasions, the need for a uniform interpretation of Community regulations requires the provision in question to be interpreted and

25 — Even if from the outset the Community's objectives went beyond the mere creation of a customs union between the Member States, the fact that such objective always heads the list of Community policies makes it clear, however, that it enjoys a higher status. It is the crystallisation point for nearly all other objectives and policies. Even following the creation of the European Union and the internal market, that fact has not changed, although the customs union is now subsumed within the internal market and trade policy which can be regarded as a sign of progress in the integration process. Without a customs union neither a common transport nor a common agricultural policy is possible. Without a customs union no free movement for persons and services can exist. The free movement of goods necessitates the free movement of capital, at least inasmuch as payment must be made for supplies of goods. Inconsistent application of customs law results in changed traffic flows thus damaging the Community's financial interests, in particular, because customs duties and charges having equivalent effect are no longer received nationally but are allocated to the Community to finance its activities (see on this point Sack, J., cited above in footnote 9, points 6 to 8).

26 — See Case C-260/96 *Spac* [1998] ECR I-4997, paragraph 19; Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 28; and Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 48.

27 — Schwarze, J., *Europäisches Verwaltungsrecht*, Volume II, 1st edition, Baden-Baden, 1988, p. 1058 et seq., correctly points out that one of the Community legislature's objectives in adopting Regulation No 1697/79 was precisely to create uniform procedural rules, overriding national administrative law, in order to counteract the risk of divergence in administrative implementation.

applied in the light of the other languages. [28] Thus the starting point for interpretation must be the manner in which the contested concept is reproduced in the different language versions. On examination of those texts, what is striking is that certain versions, in particular the German and Dutch versions, referring to 'Handlungen, die strafrechtlich verfolgbar sind' and 'een strafrechtelijk vervolgbare handeling' do not indicate clearly whether a criminal court must at all be seised in an individual case with a criminally relevant set of facts or whether it is sufficient that in mere abstract terms the substantive criminal law treats a particular act as criminal.

40. On the contrary, the Portuguese, French, Spanish, English and Italian versions ('um acto passível de procedimento judicial repressivo', 'un acte passible de poursuites judiciaires répressives', 'un acto que puede dar lugar a la incoación de un proceso judicial punitivo', 'an act that could give rise to criminal court proceedings', 'un atto passibile di un'azione giudiziaria repressiva') clearly refer to judicial proceedings within the criminal justice process and even to the possibility of imposing criminal sanctions, which leads to the inference that 'an act that could give rise to criminal court proceedings' can be taken to exist only on charges being laid before a criminal court resulting in a conviction following a full hearing. Having regard to the more precise formulation of those language versions, it must be concluded that such interpretation corresponds more closely to the intention of the Community legislature.

41. That interpretation is not precluded by the strikingly broad wording adopted by the Community legislature to describe punishable conduct. Rather, in my view, that wording suggests that in an individual case the criminal character of specific conduct must be determined according to the substantive and procedural rules of national criminal law. That wording has to be considered in the light of the state of Community law at that time and the then prevailing consensus concerning the Community's lack of authority to impose criminal penalties.

(ii) Schematic and teleological interpretation

42. From the general competence of national customs authorities, in accordance with Article 2(1) of Regulation No 1697/79, to recover ex post import or export charges not yet demanded of the debtor, the Portuguese Government, Ireland and the Commission infer a power permitting customs authorities to determine with effect for

28 — Case 19/67 *Van der Vecht* [1967] ECR 345; Case 9/79 *Koschniske* [1979] ECR 2717, paragraph 6; and Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraph 19. The Court held in those cases that the need for a uniform interpretation of Community regulations means that a particular provision should not be considered in isolation but in cases of doubt should be interpreted and applied in the light of the other language versions.

Community law whether 'an act that could give rise to criminal court proceedings' exists.

43. That view must be countered by stating that although it is beyond dispute that the customs authorities are competent to recover ex post charges not collected in accordance with the relevant provisions, that authority alone does not permit any conclusions to be drawn concerning any ancillary authority arising from Community law permitting customs authorities to characterise conduct as criminally punishable.

44. Instead, it follows from the objectives and content of Regulation No 1697/79 that the significance of Articles 2(1) and 3(1) is limited to creating the authority to take action for post-clearance recovery. That rule of Community law sets out, namely, those situations in which customs duties can be recovered ex post from the debtor when the competent customs authorities establish that the original collection was incorrect or incomplete. [29] Admittedly, both provisions refer to the power of the competent authorities to establish whether the conditions for post-clearance recovery are satisfied; however, they do not permit any conclusions to be drawn on the basis of what information the competent authorities should reach that conclusion.

45. In principle, both proximity to the customs procedure and the experience and specialised knowledge which customs authorities generally possess point to an authority in investigative matters, as is common in certain Member States. [30] However, that authority to investigate may not be equated

29 — In principle, customs authorities are required to take action for post-clearance recovery, unless that is the provision on impossibility in Article 5(1) or the discretionary situation governed by Article 5(2) of Regulation No 1697/79 applies.

