OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 26 September 1991 *

Mr President,
Members of the Court,

1. In the summer of 1983, the customs inspection service of the Oberfinanzbezirk Frankfurt am Main carried out an inspection at the premises of the firm Meico-Fell in connection with customs duties payable on goods imported between 1 July 1980 and 10 June 1983. The inspection revealed that Meico-Fell had sent raw racoon skins to a Canadian firm for dressing and had then re-imported them into the Community, declaring them as duty-free raw skins of other animals. As a result of that incorrect declaration, there was an underpayment of customs duties totalling DM 2 764.85. By a notice of a post-clearance recovery of 24 May 1984, the Hauptzollamt (Principal Customs Office) Darmstadt demanded the payment of that amount.

Following an unsuccessful administrative appeal against that decision, Meico-Fell brought an action which has to be decided by the court which has submitted the question for a preliminary ruling.

2. In support of its action, Meico-Fell claims in substance that the recovery of the customs duty in question is time-barred. It does so for the reason that Article 2(1) of Regulation (EEC) No 1697/79 [1] provides that action to recover duties not collected

'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'.

The parties to the main proceedings and the referring court all agree that that three-year period had expired, so that only under Article 3 of that regulation is post-clearance recovery still possible. That article provides 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.

* Original language: Dutch.

1 — 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 (OJ 1979 L 197, p. 1).

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

3. Whether post-clearance recovery is possible therefore depends on the answer to the question whether the error made by Meico-Fell in its declaration may be regarded as 'an act that could give rise to criminal court proceedings' within the meaning of Article 3 of the regulation. The referring court appears to assume that the incorrect declaration submitted by Meico-Fell does not infringe any specific rule of (German) criminal law, but constitutes only an administrative irregularity ('Ordnungswidrigkeit') which is subject to an administrative fine. The Hauptzollamt (Principal Customs Office) Darmstadt, the defendant in the main proceedings, considers that such a breach of an administrative rule must also be regarded as an act liable to criminal court proceedings within the meaning of Article 3 of Regulation No 1697/79. If this is the case, it will be necessary, pursuant to the second paragraph of Article 3 of the regulation, to apply the limitation period laid down in German law for such an infringement. More precisely, it will be necessary to apply Paragraph 169 of the *Abgabenordnung* (General Regulation on Taxation), which provides for a limitation period of five years.

In order to resolve this problem, the Hessisches Finanzgericht referred the following question to the Court for a preliminary ruling:

'Is Article 3 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 (Official Journal 1979 L 197, p. 1) to be interpreted as meaning that "an act that could give rise to criminal court proceedings" refers only to an act specifically covered by the criminal law of the Member State concerned, or does it extend to any infringement of tax provisions carrying a longer period of limitation?'

4. An analysis of the aims and terms of Regulation No 1697/79 may provide a better understanding of the legal questions which arise in the present case. That regulation indicates the cases in which the competent customs authorities may take action for the post-clearance recovery of customs duties against the person liable for their payment when they find that the amount initially paid was incorrect or insufficient. The aim here is two-fold: first, to ensure the uniform application of the Common Customs Tariff by laying down uniform rules for the post-clearance recovery of customs duties; secondly, to ensure that the principles of legal certainty and/or the protection of legitimate expectation are observed by subjecting post-clearance recovery to a number of limitations.

In principle, the customs authorities must commence action to effect post-clearance recovery when they find that all or part of the amount of duties legally due has not been required of the person liable for payment.[2] That basic obligation is qualified by the regulation in two respects. First of all, post-clearance recovery becomes

2 — See the first paragraph of Article 2(1) of the Regulation.

optional or even impossible when the customs authorities were responsible for the incorrect or insufficient recovery at the outset.[3] Secondly, in the cases in which post-clearance recovery is compulsory or possible, the regulation takes account of the fact that such recovery 'involves some degree of prejudice to the certainty which persons liable for payment have the right to expect from official acts having financial consequences' (second recital of the preamble to the Regulation). For that reason, Article 2 of the regulation provides for a limitation period of three years, upon the expiry of which the original collection of duties is to be regarded as definitive. However, that period is not applicable where the incorrect or insufficient recovery is the result of 'an act that could give rise to criminal court proceedings' done by the person liable for payment. In such a case, action for recovery takes place 'in accordance with the provisions in force in this respect in the Member States' (see Article 3 of the regulation) — in other words, the (presumably longer) limitation period which is laid down in national law in respect of the act concerned is applied instead of the ordinary (or rather, Community) limitation period of three years.

