The proportional assessment of costs according to the distance covered outside and inside the Community required under Article 15(2)(a) of Regulation No 1224/80 when the goods are carried 'by the same means of transport' is precluded in cases where several means of transport are used involving the application of different schedules of freight rates. Since container transport may be effected in different ways and the cost varies depending on the way chosen, it cannot be regarded as a 'means of transport' within the meaning of Article 15(2)(a) of the regulation.

REPORT FOR THE HEARING
delivered in Case C-17/89 *

I — Facts and procedure

Olivetti purchased calculators for delivery 'fob Hong Kong'. It then agreed with a German forwarding agent a single freight rate (DM 5 583.03) for transport between Hong Kong and Frankfurt. The goods, packed in containers, were transported by sea to Hamburg and from there overland to Frankfurt.

In its declaration relating to customs value, Olivetti added to the price actually paid for the goods (the 'transaction value') the cost of transport and of insurance to the place of introduction of the goods into the customs territory of the Community, in accordance with Articles 3 and 8(1)(e) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (Official Journal 1980, L 134, p. 1). On the basis of the schedule of shipping rates of the Evergreen Container Line, it calculated that the cost of transport was DM 3 624.32.

By a decision of 30 May 1984, and after an inspection had been carried out at Olivetti, the Hauptzollamt (Principal Customs Office) requested payment of additional customs duty. It recalculated the cost of transport in accordance with Article 15(2)(a) of Regulation No 1224/80, which provides that:

'Where goods are carried by the same means of transport to a point beyond the place of introduction into the customs territory of the Community, transport costs shall be assessed in proportion to the distance covered outside and inside the customs territory of the Community, unless evidence is produced to the customs authorities to show the costs that would have been incurred under a general compulsory schedule of freight rates for the carriage of the goods to the place of introduction into the customs territory of the Community.'

The total freight charges paid by Olivetti for the journey were assessed in proportion

* Language of the case: German.

to the distance covered outside and inside the Community (18 305 km and 510 km respectively). Thus the distance covered between Hamburg and Frankfurt was 2.70% of the full distance covered. A weighting of 2 was applied to take account of the higher cost of transport within the Community because the goods were carried as a part load; that gave a proportion of 5.40% of the freight charges incurred inside the Community and 94.60% (equivalent to DM 5 281.55) incurred outside. Since that sum was DM 1 657.23 more than the amount declared, it gave rise to a supplementary duty of DM 220.40.

Olivetti challenged that decision before the Finanzgericht (Finance Court) on the ground that Article 15(2)(a) of Regulation No 1224/80, which provides for the proportional assessment of transport costs, is applicable only when the goods are carried by 'the same means of transport' to the point beyond the place of introduction into the Community. In the present case, the goods arrived in Hamburg by sea and then continued overland. It was therefore necessary to have recourse to the schedule of shipping rates usually applied. The Finanzgericht found in favour of Olivetti, concluding that, since the goods were obviously taken out of the container in Hamburg, it was not possible to speak of uninterrupted transport by container.

The Hauptzollamt appealed on a point of law to the Bundesfinanzhof (Federal Finance Court) claiming that the Finanzgericht had infringed procedural rules. According to the Hauptzollamt, it was not proven that the goods were unloaded in Hamburg. The calculators remained in the same container for the entire journey from Hong Kong to Frankfurt. It also claimed that the Finanzgericht incorrectly interpreted the term 'means of transport' appearing in Article 15(2) of Regulation No 1224/80 and that transport by container must be regarded as such a 'means of transport'.

Olivetti replied that carriage by container did not constitute a 'means of transport'; the question whether or not the goods were unloaded in Hamburg was therefore immaterial.

In the view of the Bundesfinanzhof, in order to calculate the cost of transport, the sum actually paid by Olivetti for the journey between Hong Kong and Frankfurt should be taken as the starting point and the costs relating to the journey within the Community should be deducted from it. The entire question concerned the criteria to be applied in making that deduction.