30 — Berr, C. and Trémeau, H., *Le droit douanier communautaire et national*, 7th edition, Paris, 2006, point out that whilst under French law determination of legislative infringements falls, in principle, within the competence of the officers of the '*police judiciaire*', for historical reasons, however, customs officers enjoy extensive investigatory powers in the sphere of customs administration (p. 509). Those officers have the powers, inter alia, to carry out investigations on behalf of and under the supervision of the Public Prosecutor's Office or a judge in charge of preliminary investigations. In order to coordinate the cooperation between the criminal justice and customs authorities, on 5 December 2002, by way of a regulation the '*service national de douane judiciaire*' was established under the leadership of the '*directeur général des douanes et droits indirects*'. The task of that authority is to carry out investigations and to gather evidence in relation to combating infringements of customs and tax law, trade-mark counterfeiting and piracy and related offences (p. 510 et seq.). Scheurmann-Kettner, P., *Abgabenordnung* (edited by Karl Koch and Rolf-Detlef Scholtz), 5th edition, Cologne, Berlin, Bonn and Munich, 1996, points to German law, according to which the tax authorities (Finanzamt, Hauptzollamt, Bundesamt für Finanzen und Familienkasse (Federal Office for Finance and Family Allowances)) are accorded similar investigatory powers to the Public Prosecutor's Office to uncover tax offences (paragraph 397, points 3 to 15). Weighty reasons justify such restriction on the investigatory monopoly enjoyed by the Public Prosecutor's Office. Investigation of fiscal crime cannot be separated from determining the bases of taxation, the tasks of the tax authorities within framework of the tax system and the exercise of fiscal supervision with regard to customs matters and consumption taxes. Information relating to tax offences is discovered mainly in applying the tax system, above all in the course of onsite inspections. The fact that the tax authorities also perform investigations into tax offences avoids duplication of administrative efforts and unnecessary prolongation of the procedure and takes advantage of their particular expertise (paragraph 386, point 3).

with the criminal law assessment of an act, [31] which in accordance with the constitutional traditions of the Member States is generally reserved to the criminal justice authorities. [32] A contrary interpretation would result in the customs and tax authorities, part of the executive branch of the State, being granted a quasi-judicial role which is supported neither by the constitutional traditions of the Member States nor by Community law.

46. Thus it follows, for example, from Article 135 EC and from a comparison between that provision of Community primary law and the provisions of the Treaty on European Union concerning police and judicial cooperation in criminal matters that, in accordance with the wishes of the Community legislature, customs and administration of justice should remain independent fields of sovereign activity. [33] The first sentence of Article 135 EC empowers the Council to take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission, with the second sentence clarifying the fact that such measures do not concern the application of national criminal law or the national administration of justice. [34] The separation, in principle, between customs and the criminal justice system, as provided for by Community law, constitutes, in my opinion, an indication that considerations of customs authorities concerning the criminal nature of an act cannot substitute for judicial determination. [35]

31 — Faucherand, P., 'La lutte contre la fraude douanière: un impératif pour l'Union européenne', *Revue du marché unique européen*, No 1 (1995), rightly makes reference to the delineation of competences between customs investigation authorities and the courts. The task of those investigatory authorities in the field of combating fraud consists of producing to the courts such evidence as should convince them of the existence of a legal infringement (p. 78). Commencement of criminal proceedings generally occurs at an advanced stage of the investigations (p. 81); Berr, C. and Trémeau, H., cited above in footnote 30, refer to the fundamental principle of French law concerning the intimate conviction of the criminal judge (p. 541). In accordance with that principle, responsibility for the legal appraisal of the evidence and facts presented to a judge rests with him alone (p. 547). According to Scheurmann-Kettner, P., cited above in footnote 30, paragraph 399, point 3 et seq., the legal position does not differ under German law. The tax authorities are required to intervene within the scope of their competence with regard to all punishable offences provided that adequate factual basis for doing so exists. If the investigations raise sufficient grounds for a public prosecution, the tax authorities apply to a judge for issuance of a criminal order, if the matter lends itself to such an approach, otherwise they pass the case-file to the Public Prosecutor's Office. On the prescribed application of judicial procedure with regard to fiscal crime in Germany and France, see further Bremer, H., *Das deutsche und französische Steuerstrafrecht und Verfahrensrecht im Vergleich*, Baden-Baden, 2003, pp. 210 and 227. Witte, P., *Zollkodex*, 3rd edition, Munich, 2002, Article 221, point 8, points to a similar division of authority in Austrian law since only those financial crimes which are pursued exclusively before a court or an appeal board are considered to be criminal acts.

32 — Sánchez, P.,'Conference of the Chief Justices of the Supreme Courts and Attorney-Generals of the Countries of the European Union (Lisbon, 18 to 21 May 1994), *Boletim de documentação e direito comparado*, Issues 59/60, 1994, p. 453, points to the fact that as regards the Spanish legal order investigatory powers may not be confused with judicial functions, since under Article 117(3) of the Spanish Constitution the latter are reserved to the judges.

33 — As a result of decisions taken in Amsterdam, the rules on cooperation in the areas of justice and home affairs under the Treaty of Maastricht (known as the third pillar) were in part transferred from the area of intergovernmental cooperation to the area of the EC. Article 135 EC on customs cooperation was newly inserted under its own title into the sphere of Community powers. On the contrary, police and judicial cooperation in criminal matters continues to belong to the area of intergovernmental cooperation. According to the second subparagraph of Article 29 EU and Article 30(1)(a) EU that cooperation also extends to customs authorities, to the extent that they are concerned with pursuit of criminal offences (see Voß, R., cited above in footnote 10, Article 135 EC, point 2 et seq.).

