regulation, that action to recover charges must be taken by the Benelux country in which the document was issued, even if it is found that an irregularity was committed in the course of Community transit in another Benelux country.

Koopmans Bahlmann

Pescatore O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 May 1984.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the Fourth Chamber

OPINION OF MR ADVOCATE GENERAL LENZ DELIVERED ON 28 MARCH 1984 [1]

Mr President,
Members of the Court,

The reference for a preliminary ruling on which I shall deliver my Opinion today concerns the relationship between the Benelux and Community transit rules. The facts of the case may be summarized as follows:

A — At the end of 1976 and the beginning of 1977 the plaintiff in the main proceedings, Pakvries BV, customs agents established in Rotterdam, declared to the Collector of Customs and Excise at Rotterdam, in accordance with the external Community transit procedure then laid down in Regulation (EEC) No 542/69 of the Council (Official Journal, English Special Edition 1969 (I), p. 125), six consignments of frozen boneless beef from Argentinia which were to be transported by road from Rotterdam, the office of departure, to Milan, the office of destination.

The Netherlands Fiscal Intelligence and Investigation Branch later discovered that the goods had never been produced at the office of destination but had been put into free circulation irregularly in Belgium. On 19 September 1979 the

1 — Translated from the German.

Collector thereupon demanded *inter alia* that the plaintiff pay the agricultural levies due, totalling HFL 695 945.30.

In its appeal against that demand for payment the plaintiff does not dispute the facts. It contends, however, that the Collector has no authority to demand payment of the agricultural levies. According to Article 36 (1) of Regulation No 542/69, where an offence or irregularity is committed in the course of a Community transit operation, the duties or other charges which may be chargeable are to be recovered by the Member State in which the offence was committed, in accordance with the provisions laid down by law, regulation or administrative action in that State. Since the offence took place in Belgium, the Belgian authorities are therefore authorized to recover the levies.

The defendant, the Netherlands Minister for Agriculture and Fisheries, contends, on the other hand, that the Netherlands are authorized to recover the levies. It bases its contention on Article 59 of Regulation No 542/69, which is worded as follows:

"In derogation from this regulation, Belgium, Luxembourg and the Netherlands may apply to the Community transit documents the agreements concluded or to be concluded between them with a view to reducing or abolishing frontier formalities at the Belgo-Luxembourg and Belgo-Netherlands frontiers".

In the Minister's view, the Supplementary Protocol containing special provisions on taxation [1], annexed to the Benelux Convention of 29 April 1969 on cooperation in administrative and criminal matters in the context of the arrangements for the attainment of the aims of the Benelux Economic Union [2], must be regarded as an agreement within the meaning of that provisions.

He considers that Article 5 of the Supplementary Protocol, containing special rules for the recovery of duties in the event of a document being issued for use in more than one Benelux country, is applicable in this case. According to Article 5 (2), the levies are to be recovered by the Netherlands, that being the country in which the transit documents were issued.

By judgment of 20 May 1983 the College van Beroep voor het Bedrijfsleven [administrative court of last instance in matters of trade and industry] stayed the proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

"Must Article 59 of Regulation (EEC) No 542/69, as worded and in force before 1 July 1977, be interpreted as meaning that the Netherlands may apply to a Community transit document a Benelux agreement which provides, in derogation from Article 36 (1) of that regulation, that action to recover charges must be taken by the Benelux country in which the document was issued, even if it is found that an irregularity was committed in the course of Community transit in another Benelux country"?

1 — Aanvullend Protocol houdende bijzondere bepalingen op het stuk van de belastingen.

2 — Benelux Overeenkomst inzake de administrative en strafrechtelijke samenwerking op het gebied van de regelingen die verband houden met de verwezenlijking van de doelstellingen van de Benelux Economische Unie.

B — My views on that question are as follows:

The provision in question, Article 59, contains a *proviso* for the benefit of Belgium, Luxembourg and the Netherlands. It allows the Benelux countries to derogate from Regulation No 542/69 by applying to the Community transit documents the agreements concluded or to be concluded between them with a view to reducing or abolishing formalities at their frontiers. The Netherlands Government and the Commission take the view that the Benelux Convention, to which the Supplementary Protocol is annexed, must be regarded and applied as an agreement within the meaning of Article 59. The plaintiff, on the other hand, takes the view that only those Benelux provisions which in the strict sense contribute to the reduction of formalities at intra-Benelux frontiers are exempt from the application of the Community transit rules and that the rules conferring the authority to deal with irregularities are not part of them.

1. The plaintiff is right in arguing that Article 5 of the Supplementary Protocol, viewed in isolation, does not directly contribute to the abolition of frontier formalities. The object of that provision is rather to ensure that, in the event of the irregularities which may occur as a result of the abolition of frontier formalities, levies and charges are recovered.

According to Article 36 of Regulation No 542/69, the Member State in which the offences were committed is in principle authorized to recover such charges. Article 5 (2) of the Supplementary Protocol provides, however, that such charges are to be recovered by the country in which the transit document was originally issued or validated.