5. Only the Commission and Meico-Fell have submitted observations to the Court. They both agree that the first paragraph of Article 3 of Regulation No 1697/79 implicitly but definitely refers to national law. Indeed, it is apparent from the wording of Article 3 that it does contain an express reference to national law as regards the modalities of recovery, including the matter of the applicable limitation periods (in particular, where the irregularity contained in the declaration was the result of 'an act that could give rise to criminal court proceedings') but, as regards the definition of that concept appearing in the first subparagraph, at the most contains only an implicit reference to national law.

The Commission and Meico-Fell differ in their views about the scope of this reference to national law: should the meaning of the expression 'an act that could give rise to criminal court proceedings' be determined by applying Community law criteria (which are thus uniform in character) to national law (as the Commission considers) or is it a concept whose meaning varies from one Member State to another and which can be determined only on the basis of the applicable national law (as Meico-Fell considers)? I take the view that, in order to ensure that Community law is applied uniformly and that the persons liable are treated equally, which is one of the aims of Regulation No 1697/79 (see above, at paragraph 4), the Commission's view is to be preferred. That view is also supported by the case-law of the court, according to which 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 and uniform interpretation throughout the Community and that interpretation must take into account the context of the provision and the purpose of the relevant regulations.[4] In other words, it is for the national court to determine on the basis of the national law applicable, but applying interpretive criteria provided by the Court, whether there is 'an act that could give rise to criminal court proceedings'.

3 — See Article 5 of the Regulation.

4 — See the judgment in Case 327/82 *Ekro* v *Produktschap voor Vee en Vlees* [1984] ECR 107, at paragraph 11.

6. In the observations submitted to the Court, two possible criteria are advanced: a *narrow* criterion (advocated by Meico-Fell), according to which the term 'an act that could give rise to criminal court proceedings' refers only to national criminal law in the strict sense and a *broad* criterion (advocated by the Commission), according to which the expression in question could also include acts in respect of which the Member States have provided for penalties of a non-criminal nature (such as administrative penalties, for example).

The narrow criterion advocated by Meico-Fell has the advantage of being easy to apply but it has no Community content and may lead to the unsatisfactory situation in which the post-clearance recovery of customs duties following the commission of a single act is subject to the limitation period applying in Community law or the 'longer' limitation period, depending on whether a Member State has made the decision (which in the end is quite arbitrary) to punish that act under criminal law or under administrative law. The uniform application of the Common Customs Tariff and the equal treatment of persons liable for customs duties will thus be ensured only to a limited extent.

7. It is precisely with a view to achieving a uniform application and interpretation of Article 3 that the Commission proposes to interpret the expression 'an act that could give rise to criminal court proceedings' in such a way that the presumably longer limitation period applying in national law becomes applicable whenever the person liable for payment acted in bad faith, that is to say whenever the incorrect or insufficient collection of duties is attributable to his culpable negligence or even when the person liable ought to have known that his conduct was unlawful and/or led to the insufficient collection of customs duties. 'Acts that could give rise to criminal court proceedings' would then cover infringements of the rules concerning customs declarations, at least where rules specifically laying down a duty to take care for the person liable are concerned.

Whilst this criterion may seem more suitable for achieving a uniform application of Community law and the equal treatment of persons liable for customs duties in the Member States, it also has a number of drawbacks. First of all, it is a vague criterion which national courts would have to apply in the context of their own legal system, and this, too, would ultimately lead to results varying from one Member State to another; moreover, being vague, the criterion does not sit well with the principle of legal certainty (on which Regulation No 1697/79 is also based). Secondly, it seems to me that the criterion is difficult to reconcile with the scheme of Regulation No 1697/79: the regulation leaves no doubt that the limitation period of three years laid down by Community law is *also* applicable when the incorrect or insufficient collection of duties was due to the negligence of the person liable; it is only by way of exception, namely when the acts committed are liable to criminal court proceedings, that the period laid down by national law, which is ex hypothesi longer, is applicable. However, the criterion advocated by the Commission would have the result that the longer period would be applicable whenever the incorrect or insufficient collection of duties is due to culpable negligence, punishable under national law, on the part of the person liable for duties, irrespective of the nature and gravity of the penalty laid down for such negligence. This does not seem to me to be

compatible with the scheme of the regulation.

8. As a result of the foregoing considerations, I find that the criterion proposed by Meico-Fell leads to a too narrow interpretation of the expression 'an act that could give rise to criminal court proceedings' and that the criterion advocated by the Commission leads to an interpretation which is too broad. It is therefore necessary to find an 'intermediate' criterion by which the requirements for the uniform application of Community law and the equal treatment of payers of customs duties, on the one hand, and the requirements of the principles of legal certainty and the protection of legitimate expectation, on the other hand, may be reconciled.