34 — Faucherand, P., cited above in footnote 31, p. 87, stresses the fact that in planning Community measures to improve cooperation between the administrations of the Member States in the area of combating smuggling care was taken to ensure that the activities of prosecuting authorities and criminal courts were not impeded.

35 — Advocate General Ruiz-Jarabo Colomer in his Opinion in *Commission* v *Council*, cited in footnote 21 above, point 78, points to the fact that 'administration of justice' within the meaning of Article 135 EC must be interpreted as including the competence to apply criminal law, a competence which undoubtedly lies with the judges who exercise criminal jurisdiction.

47. Advocate General Van Gerven evidently takes similar considerations into account when in his Opinion in *Meico-Fell*, first, he expressly indicates that it is a matter for the national court to determine on the basis of applicable national law whether there is 'an act that could give rise to criminal court proceedings'. [36] Those observations are subsequently supplemented by the conclusion that the legal concept at issue necessarily refers to acts to which sanctions are attached, which a court must determine. [37]

48. By way of a schematic and teleological interpretation, it must be concluded, therefore, that the reference made in Article 3 of Regulation No 1697/79 is intended not only to refer to the substance but also to the procedure of national criminal law.

(iii) Interpretation in the light of Community fundamental rights

49. That conclusion is confirmed on interpreting the provisions of Regulation No 1697/79 in the light of Community fundamental procedural rights, above all the right to fair legal process.

50. The Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. [38] For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') signed in Rome on 4 November 1950 has particular significance. [39]

51. In the course of the further development of the European integration process, that case-law has become embodied in Article 6(2) EU. According to that provision, the Union must respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common

36 — Opinion of Advocate General Van Gerven in *Meico-Fell*, cited in footnote 15 above, point 5.

37 — Ibid., point 8, although, as Advocate General Van Gerven states, the national court concerned does not necessarily have to be a criminal court.

38 — See Opinion 2/94 [1996] ECR I-1759, paragraph 33; Case 29/69 *Stauder* [1969] ECR 419, paragraph 7; Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *ECSC* [1957] ECR 39; and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14.

39 — See, for example, Case 4/73 *Nold* [1974] ECR 491; Case 44/79 *Hauer* [1979] ECR 3727, paragraph 15; Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; and Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 25.

to the Member States, as general principles of Community law.

52. In that connection, the Court has pointed out on many occasions that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules and that the Member States must therefore, as far as possible, apply those rules in accordance with those requirements. [40] From that finding, it must be concluded that Member States, in the same way as Community institutions, are bound directly by fundamental rights under Community law, if and to the extent that they act within the scope of the Treaties. [41] That condition is doubtless satisfied when, as in the present case, they have competence for the administrative implementation of customs law.

53. Moreover, the Court has held that where such national rules fall within the scope of Community law and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights whose observance the Court ensures. [42]

— Right to a fair legal process

54. In order to answer the first question, it is relevant to begin with the provisions of

40 — Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 37; Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case C-351/92 *Graff* [1994] ECR I-3361, paragraph 17; Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 42; Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19; and Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, paragraph 8.

41 — Moitinho de Almeida, J.C., 'Protección de los derechos fundamentales en la jurisprudencia del TJCE', *El Derecho comunitario europeo y su aplicación judicial* (edited by Gil Carlos Rodríguez Iglesias and Diego Liñan Nogueras), Madrid, 1993, p. 113; Brosius-Gersdorf, F., *Bindung der Mitgliedstaaten an die Gemeinschaftsgrundrechte — Die Grundrechtsbindung der Mitgliedstaaten nach der Rechtsprechung des EuGH, der Charta der Grundrechte der Europäischen Union und ihre Fortentwicklung*, Berlin, 2005, pp. 17 to 20; Jürgensen, T. and Schlünder, I., 'EG-Grundrechtsschutz gegenüber Maßnahmen der Mitgliedstaaten', *Archiv des öffentlichen Rechts*, No 2 (1996), p. 208 et seq.; Schütz, H.-J., Bruha, T. and König, D., cited above in footnote 10, pp. 70, 294 and 883, take the view that Member States are bound by Community fundamental rights if and to the extent that they act 'within the scope of the Treaties'. It is uncontested that such a principle applies in the implementation of Community law since the Member States, which generally have executory power, act in functional terms as 'Community authorities'; Herrero de la Fuente, A., *La Carta de derechos fundamentales de la Unión Europea — Una perspectiva pluridisciplinar*, Zamora, 2003, pp. 229, 230 and 235, indicates that Community fundamental rights can be invoked against both Community institutions and Member State institutions when they are applying rules of Community law.

42 — *Bostock*, cited in footnote 40 above, paragraph 16, and *ERT*, cited in footnote 40 above, paragraph 42.

