OPINION OF ADVOCATE GENERAL LENZ
delivered on 15 December 1994 *

A — Introduction

1. The applicant in the main proceedings between 1989 and 1991 imported several consignments of medicinal products into the Federal Republic of Germany which were supplied by the Firm M. in Vienna. The national court found that these were goods originating in the Community which had been exported through Austria. It seems that prices for medicinal products are considerably higher in Germany than in Austria so that it is worth while carrying out such re-imports.

2. When the medicinal products were exported to Germany, the Firm M. declared that the goods originated in the Community. On verification, however, it was found that the Firm M. was not in a position to give the requisite proof of origin in the form prescribed by Protocol No 3 to the free trade agreement between the EEC and the Republic of Austria of 22 July 1972 [1] (hereinafter referred to as 'the agreement'). Thereupon the Hauptzollamt (Principal Revenue Office) Krefeld on 3 March 1992 decided that Bonapharma had to pay post-clearance recovery customs duty amounting to DM 20 000.

3. Bonapharma appealed against that decision to the Finanzgericht (Finance Court), Düsseldorf. It claimed that the requisite proofs of origin could not be produced since the suppliers of the Firm M. (Austrian wholesalers) had refused to supply that firm with information concerning the origin of the goods. That refusal was attributable to the endeavours of manufacturers of those products established in the Community to prevent re-imports from Austria into the Community. Since, however, on the importation of the goods from the Community the relevant certificates must have been submitted to the Austrian customs authorities it could have been established that the goods originated in the Community. The Austrian

* Original language: German.

1 — See Council Regulation (EEC) No 2836/72 of 19 December 1972 on the conclusion of an agreement between the European Economic Community and the Republic of Austria and on provisions implementing that agreement (OJ 1972 L 300, p. 1). The text of the agreement is annexed to the regulation (*loc. cit.*, p. 2).

customs authorities expressed the view that it was not its responsibility to carry out its own researches into the origin of the goods.

The applicant regards the conduct of the suppliers as constituting an infringement of Article 23(1)(ii) of the agreement. Under this provision, modelled on Article 86 of the EEC Treaty, the abuse of a dominant position on the whole territory of the contracting parties (that is to say of the Community and of Austria), or of a substantial part thereof, by one or more undertakings is incompatible with the agreement, inasmuch as it might affect trade between the Community and Austria.

The applicant is of the opinion that despite the lack of proofs of origin within the meaning of Protocol No 3 it is apparent from a series of documents which it submitted in the proceedings before the Finanzgericht that the goods in question originated in the Community.

4. Accordingly, the Finanzgericht, Düsseldorf, referred the following question to the Court of Justice for a preliminary ruling:

'Where imports from Austria which are in fact re-imports from the Community, is it permissible to dispense with production of the documents establishing proof of favoured origin as provided for in Title II of Protocol No 3 to the agreement between the European Economic Community and Austria where a cartel in breach of Article 23(1) of that agreement prevents those documents from being issued and the Austrian customs authorities, without undertaking their own investigations, leaves it to the exporter alone to prove his entitlement to preferential treatment?'

5. Pursuant to the provisions of the agreement no import duties are now levied in trade in goods between the Community and Austria. Under Article 2 thereof the agreement is applicable to products originating in the Community or Austria. The rules on origin are laid down in Protocol No 3 (Article 11 of the agreement).

6. Protocol No 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation has in the meantime been amended on several occasions. As regards the period to be taken into consideration in the present case attention should be focused on the version of the protocol adopted by Council Regulation (EEC) No 1598/88 of 24 May 1988, [2] Council Regulation (EEC) No 4265/88 of 21 December 1988 [3] and Council Regulation (EEC) No

2 — OJ 1988 L 149, p. 1.
3 — OJ 1988 L 379, p. 1.

4271/88 of the same date. [4] Title I (Articles 1 to 7) defines the concept of 'originating products'. Title II (Articles 8 to 18) concerns arrangements for administrative cooperation.

7. Under Article 8(1) of the protocol the agreement is applicable to products originating in the Community or in Austria on submission of a EUR.1 movement certificate (Article 8(1)(a)) or an invoice with a declaration by the exporter (Article 8(1)(b) and (c)). Use can be made of the latter possibility in the context of the simplified procedure for the issue of proofs of origin laid down in Article 13 of the protocol and in cases in which the value of the goods does not exceed a given threshold value (which at the material time was ECU 4 400). There is no need for these purposes to embark on an examination of the details of these special provisions and analogous rules. [5]

8. The EUR.1 certificate is issued in accordance with Article 9(1) of the protocol by the authorities of the exporting State. Under Article 9(2) that certificate is issued by the authorities of a Member State of the European Community if the goods are products originating in the Community and by the Austrian authorities where products originating in Austria are concerned. The situation now before the Court in which a product originating in the Community is first exported to Austria and then exported from Austria to the Community should be covered by Article 9(3). [6] In accordance with the second subparagraph of this provision in such cases the EUR.1 certificates are to be issued 'upon presentation of the EUR.1 certificates issued previously'.