In seeking such a criterion, the obvious starting point is to look at the way in which the expression 'an act that could give rise to criminal court proceedings' is rendered in the various language versions. It is noticeable that some versions, in particular the Danish, German, English and Dutch versions, which are, respectively, 'en handeling, der vil kunne undergives strafferetlig forfølgning', 'Handlungen, die strafrechtlich verfolgbar sind', 'an act that could give rise to criminal court proceedings' and 'strafrechtelijk vervolgbare handelingen', appear to be narrower (they appear to refer to criminal law in the strict sense) than the French, Italian, Spanish, Portuguese and Greek versions (which are, respectively 'actes passible de poursuite judiciaires repressives', 'atto passibile di un'azione giudiziaria repressiva', 'un acto que puede dar lugar a la incoación de un proceso judicial punitivo', 'um acto passivel de procedimento judicial repressivo' and 'στη συνέχεια πράξεως γιά την οποία έχει επ ιληφθεί η δικαστική αρχή'). The broader expressions used in the French, Italian, Spanish, Portuguese and Greek versions suggest that these acts are rather those to which sanctions are attached which, although they must be imposed by a court (not necessarily a criminal court), have a deterrent or repressive character. It is noticeable, moreover, that in other Community instruments in which expressions like 'an act that could give rise to criminal court proceedings' (or similar expressions) are used, expressions belonging to criminal law in the strict sense are used in the French, Italian, Spanish and Portuguese versions.[5] In my view, this is a first indication that in the regulation in question in the present case the expression 'an act that could give rise to criminal court proceedings' must not be given a strict meaning but a substantive meaning, referring more specifically to the deterrent and repressive character of the sanction chosen by a Member State.

9. Support for this view can, however, also be found in another provision of European law, namely Article 6 of the European Convention for the Protection of Human Rights, which, like a provision of Community law, is intended to be interpreted and applied in the most uniform way possible in various states. In this regard, it hardly needs to be stated that the Court

5 — Three examples may be quoted here. In Council Regulation (EEC) No 2144/87 (OJ 1987 L 201, p. 15), the corresponding expressions for criminal proceedings used in Article 2(2) are poursuites pénales, azioni penali, diligencias penales and procedimentos penais. In Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (OJ 1989 L 334, p. 30) the corresponding expressions for judicial proceedings under criminal law as in Article 10(3) are poursuites judiciares à caractère pénal, procedimenti giudiziari di carattere penale, procedimientos judiciales de indole penal and processos judiciais de carácter penal. In Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance (OJ 1987 L 185, p. 77) the corresponding expressions for criminal proceedings used in Article 2(1) are procédure pénale, procedimento penale, procedimiento penal and processo penal.

accepts as a criterion for the interpretation of provisions of Community law an interpretation which is in conformity with the aforementioned convention. [6]

The European Court of Human Rights was asked to interpret the expression 'criminal charge' (in the French text of the Treaty, 'accusation en matière pénale') appearing in Article 6(1) of the aforementioned convention and the expression 'everyone charged with a criminal offence' (in the French text, 'toute personne accusée d'une infraction') contained in Article 6(2) and (3) in connection with infringements which, under national law, are not punished by criminal law penalties but administrative law penalties. In its judgment of 1976 in the *Engel* case, [7] the European Court of Human Rights held that the expression 'criminal charge' had an independent meaning in the scheme of the convention so that definitions in national law were certainly indicative but not decisive. In order to determine whether a specific sanction laid down by national law is criminal in nature, the European Court of Human Rights analyses the substance of the sanction.

In the *Öztürk* judgment of 1984, [8] for example, it held that a traffic offence which the German authorities punished with an administrative fine ('Ordnungswidrigkeit'), that is to say an infringement of the same nature as that in question in the present case, was to be regarded as 'an offence' within the meaning of Article 6(2) and (3) of the Convention. In taking this view, the European Court of Human Rights attached only limited importance to the fact that such an offence was 'decriminalized' in national law, in the sense that it was removed from the field of criminal law. The fact that (i) the legal rule whose infringement was punished by an administrative fine was a legal rule of a general nature (that is to say one applicable to all citizens as road users) and the fact that (ii) the sanction attached to the offence in question was deterrent and punitive in character [9] were considered more important. In the *Engel* and *Lutz* judgments, the European Court of Human Rights also stated that a 'criminal charge' and an 'offence' existed where the sanction imposed for a specific act was so 'severe' that it had to be regarded as belonging to the 'sphere' of criminal law. [10]

In short, the safeguards contained in Article 6 of the European Convention for the Protection of Human Rights will accordingly be applicable *either* where an act is punished by the national authorities by means of a sanction which belongs to criminal law in the strict sense, *or* where a generally applicable rule to which sanctions of a deterrent and punitive nature (préventif et répressif) is involved, *or* when, owing to

6 — See in this regard the judgment in Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219 in which it was pointed out that the limitations on the powers of the Member States in the matter of the supervision of aliens provided for by a Community law instrument could be regarded as being in conformity with the European Convention for the Protection of Human Rights.