Article 6(1) of the ECHR according to which, in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. That fundamental right has taken on a similar form in Article 47 of the Charter of Fundamental Rights of the European Union [43] according to which everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. From those fundamental rights, the Court has expressly developed a general principle of Community law according to which everyone has a right to fair legal process [44] which applies also in the area of criminal law. [45]

55. All Member States of the European Union possess a complex judicial organisation with numerous courts whose powers and areas of competence are strictly defined. The differing judicial systems within the European Union reflect the diverse legal traditions of the Member States. However, alongside a jurisdiction for civil and administrative matters, most Member State legal orders provide for a criminal jurisdiction which is characterised by a particular procedure for investigating and sanctioning criminal conduct. It is incumbent on that

43 — Charter of Fundamental Rights of the European Union proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1). The Charter of Fundamental Rights has neither been incorporated into the Treaties nor does Article 6(2) EU refer to it. First and foremost, the Charter constitutes a political declaration to which, inter alia, the European Commission and the European Parliament consider themselves bound. Although the expressly declared will of the Charter's authors not to give it legally binding effect cannot be ignored, I share the view of Advocate General Léger, however, that it would be a mistake to deprive it of all meaning (see the Opinion of Advocate General Léger in Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, points 73 to 86). Rather, it must be regarded as the specific expression of common European values. Thus, it is natural to have reference to it in the interpretation of Community law (see, for example, the references made to the Charter of Fundamental Rights in the Opinions of Advocates General Alber in Case C-340/99 *TNT Traco* [2001] ECR I-4109, point 94; Tizzano in Case C-173/99 *BECTU* [2001] ECR I-4881, points 26 to 28; Mischo in Joined Cases C-122/99 P and C-125/99 P *D and Sweden* v *Council* [2001] ECR I-4319, point 97; Jacobs in Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079, point 197; Geelhoed in Case C-413/99 *Baumbast and R* [2002] ECR I-7091, points 59 and 110; Ruiz-Jarabo Colomer in Case C-208/00 *Überseering* [2002] ECR I-9919, point 59. In the same vein, see also Poiares Maduro, M., 'The double constitutional life of the Charter of Fundamental Rights', *Unión Europea y derechos fundamentales en perspectiva constitucional*, Madrid, 2004, p. 306; Schmitz, T., 'Die Charta der Grundrechte der Europäischen Union als Konkretisierung der gemeinsamen europäischen Werte', *Die Europäische Union als Wertegemeinschaft*, Berlin, 2005, p. 85; and Beyer, U., Oehme, C. and Karmrodt, F., 'Der Einfluss der Europäischen Grundrechtecharta auf die Verfahrensgarantien im Unionsrecht', *Beiträge zum Transnationalen Wirtschaftsrecht*, No 34, November 2004, p. 14. More recently, the Charter of Fundamental Rights has been invoked by the European Court of Human Rights in order to interpret in a more modern light the articles of the ECHR which are over 50 years old (see, for example, *Goodwin v. the United Kingdom*, *Reports of Judgments and Decisions* 2002-VI, § 100). In *Unibet*, cited in footnote 23 above, paragraph 39, the Court of Justice of the European Communities first made reference to it in connection with the right to effective legal protection.

44 — *Krombach*, cited in footnote 39 above, paragraph 26; Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 20 et seq.; and Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 17.

45 — According to Haase, K., *Die Anforderungen an ein faires Gerichtsverfahren auf europäischer Ebene*, Berlin, 2006, p. 282, in contrast to the principle of fairness in Article 6 of the ECHR, which according to its wording covers only civil and criminal proceedings, the substantive scope of application of the Community fairness requirement, as a result of its characteristics as a general principle of Community law, applies from the outset to all types of proceedings. See Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9; Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 80; and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 53 et seq.

jurisdiction to realise the State's right to punish whilst at the same time protecting the rights of the accused. [46] In addition to particular expertise in the area of prosecution and individual legal protection, it ensures the judicial independence necessary to perform its tasks. [47]

56. In order to prevent the legal protection granted by the criminal jurisdiction from being circumvented by classifying prosecution measures as disciplinary, administrative or civil measures, [48] the European Court of Human Rights has held that the concept of 'criminal charge' within the meaning of Article 6(1) of the ECHR must be interpreted autonomously. [49] In that context, it is uncontested that such indeterminate legal concept contains both substantive and procedural components, inasmuch as the area protected by that fundamental right covers the whole criminal proceedings including appeal proceedings and sentencing. [50]

57. In my opinion, the same considerations must apply with regard to the interpretation of the legal concept of 'an act that can give rise to criminal court proceedings' in Article 3 of Regulation No 1697/79. Otherwise there is a risk that the procedural guarantees provided for by Community law based on Article 6(1) of the ECHR and Article 47 of the Charter of Fundamental Rights could be circumvented if a Member State were entitled to create an additional and competing jurisdiction. That conclusion is especially applicable as regards an allocation of power to the customs authorities, part of the executive branch of the State, which from the outset is in contradiction to the wording of Article 6(1) of the ECHR and Article 47 of the Charter of Fundamental Rights.

46 — Cunha Rodrigues, J.N., 'Discours de son Excellence le Procureur Général de la République, Conference of the Chief Justices of the Supreme Courts and Attorney-Generals of the Countries of the European Union', cited above in footnote 32, p. 19 et seq., refers to the exclusive competence of the courts in the area of criminal justice. Moreover, he refers to the difficulty of reconciling the need to protect society against crime with ensuring procedural guarantees. Bacigalupo, E., *Justicia penal y derechos fundamentales*, Madrid, 2002, p. 134, considers the objective of the criminal trial to be the conviction of the guilty and the protection of the innocent.

47 — De Figueiredo Dias, J., *Direito processual penal*, Coimbra, 2004, p. 303 et seq., considers the independence of the criminal jurisdiction to constitute an expression of the principle of the division of powers. He regards that division as justified also by reason of the increasing social function which criminal judges must fulfil. Bacigalupo, E., cited above in footnote 46, p. 14, recalls the process by which the first independent criminal courts in the Europe of the 18th and 19th centuries developed following the end of the absolutist period.