Under Article 10(3) of the protocol the EUR.1 certificate 'constitutes the documentary evidence for the application of the preferential tariff and quota arrangements laid down in the agreement'.

B — Opinion

9. The present case concerns the question whether proof of origin of goods for the purposes of the agreement can only be adduced in the manner provided for in Protocol No 3 or whether exceptionally other

4 — OJ 1988 L 381, p. 1.

5 — Reference may be made to Article 8(2) of the protocol according to which the certificates mentioned in Article 8(1) are not necessary where consignments of goods between private persons or goods in the personal luggage of travellers are concerned and the value of such goods does not exceed given amounts.

6 — This may be inferred from note 9 of the Explanatory Notes contained in the annex to Protocol 3.

means of proof may be taken into consideration.

10. Prior to an examination of this question it should be pointed out that the national court is proceeding on two assumptions which must therefore also underpin the Court's ruling. On the one hand the national court states that it considers the applicant's assertion in the main proceedings that the goods in question originated in the Community to be accurate. Secondly, the question submitted is based on the premise that the issue of the certificates of origin required under the protocol is prevented by a cartel infringing Article 23(1) of the agreement. [7] It is solely for the national court to determine whether these suppositions are in fact accurate.

11. The national court takes the view that the refusal by the Austrian customs authorities to issue the requisite certificates of origin or to involve itself therein is an infringement of Article 13 of the agreement. Under this provision, which is comparable to Article 30 of the EC Treaty, no new quantitative restrictions on imports or measures having equivalent effect are to be introduced in trade between the Community and Austria. Existing restrictions on imports and measures having equivalent effect are to be abolished. Whether the national court's view is correct [8] does not need to be discussed here, contrary to the opinion expressed at the hearing by the representative of Bonapharma, since this consideration does not form the subject-matter of the question submitted for a preliminary ruling.

12. As the Court has already established it follows from the provisions of the agreement and protocol that only goods originating in the Community or in Austria can benefit from the agreement and that the EUR.1 movement certificate constitutes the documentary evidence of such origin. [9] It follows that the origin of goods can be proved in principle only by submission of one of the means of proof provided for in the protocol — that is to say the EUR.1 movement certificate or the other documents referred to in Article 8 of the protocol. The uniformity and certainty of application of the agreement would be jeopardized if one were to permit, in addition to these proofs of origin, other means of proof as well. Similar considerations also underpin the decisions of the Court on the question of proof of origin in

7 — It is apparent from the order for reference that the national court regards the conduct of the suppliers of the Firm M. not only as constituting an abuse of a dominant position within the meaning of Article 23(1)(ii) of the agreement but also as a concerted practice which infringes the provision contained in Article 23(1)(i) based on Article 85(1) of the EC Treaty.

8 — Cf. in this connection Thomas Eilmansberger, 'Zur Auslegung des Integrations-Durchführungsgesetzes', *WBl (Wirtschaftsrechtliche Blätter)* 1990, p. 367, 367 et seq.

9 — Judgment in Case C-12/92 *Huygen* [1993] ECR I-6381, paragraph 16.

intra-Community trade, to which the Commission has referred. [10]

13. In addition it should be pointed out that under the provisions of the protocol the determination of the origin of goods is based on a division of competences between the customs authorities of the States concerned, inasmuch as the determination of origin is the responsibility of the authorities of the exporting country and the functioning of this provision is supervised by way of cooperation between the participating customs authorities. [11] That system 'is justified by the fact that the authorities of the exporting State are in the best position to verify directly the facts which determine origin; moreover, it has the advantage of producing certain and uniform results regarding the identification of the origin of goods and of thereby avoiding deflections of trade and distortions of competition in trade.' [12] If the customs authorities of the importing State were permitted themselves to establish the origin of goods this division of tasks would be compromised.

14. The Commission also relies on the fact that Article 23 of the agreement, unlike Article 85(1) and Article 86 of the EC Treaty, is not directly applicable. Article 23(2) of the agreement provides that, should a contracting party (that is to say the Community or Austria) consider that a practice is incompatible with that article it may 'take appropriate measures under the conditions and in accordance with the procedures laid down in Article 27.' Under Article 27(3) either contracting party may refer the matter to the Joint Committee (consisting of representatives of the Community and Austria). If the infringement of the competition rules is not terminated or if the Joint Committee fails to agree, the contracting party concerned may adopt any safeguard measures it considers necessary under these provisions. Therefore, the contracting parties (the Community or Austria) are supposed to intervene and terminate the infringement without appearing to be under any obligation to do so at any rate according to the wording of the provision. In view of this provision it would appear to be impossible (contrary to the view expressed by the representative of Bonapharma at the oral hearing) for an economic operator directly to invoke an infringement of Article 23 of the agreement before the courts.