The Bundesfinanzhof took the view that Article 15(1) of Regulation No 1224/80, which states that the customs value does not include the cost of transport after importation into the customs territory of the Community provided that such cost is distinguished from the price paid for the goods, was not applicable because it covered only cases in which the price paid included the cost of transport (the cif price). However, it tended towards the view that Article 15(2) was applicable, in principle, to cases in which the cost of transport was added to the invoiced price (and to which Article 15(1) was therefore not applicable).

The question then arose whether carriage by container is a 'means of transport' within the meaning of Article 15(2) (even assuming that the goods were transported in the same container, without interruption, from Hong Kong to Frankfurt). The Bundesfinanzhof

considers that that term relates to the medium (sea, air, etc.) in which the goods were transported. Consequently, even if a container must be regarded as a way of transporting goods, it was not to be regarded as a particular means of transport. Moreover, it would be illogical to allocate the cost of transport proportionally when goods were transported in the same container by different means of transport whose costs differed considerably.

If Article 15(2) was therefore not directly applicable to the present case, it was necessary to find other criteria for calculating the amount to be added to the invoiced price pursuant to Article 8(1)(e). In that regard, the Bundesfinanzhof put forward three possibilities: firstly, the application by analogy of Article 15(2), which corresponds to the method used by the Hauptzollamt and consists in assessing transport costs in proportion to the distance covered outside and inside the territory of the Community and in applying a weighting to take account of the different costs of the two means of transport concerned. The second possibility is the one advocated by Olivetti: in the absence of a general compulsory schedule of freight rates, reference could be made to a schedule of rates which reflects the prices generally charged for the journey. Finally, the Bundesfinanzhof raises the possibility of deducting from the price paid by Olivetti the costs incurred for the journey from Hamburg to Frankfurt under the applicable German schedule of freight rates. However, the Bundesfinanzhof rejects that possibility on the ground that it would lead to a distortion of the costs relating to the journey outside the Community, because the cost per unit of distance is in general inversely proportional to the distance covered.

By an order of 14 December 1988, which was received at the Court Registry on 23 January 1989, the Bundesfinanzhof referred the following questions to the Court for a preliminary ruling:

'According to what criteria are transport costs which, under Article 8(1)(e)(i) of Council Regulation (EEC) No 1224/80, are to be added to the price actually paid or payable for goods within the meaning of Article 3 to be determined if under fob terms of delivery an importer has paid an all-inclusive price for transport of the goods beyond the place of introduction into the Community to a point inside the Community? If the goods are imported in a container, is it material whether or not the goods were carried in the same container during the entire journey?'

II — Procedure before the Court

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 24 April 1989 by Deutsche Olivetti GmbH, represented by Dirk Krüger, Rechtsanwalt, and on 21 April 1989, by the Commission of the European Communities, represented by its Legal Adviser, Jörn Sack, assisted by Jean Imbach, avocat, of Strasbourg.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III — Written observations submitted to the Court

Concerning the transport by container

Olivetti and the Commission agree that carriage by container is not a 'means of transport' within the meaning of Article 15(2)(a) of Regulation No 1224/80 and that, consequently, that provision does not apply to the present case.

The Commission observes that application of Article 15(2)(a), which is based on the principle that the same schedule of rates apply to the entire distance covered, would lead to very arbitrary results in view of the enormous differences according to whether a container is transported by sea or by air.

According to Olivetti, nor should container transport be deemed to be a mode of transport, thereby allowing Article 15(2)(a) to be applied by an analogy; that would give rise to inaccuracies.

(1) *The criteria to be used for calculating the cost of transport*

Olivetti makes the preliminary observation that the objective of Regulation No 1224/80 is to introduce a fair, uniform, and neutral system of customs valuation. To that end, Article 2(4)(g) provides that no customs value is to be based on arbitrary or fictitious values; to the contrary, under Article 8(2), any additions to the price actually paid, such as the cost of transport, must be made only on the basis of objective and quantifiable data. The customs authority has therefore no right either to assess the value of the goods itself or to require the declarant to declare values assessed in that way.