48 — See Ovey, C. and White, R., Jacobs and White, *The European Convention on Human Rights*, 3rd edition, Oxford, 2002, p. 141; Soyer, J.-C. and de Salvia, M., *La Convention européenne des droits de l'homme — Commentaire article par article* (edited by Decaux, E. and Imbert, P.-H.), 2nd edition, Paris, 1999, p. 254.

49 — See, for example, European Court of Human Rights, *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, § 81, and *Funke v. France*, judgment of 25 February 1993, Series A no. 256-A, § 44.

50 — See Ovey, C. and White, R., cited above in footnote 48, p. 143. In its judgment in *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, (1983) 5 ECHR 1, § 73, the European Court of Human Rights defines the concept of 'charge' as follows: '"Charge", for the purposes of Article 6 par. 1 (art. 6-1), may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence"'. Accordingly, the scope of the protection accorded by Article 6(1) of the ECHR covers the whole criminal proceedings including appeal proceedings and sentencing: 'As regards the end of the "time", in criminal matters the period governed by Article 6 par. 1 covers the whole of the proceedings in issue, including appeal proceedings' (§ 76).

— Principle of presumption of innocence

58. Furthermore, I consider it appropriate also with regard to the first question to refer to the principle enshrined in Article 6(2) of the ECHR according to which everyone charged with a criminal offence is to be presumed innocent until proved guilty according to law. Article 48 of the Charter of Fundamental Rights provides accordingly that everyone who has been charged is to be presumed innocent until proved guilty according to law. The principle of the presumption of innocence is recognised as an expression of the rule of law in all legal orders of European Union Member States.

59. The case-law of the European Court of Human Rights sheds light on the meaning of the principle of the presumption of innocence. It follows from that case-law that such presumption has different manifestations. However, for the purposes of the present case, the following relevant characteristics may be observed.

60. The principle of the presumption of innocence benefits only persons who are charged with a criminal offence. [51] It requires the State to treat the accused as if he had not committed a crime until such time as the State in the form of the prosecuting authorities has put forward sufficient evidence to convince an independent and impartial court of his guilt. As a rule, the public prosecutor must prove beyond all doubt the guilt of the accused. According to the view taken by the European Court of Human Rights, the burden of proof lies on the public prosecutor and any doubt must benefit the accused. [52]

61. Moreover, neither a court nor a public official may make any statement that the accused is guilty of an offence before he has been brought before a court and convicted. The presumption of innocence is infringed if by way of a remark of a public official concerning a person charged with an offence statements concerning that person's guilt are made without that guilt being proven in accordance with the law and without that person having the opportunity to avail

51 — *X v. Federal Republic of Germany*, no. 4483/70 — the action was dismissed as inadmissible.

52 — *Barberà, Messegué and Jabardo v. Spain*, judgment of 6 December 1988, Series A No 146 (1989), § 77.

himself of his rights of defence. [53] If public statements are made concerning matters connected to criminal proceedings, discretion should be exercised. [54]

62. Underlying that case-law is, first, the legal conviction that only criminal proceedings can result in a formal determination of guilt according to the criminal law and that, therefore, no other public institution may characterise a person as guilty. Second, it takes account of the fact that a public statement of the suspicion held by public authorities may have negative consequences for the individual's legal position. Logically, it aims to protect an accused person from being prejudged. [55]

63. In my view, a determination of the punishability of a debtor's action, if reached by the customs authorities within the context of post-clearance recovery prior to conviction by a court, runs the risk of prejudging the matter and of publicly branding the debtor. Whilst the debtor is free to contest a customs assessment issued by the authorities by way of administrative court proceedings and, thus, could defend himself against the indirect allegation of

53 — By way of its judgment in *Minelli v. Switzerland*, judgment of 25 March 1983, Series A No 62 (1983), § 38, the European Court of Human Rights held as regards the scope of the presumption of innocence that any ground of a judicial decision bringing a procedure to an end on account of the expiry of the limitation period infringes Article 6(2) of the ECHR if it gives the impression that the judge considers the accused to be guilty. At issue in that case was a procedural rule which required the accused to bear the costs if it was clear that he would be unsuccessful. The Court of Human Rights held that despite the cautious phraseology ('in all probability', 'very probably') the reasoning of the Swiss court contained appraisals which were incompatible with Article 6(2) of the ECHR. The judgment in *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A No 308 (1995), §§ 37 and 41, concerned statements relating to the allegation that Ribemont had aided and abetted an intentional homicide which were made by high-ranking police officers and the French Ministry of the Interior in the course of a press conference taking place in parallel with the criminal proceedings. The Court of Human Rights held those statements to be a clear declaration on the part of the public authorities as to Mr Ribemont's guilt which was apt to influence public opinion and to prejudge an assessment by the competent court. The judgment of 10 October 2000 *Daktaras v. Lithuania*, Individual complaint No 42095/98, § 41, concerned the remarks of a public prosecutor made in the course of an investigation from which it could be concluded that the guilt of the accused had already been proved. First, the Court of Human Rights recalled that the presumption of innocence could be infringed also by a public prosecutor who is required to take a decision on the closure of an investigation. Whilst the court considered the expression 'proved' to be unfortunate, having regard to the particular circumstances in which the expression was used it declined to recognise a violation of Article 6(2) of the ECHR. In its judgment of 28 April 2005 *A. L. v. Germany*, Individual complaint No 72758/01, § 31, the European Court of Human Rights made reference to its judgment in *Daktaras*, recalling 'that the presumption of innocence enshrined in Article 6(2) is one of the elements of a fair criminal trial required by Article 6(1). It will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty unless he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards that person as guilty'.