Such rules do not in the strict sense directly contribute to the reduction of frontier formalities. However, contrary to the view taken by the plaintiff in the main proceedings, that does not mean that they do not, as a *necessary component* of agreements having such a purpose, come within the proviso contained in Article 59. Such rules, derogating from Article 36 of Regulation No 542/69, are in any event to be regarded as a necessary component of an agreement within the meaning of Article 59 of that regulation if the *interrelation* between the abolition of obstacles at frontiers and the monitoring of compliance with the transit rules or the rules governing the consequences of a failure to comply with them requires such a derogation.

As the Netherlands Government and the Commission also point out, there are a number of reasons for accepting that there is an interrelation between the reduction of frontier fromalities within the framework of a transit procedure and the necessary monitoring of the use to which goods are put. As is clear from the preamble to the abovementioned regulation on Community transit, its primary aim is to facilitate transport within the Community and in particular to simplify formalities at internal frontiers. Like the Benelux provisions, the regulation contains rules, in Article 36, governing the consequences of any infringement of the transit rules.

Article 36 takes account of the aim of the Community transit procedure to have goods cleared near the place where they

will be used or, if this cannot be established, to retrace it as far as possible by means of the frontier documents. Another, no less important, reason for the rules conferring authority contained in Article 36 is that, in the present state of Community integration, a Member State is not authorized to recover charges due to another Member State.

The situation is different, however, within the customs union established by the Convention of 29 April 1969 on the unification of the Benelux customs area. That union is characterized *inter alia* by the fact that there are no controls at the frontiers between the three Benelux countries. The Benelux Convention on cooperation in administrative and criminal matters in the context of the arrangements for the attainment of the aims of the Benelux Economic Union and the Supplementary Protocol thereto govern cooperation in administrative and criminal matters between the Benelux countries. Article 5 of the Supplementary Protocol provides that a Community customs document valid in more than one Member State is to be treated as a Benelux document. To *simplify administration* Article 5 provides that, in the event of an offence or irregularity occurring in the course of a Benelux transit operation, the duties, excise and other charges are to be recovered only by the country in which the document was issued or validated, even if they are due to another Benelux country.

Since it is more difficult, owing to the absence of frontier controls, to retrace the precise route which goods have taken, such a rule appears indispensable. In the first place it prevents conflicts as to which Benelux country is competent to recover the charges owed. In the second place, it eliminates the risk of artificial operations created by the fact that traders could obtain an advantage by paying charges in the Benelux country with the lowest rates. Thirdly, any possibility of the Benelux exporting country having authority is excluded.

2. According to Article 233 of the EEC Treaty, the Treaty does not preclude the existence or completion of an economic and customs union between the Benelux countries to the extent to which the objectives of the union are not attained by application of the Treaty. That provision is therefore intended to make it possible under Community law for Benelux economic integration, which, compared with the EEC Treaty, is more intensive, to be continued and extended. Furthermore, Article 19 (1) of the EEC Treaty recognizes the territory of the Benelux countries as a single customs area for the purposes of establishing the Common Customs Tariff.

Secondary Community law also takes account of the Benelux Customs Union. Article 3 of the Community regulation provides that each Member State may provide for the application of a national procedure instead of the external or internal Community transit procedure where the goods are carried within its territory. For the purposes of that provision, the territory of the Benelux Economic Union is to be treated as the territory of one Member State as far as the movement of goods *within* the Benelux territory is concerned.

Finally, the economic unity of the Benelux countries is also recognized in Article 59 of the regulation, since it allows Benelux agreements on the reduction or abolition of frontier formalities to be applied to the Community transit documents *irrespective of the destination of the goods.*

3. The abolition of frontier formalities can be effective only if provision is also made for supervising compliance with the transit procedure. It is therefore logical that the Benelux countries should also be able under Article 59 of the Community regulation to lay down rules determining which Benelux country is authorized to recover the charges owed in the event of an irregularity. This is particularly true since it is undeniable that the rule that the place of importation is to be the place where charges are covered helps to simplify administration.

Finally, only such an interpretation of Article 59 is consistent with Article 233 of the Treaty, which is based on the principle that Community law prevails over Benelux law only in so far as Benelux law does not seek to establish a closer union between the Benelux countries.

4. The other question raised by the plaintiff in the main proceedings, namely whether the court making the reference for a preliminary ruling has jurisdiction to decide on the legality of the recovery of the charges in question and, if so, which law must then be applied, is a question of national or Benelux law, which the Court is not competent to answer. It does not relieve the Court of its obligation to answer the question of Community law referred to it.

C — In my opinion, the question submitted should therefore be answered as follows:

Article 59 of Regulation (EEC) No 542/69 of the Council of 18 March 1969 on Community transit must be interpreted as meaning that the Netherlands may apply to a Community transit document a provision of a Benelux agreement which, in derogation from Article 36 (1) of that regulation, provides that the charges are to be recovered in the Benelux country in which the transit document was issued, even if it is found that an irregularity was committed in the course of Community transit in another Benelux country.