Olivetti claims that its customs declaration was in fact based on objective and quantifiable data. It paid USD 126/m³ for the journey between Hong Kong and Frankfurt and declared an amount of USD 85/m³ in respect of shipping charges on the basis of a letter supplied by the forwarding agent appointed as carrier. It therefore takes the view that, since it made an accurate declaration of the cost of transport, the Hauptzollamt ought not to have made its own calculation. If it doubted the amount declared by Olivetti, the Hauptzollamt could have verified it with the forwarding agent, pursuant to Article 10 of Regulation No 1224/80.

In any event, the method adopted, and in particular the weighting applied by the Hauptzollamt, involved, according to Olivetti, the use of arbitrary or fictitious elements of evaluation, which, under the provisions of the regulation, are unacceptable. Since the weightings are negotiated between the customs office and the declarant, the customs values could be different in similar cases.

Olivetti therefore proposes that the first question should be answered in the following way:

'If the cost of transport has been calculated as a single all-inclusive rate and importation

was not made using the same means of transport, the transport costs which were actually incurred to the place of introduction into the Community must, pursuant to the provisions of Article 3 in conjunction with Article 8 of Regulation No 1224/80 on the valuation of goods for customs purposes, be added to the price of the goods when determining their customs value.

Article 15(2)(a) of Regulation No 1224/80 is applicable only where the imported goods have been carried by the same means of transport to a point beyond the place of introduction into the Community.'

The observations of the Commission in this connection are based on Article 15(1) of Regulation No 1224/80, which provides that the customs value of imported goods does not include the cost of transport after importation into the customs territory of the Community provided that such cost is distinguished from the transaction value of the goods. However, that provision, which is not applicable only to sales on cif terms, as the Bundesfinanzhof believes, is not of great assistance in settling the present case.

Since Article 15(2)(a) is not applicable, recourse must be had to Article 2(3) of Regulation No 1224/80, which provides that where the customs value cannot be determined under Articles 3 to 7, it must be determined using reasonable means consistent with the principles and general provisions of Article VII of the General Agreement on Tariffs and Trade and the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (see Official Journal L 71, 17.3.1980, p. 1).

The Commission concedes that Article VII strictly concerns only the determination of the transaction value, but considers that where there is a gap in the law it is also applicable to other elements of the customs value. The objective of both the Agreement and the regulation is to determine the customs value on the basis of real costs and not fictitious values.

For that reason, the Commission considers that the sum declared by Olivetti was not reasonable within the meaning of Article 2(3). It claims that that sum was based on a schedule of rates which was not even compulsory and took no account of costs payable to the forwarding agent in return for his services.

Since Article 2(3) refers expressly to 'data available in the Community', the Commission maintains that the actual price for the journey within the Community (Hamburg to Frankfurt) must be calculated and the amount paid for the journey between Hong Kong and Frankfurt deducted from it. That method appears consistent with the opinion expressed by the Court in its judgment of 10 December 1985 in Case 290/84 *Hauptzollamt Schweinfurt* v *Mainfrucht Obstverwertung* [1985] ECR 3909. It is also fairer because the declarant can call on the transport undertaking to establish the exact amount of the cost of transport within the Community if he considers that the amount adopted by the customs authorities is inaccurate.

The Commission adds that clearance charges incurred within the Community and transhipping charges must also be deducted from the total cost of transport.

The Commission therefore proposes that the following reply should be given to the first question referred by the Bundesfinanzhof:

'Where an importer has paid an all-inclusive price for transport to a destination within the Community and different means of transport have been used inside and outside the customs territory of the Community, the cost of transport to be added to the price actually paid or payable for goods pursuant to Article 8(1)(e)(i) of Regulation (EEC) No 1224/80 must, in the absence of rules more specific to Article 15, be calculated in accordance with the principles laid down in Article 2(3) of the regulation. That means that transport costs incurred within the Community and costs, also incurred within the Community, for other services connected with the transport of the goods must be deducted from the total cost agreed for transport. For that purpose, the fact that the goods may or may not have been transhipped in the customs territory of the Community may be relevant. In the absence of specific supporting documents, recourse must be had to established or generally applicable schedules of rates.'

R. Joliet
Judge-Rapporteur