54 — The judgment of 26 March 2002 *Butkevičius v. Lithuania*, Individual complaint No 48297/99, §§ 51 to 54, concerned the media statements made by the Prosecutor General and the President of the Lithuanian Parliament following the arrest of the former Defence Minister Mr Butkevičius on suspicion of bribery. The European Court of Human Rights considered those statements apt to encourage the public — even before his final conviction — to believe that the accused was guilty. Accordingly, it held that Article 6(2) of the ECHR had been violated.

55 — Frowein, J., 'Zur Bedeutung der Unschuldsvermutung in Art. 6 Abs. 2 der Europäischen Menschenrechtskonvention', *Recht als Prozess und Gefüge: Festschrift für Hans Huber zum 80. Geburtstag*, Berne, 1981, pp. 554 to 556, discusses the decision of the Commission of Human Rights in connection with the complaint of Petra Krause against Switzerland in which she alleged that a television statement made by the Swiss Minister for Justice violated Article 6(2) of the ECHR. In that statement, Petra Krause, who was under arrest at that time, was described as having committed explosives offences. The Commission confirmed the applicability of Article 6(2) of the ECHR by reason of the fundamental principle contained in that provision that nobody may be described by the authorities as being guilty of criminal conduct without that being determined as such by a court. Referring to the observations of the Commission of Human Rights, the author remarks that the categorical expression of a suspicion can have considerable repercussions. In particular, they can influence court proceedings, if they result in a press campaign or other risks of the judges becoming influenced exist.

criminal conduct, it is unreasonable, however, to expect the person concerned to have recourse to a means of legal protection other than that guaranteed by the law of criminal procedure. Rather, it is incumbent on a Member State to assume the duty of care which the ECHR [56] and Community law impose. A power of interpretation in favour of the customs authorities, as argued for by the Portuguese Government and the Commission, cannot be regarded as compatible, therefore, with the case-law of the European Court of Human Rights on the principle of the presumption of innocence in *Minelli*, *Ribemont*, *Daktaras* and *Butkevičius*. [57] Nor can the restriction on the fundamental rights of the debtor thereby arising be justified by the Community's interest in ex post recovery of unpaid duties possibly resulting from an infringement of Community law.

(c) Conclusion

64. From all of this, it follows that the legal concept of 'an act that could give rise to criminal court proceedings' must be regarded also in the light of Community fundamental rights as referring to the law of criminal procedure of the Member States. As a result, only final conviction by a criminal court of a Member State is capable of delivering an interpretation with effects for the relevant Community law on post-clearance recovery.

2. Second question

65. From my observations on the first question, it follows that the decision of a public prosecutor cannot substitute for a final judicial determination. Further, it must be noted, first, that in many Member States of the European Union in organisational and functional terms the Public Prosecutor's Office either is attached to the executive branch of the State or at the very least is

56 — Haase, K., cited above in footnote 45, p. 92, recalls the fact that in the event of media publications which are prejudicial the European Court of Human Rights has held that under Article 6(1) of the ECHR Convention States have a certain duty of protection. In accordance with that duty, States must take positive measures to ensure that the press when reporting on pending criminal proceedings keeps within the required boundaries of objectivity.

57 — See footnotes 53 and 54.

regarded as being closely connected [58] and, second, that procedural law grants the criminal judge an authority to take decisions in the last resort, in the sense that as soon as a judgment becomes final the criminal proceedings are considered to be closed. Legal proof of guilt is furnished thus only on final judgment. [59] Moreover, that conclusion coincides with the view taken by the Portuguese Government according to which the only possibility to be certain that 'an act that could give rise to criminal court proceedings' has been committed in fact is to await the conclusion of the criminal proceedings. [60] Logically, in the interests of legal certainty, only that sovereign act and not the laying of charges by the Public Prosecutor's Office may be taken into account.

58 — In several Member State legal orders, the Public Prosecutor's Office alone is responsible for pursuing criminal proceedings and accordingly has the exclusive right to bring a prosecution. Its duty is to investigate and prosecute the act concerned before a court. In so doing, it acts either according to its own discretion (principle of prosecution where it is opportune) or is required to do so by law (principle of prosecution according to the law). The main problem in connection with the Public Prosecutor's Office is whether such conditions prevail as permit the performance of its tasks free from political interference which might impinge on its duty of impartiality. In that context, it is considered problematic that the Public Prosecutor's Office is often closely connected or even subordinated to the executive (on that point, see 'Conference of the Chief Justices of the Supreme Courts and Attorney-Generals of the Countries of the European Union', cited above in footnote 32, p. 484 et seq.). On the autonomy and administrative structure of the Portuguese 'Ministério Público', see Pereira, R., 'O domínio do inquérito pelo Ministério Público', *Jornadas de direito processual penal e direitos fundamentais (Organizadas pela Faculdade de Direito da Universidade de Lisboa e pelo Conselho Distrital de Lisboa da Ordem dos Advogados, com a colaboração do Goethe Institut)*, Coimbra, 2004, pp. 128 to 130. De Figueiredo Dias, J., cited above in footnote 47, pp. 362 to 368, takes the view that in the absence of an authority to pronounce judgment the Portuguese 'Ministério Público' cannot be considered part of the judiciary. According to the Portuguese Constitution, the authority to pronounce judgment is reserved to the courts alone. By reason of its relative autonomy, however, the 'Ministério Público' constitutes a link between the executive and judiciary.