7 — The European Court of Human Rights, Engel and Others, judgment of 8 June 1976/23 November 1976, *Publications of the European Court of Human Rights*, A Series, Volume 22, in particular paragraphs 80 and 81.

8 — Judgment of 21 February 1984, *Publications of the European Court of Human Rights*, A series, Volume 73, in particular paragraphs 49 to 54, confirmed in the Lutz judgment of 25 August 1987, ibid, A Series, Volume 123, in particular paragraphs 50 and 55.

9 — See paragraphs 52 and 53 of the judgment.

10 — See paragraphs 82 and 85 of the judgment in *Engel*, as they were later clarified by the judgments in *Öztürk* (paragraph 54) and *Lutz* (paragraphs 54 and 55).

its degree of severity (degré de gravité), the penalty for an act must be regarded as falling within the 'criminal' sphere (la matière pénale).

10. I consider that the criteria used by the European Court of Human Rights for the interpretation of the expressions 'criminal charge' and 'offence' within the meaning of Article 6 of the European Convention for the Protection of Human Rights may also be used in the present case for the interpretation of the expression 'an act that could give rise to criminal court proceedings'. This is all the more true since where it must assess the compatibility of national sanctions with Community law the Court also uses uniform criteria which are not based on the formal classification of the sanction under national law but takes account of the substance of those sanctions. More particularly, the Court requires sanctions which the national legislature attaches to infringements of Community law to be 'effective, proportionate and dissuasive'.[11] Moreover, where Community law itself provides for certain sanctions, for example in Article 15 of Regulation No 17[12] (with regard to which it is stated in paragraph (4) that they are not to be of a criminal law nature), the Community legislature also uses administrative sanctions which are no less dissuasive or punitive than criminal sanctions in the strict sense. This shows once again that it is not the formal classification of the sanction which matters, or is of prime importance at least, but its nature and degree of gravity.

11 — See, for example, the judgment in Case C-326/88 *Hansen & Søn I/S* [1990] ECR I-2911.

12 — Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ English Special Edition, 1959-1962, p. 87).

What does this mean specifically as far as the present case is concerned? In my view, the referring court may conclude that 'an act that could give rise to criminal court proceedings' exists first of all where the act in question is one which under the applicable national law is punished with a criminal sanction in the strict sense; and, secondly, where the act is one which infringes a general provision and under the applicable national law is punished with a sanction which is of such a deterrent or punitive character and/or characterized by such a degree of gravity that it must be regarded as being equivalent to a criminal penalty in the strict sense.

11. One objection which can be made against my proposal to interpret the expression 'an act that could give rise to criminal court proceedings' in Article 3 of Regulation No 1697/79 by taking account of the way in which the European Court of Human Rights interprets the expressions 'criminal charge' and 'offence' in Article 6 of the European Convention for the Protection of Human Rights is that the last-mentioned article is intended to guarantee individuals a fair and public hearing (even in the course of an administrative procedure which, however, ends in judicial proceedings) whereas Article 3 of the regulation in question provides for the imposition of a longer limitation period to the detriment of individuals. I do not consider, however, that this justifies the use of different methods of interpretation in the two cases. After all, in both cases the legislature is seeking to guarantee to individuals proper legal protection. This also the case where a provision provides for a limitation period. The fact that, in order to determine the length of the limitation period, it is necessary in this regard to take account of the gravity of the offence and therefore of the nature and gravity of the sanction, regardless of its strict classification under

national law, likewise meets the need for proper legal protection and, more particularly, the requirement that persons committing infringements of the same gravity should be treated equally and persons committing infringements of different gravity should be treated differently.

Conclusion

12. For all those reasons, I propose that the question referred for a preliminary ruling should be answered as follows:

'Article 3 of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import 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 is to be interpreted to the effect that the expression "an act that could give rise to criminal court proceedings" must be understood as meaning (i) acts which are punished under the applicable law by a formal criminal sanction; (ii) acts which infringe generally applicable rules and which attract a penalty which is of such a deterrent and punitive nature and/or characterized by a degree of gravity that it must be regarded as being equivalent to a formal criminal sanction.'