59 — See also Meyer-Ladewig, J., *Konvention zum Schutz der Menschenrechte und Grundfreiheiten — Handkommentar*, Baden-Baden, 2003, Article 6, point 85, according to whom legal proof of guilt is furnished by way of the final judgment of a court.

60 — See paragraph 55 et seq. of the written observations of the Portuguese Government.

3. Third question

66. The principle of the presumption of innocence as derived from Article 6(2) of the ECHR and the case-law of the European Court of Human Rights demands that the public prosecutor proves beyond doubt the guilt of the accused. [61] The principle of *in dubio pro reo* [62] derived according to the majority of commentators also from that provision applies in the context of judicial deliberations. It constitutes, thus, a particular expression of the presumption of innocence.

61 — *Barberà, Messegué and Jabardo v. Spain*, cited in footnote 52 above, § 77.

62 — Bacigalupo, E., cited above in footnote 46, p. 145, refers to the fact that according to the theory of fundamental rights and modern procedural law the principle of *in dubio pro reo* is regarded as an essential component of the fundamental right of respect for the presumption of innocence. In those cases where the presumption of innocence cannot be derived directly from national law, the legal literature makes reference to Article 6(2) of the ECHR. In that connection, agreement exists that such provision also requires respect for the principle of *in dubio pro reo*. In a similar vein, see also Marques da Silva, G., *Curso de processo penal*, Volume 2, Lisbon, 1993, p. 92 et seq., who derives the principle of *in dubio pro reo* from the presumption of innocence. Walter, T., 'Die Beweislast im Strafprozess', *Juristenzeitung*, 2006, p. 344, on the contrary, derives the principle of *in dubio pro reo* from the principle of the rule of law, justifying that conclusion by reference to the differing scope of protection afforded by the benefit of the doubt and the presumption of innocence. In some respects, the latter goes further because it applies even in cases in which at no time the court had the slightest of doubts with the result that prior to judgment the accused is considered to be innocent. On the other hand, the benefit of the doubt goes beyond the presumption of innocence because it relates also to circumstances which are relevant only in procedural law terms, for example, the date of the act as a precondition for applying limitation periods.

67. However, for the criminal judge, unlike the Public Prosecutor's Office, that principle is not an evidential rule, but a decision-making rule. It does not tell the judge when to have doubts, but simply how he must decide when he is in doubt. If in criminal proceedings it cannot be determined with the necessary certainty whether the accused has committed a particular offence, the presumption of innocence must operate in his favour. [63] The law of criminal procedure takes that fact into account in requiring in principle that the judge, in convicting the accused, is sure beyond all reasonable doubt of the latter's guilt, with the precise requirements concerning judicial certainty being determined in accordance with the domestic law of criminal procedure and, thus, capable of varying from one Member State to another. [64] The principle of *in dubio pro reo* affords the accused the right to be treated as if he has been proven innocent. [65] Accordingly, from the perspective of criminal justice and the protection of fundamental rights, no qualitative difference exists between acquittal for lack of evidence and acquittal resulting from a clear determination of the accused's innocence. [66]

68. The reference to the national law of criminal procedure in Article 3 of Regulation No 1697/79 has as regards those procedural principles a binding effect on the Community with the consequence that, where application of the principle of *in dubio pro reo* is concerned, as between the national authorities charged with the implementation of the regulation and the debtor that principle must also apply. As a result, a debtor who is acquitted by a criminal court for lack of evidence may not in legal terms be treated less favourably than a person whose innocence is clearly established.

4. Fourth question

69. By its fourth question, the referring court asks, first, what consequences result from the fact that the Public Prosecutor's

63 — De Figueiredo Dias, J., cited above in footnote 47, p. 213; Tome Garcia, J.A., *Derecho procesal penal* (edited by Andrés de la Oliva Santos and Others), Madrid, 1993, p. 453.

64 — Judgment of 27 September 1990, *Windisch v. Austria*, Individual complaint No 12489/86, § 25.

65 — Walter, T., cited above in footnote 62, p. 348 et seq., indicates that the principle of *in dubio pro reo* requires in general terms that decisions are taken in favour of the accused. The nature of such a decision depends on the object of the relevant doubt. As regards the procedural conditions and bars applying to investigatory and first instance proceedings, such favourable decision consists always in the discontinuance of the proceedings.

66 — De Figueiredo Dias, J., cited above in footnote 47, indicates that under the law of criminal procedure acquittal for lack of evidence does not constitute a decision to the disadvantage of the accused, where the prosecution is brought by the Public Prosecutor's Office (p. 212). According to the author, the existence of a reasonable doubt relating to the cogency of the evidence produced must result in the same legal consequences as in a case of a clear determination of the accused's innocence (p. 215).

Office does not lay charges against the debtor because it takes the view that there is no evidence of acts that could give rise to criminal court proceedings. Second, it wishes to know whether such decision precludes an action to recover duties uncollected.

70. As regards that question, I wish to point out that it is clear from the settled case-law of the Court that the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them. [67]

71. In the context of that cooperation, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling. [68]

72. Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [69]

73. The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions. [70]

74. Inasmuch as the question referred concerns the possible legal effects for the post-clearance recovery procedure which could

67 — See, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20.

68 — *Schneider*, cited in footnote 67 above, paragraph 21 and the case-law cited therein.

69 — See, inter alia, Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 18; Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 29; Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 19; and *Schneider*, cited in footnote 67 above, paragraph 22. See most recently the Opinion of Advocate General Tizzano in Case C-165/03 *Längst* [2005] ECR I-5637, point 45, and the Court's judgment in the same case, paragraphs 30 to 35.

70 — *Schneider*, cited in footnote 67 above, paragraph 23.

arise from a decision of the Public Prosecutor's Office to waive the laying of charges, in my view, the question must be considered unnecessary for a decision in the main proceedings since it bears no relation to the facts. It is clear, both from the order for reference and from the written observations submitted to the Court by the Portuguese Government and ZF Zefeser that the Public Prosecutor's Office following its criminal investigations on suspicion of smuggling, falsification of documents, fraud and criminal conspiracy laid charges against the members of ZF Zefeser before a national court for civil and criminal matters, the Tribunal Judicial de Setúbal, which acquitted them by judgment of 10 January 2001. Accordingly, at no time did the question of the Public Prosecutor's Office discontinuing criminal proceedings or not laying charges arise.

75. It follows from those observations that the fourth question, having regard to its purely hypothetical character, is irrelevant for a decision in the main proceedings pending before the national court and that, accordingly, the Court is not required to reply.

5. Fifth question

76. On the contrary, the fifth question has a real connection to the main proceedings in so far as the submissions of ZF Zefeser indicate that the Tribunal Judicial de Setúbal determined of its own motion that the criminal proceedings concerning the offences of smuggling and falsification of documents — with which the members of that undertaking had been charged — were time-barred.

77. As a result of the reference to national criminal law in Article 3 of Regulation No 1697/79, it follows necessarily that the time-bars applying to criminal proceedings must be determined also in accordance with national law. As I have already indicated in the context of the first question, customs authorities when applying Community law are bound by the notion of efficiency within the meaning of the principle of cooperation according to the first paragraph of Article 10 EC. That principle correlates to the obligation under the second paragraph of Article 10 EC to abstain from any measures which could jeopardise the attainment of the objectives of the Treaty.

78. The intention of the Community legislature expressed in Article 3 of Regulation No 1697/79 that Community law should reflect national criminal law would be hindered if, notwithstanding the expiry of the general three-year limitation period, on the basis of alleged offences, the prosecution of which is time-barred by way of judicial determination, the customs authorities were entitled to bring administrative court proceedings to recover duties not received.

79. Closure of proceedings because a matter has become time-barred is not based on an assessment of the criminal nature of particular conduct pursuant to substantive criminal law but results from the existence of a procedural bar. Time-limits on prosecution reflect the legislature's will in the interests of legal certainty only to pursue offences within a specific period.

80. Logically, that legislative will must be respected also in the area of customs law. If according to the assessment of the competent criminal court an act that could give rise to criminal court proceedings has become time-barred, an administrative court which is required to determine the legality of a customs decision is precluded for the purposes of customs law from assuming the existence of 'an act that could give rise to criminal court proceedings' within the meaning of Article 3 of Regulation No 1697/79.

81. Accordingly, the judicial closure of criminal proceedings which have become time-barred precludes the bringing of proceedings to recover duties not received to the extent that those proceedings are brought following the expiry of the general three-year limitation period in Article 3 of Regulation No 1697/79. On the contrary, if the period within which criminal proceedings become time-barred is shorter than the general three-year limitation period, proceedings may be brought accordingly.

82. In the present case, it is clear from the file that it has been judicially determined that the criminal proceedings are time-barred and the general three-year time-limit has expired. Recovery by way of court proceedings of the charges not collected is, thus, excluded.

VII — Conclusion

83. On the basis of the foregoing observations, I propose that the Court should reply to the questions referred by the Supremo Tribunal Administrativo as follows:

(1) Within the framework of post-clearance recovery in determining whether 'acts that are capable of giving rise to criminal court proceedings' within the meaning

of Article 3 of Council Regulation (EEC) No 1697/79 of 24 July 1979 exist the customs authorities must apply the characterisation made by the competent criminal court.

(2) The conditions of Article 3 of Regulation No 1697/79 shall be regarded as satisfied only when final conviction of the debtor has been established in the relevant criminal proceedings.

(3) No 'act that is capable of giving rise to criminal court proceedings' within the meaning of Article 3 of Regulation No 1697/79 is to be taken to exist if the court has acquitted the debtor in accordance with the principle of *in dubio pro reo.*

(4) The Court shall not be required to answer the fourth question on account of its hypothetical character.

(5) Judicial closure of criminal proceedings because they have become time-barred must result in the situation that proceedings for recovery of duties not collected may not be brought following expiry of the general three-year limitation period in Article 3 of Regulation No 1697/79, inasmuch as the ex post recovery is justified by the fact that the debtor committed an act, which has been judicially determined to be time-barred pursuant to criminal law. If the period within which criminal proceedings become time-barred is shorter than the general three-year limitation period, proceedings may be brought to recover the duties not collected.