However, it should be pointed out that the present case does not concern the *application* of Article 23 of the agreement. The national court in fact would like to know whether there may be a departure from the formal requirements of Protocol 3, *where* there is an infringement of Article 23 of the agreement and such infringement makes it impossible for the exporter to obtain the requisite

10 — See judgment in Case 12/70 *Craeynest* [1970] ECR 905, paragraph et seq; judgment in Case C-117/88 *Trend-Moden Textilhandel* [1990] ECR I-631, paragraph 20.

11 — Judgment in Case 218/83 *Les Rapides Savoyards* [1984] ECR 3105, paragraph 26; judgment in the *Huygen* case, cited above in footnote 9, paragraph 24. The first-mentioned judgment concerned the free trade agreement between the Community and Switzerland and the protocol relating thereto whose provisions are analogous as to content to the provisions here under consideration.

12 — See judgment in *Les Rapides Savoyards*, cited above in footnote 11, paragraph 26.

proofs of origin. However, to take into account the possibility of an infringement of Article 23 of the agreement would seem to raise problems on other grounds. In such a case the customs authorities of the importing State and in the final analysis the courts with jurisdiction over these authorities (such as here the finance courts or equivalent courts) would have to decide whether there has been any such infringement. It is evident that in the performance of this task the abovementioned authorities would face considerable difficulties. Although the national court's question is submitted on the basis that there is an infringement of Article 23 of the agreement those difficulties must be taken into consideration in the present case since the Court's ruling will have significance also for future disputes of a comparable nature.

15. On the basis of all the foregoing there are good grounds for arguing that the reply to the national court should be in the negative and that the arrangements provided for in Protocol No 3 should stand, as advocated by Belgium and the Commission. The Commission's argument that possible hardships have to be accepted on overriding grounds and can be removed only by other means has much in its favour. However, on mature reflection I have come to the conclusion that such a solution is not satisfactory. I am thereby relying essentially on two considerations: first, it may be inferred from the Court's recent case-law that exceptions from the provisions contained in Protocol 3 may be permissible in the event of exceptional circumstances. Secondly, the result of a negative reply to the question submitted by the national court could be that the principle of the free movement of goods underlying the agreement would be significantly affected.

16. The Court's judgment in *Huygen* [13] shows there are limits to the mandatory formal requirements laid down in Protocol No 3. That case concerned the export of a machine from Austria to Belgium. The machine was manufactured in Germany and had been exported to Austria in 1970, that is to say before the entry into force of the agreement. For the export to Belgium the Austrian customs authorities issued a EUR.1 movement certificate. On an enquiry by the Belgian customs authorities they had to concede that they did not have the requisite certificate of origin in Germany and that the EUR.1 movement certificate could not therefore be upheld. In its judgment the Court confirmed that in view of those facts the movement certificate had been wrongly issued. [14]

However, the Court alluded to the special circumstances of the case. For one thing, according to the information given by the national court a document was available (in the form of an invoice) which proved that the machine originated in the Community. For another thing, it was impossible for

13 — Cited above in footnote 9.

14 — Cited above in footnote 9, paragraph 17.

those concerned to adduce the evidence of origin provided for in the prescribed form by Protocol No 3 since at the time the goods were imported into Austria it was not possible to issue any such certificate. [15] The customs authorities of the exporting State were therefore not in a position to carry out an *ex post facto* examination of the EUR.1 certificate as provided for in the protocol. Under those circumstances the customs authorities of the importing State were not precluded from attaining the objective of that subsequent examination, namely verification of the authenticity and correctness of the EUR.1 certificate, by taking into account other methods of proof. [16]

17. The Commission is indeed correct to point out that there are differences between the facts underlying that decision and the present case. Most significant of all is certainly the fact that in *Huygen* the certificate of origin provided for could not be produced because at the time of the import into Austria the agreement had not yet entered into force (and had not even been concluded). This may be termed a case of *objective impossibility*. Since such a situation does not appear to have been contemplated by the contracting parties the protocol to that extent contained a gap which it was legitimate for the Court to fill in its judgment.

In the present case there was no doubt a possibility of issuing the requisite certificates of origin since the suppliers of the Firm M. may be assumed to have had available to them the requisite documentation. According to the circumstances underlying the order for reference the issue of the certificates of origin was however *prevented* owing to the fact that those suppliers refused to make available to the Firm M. the requisite documents or information. [17] If that was so, it may be termed a case of subjective impossibility.

18. In my view it is however appropriate to treat both cases in the same way. Just as those concerned in the *Huygen* case could not be held responsible for the fact that the requisite certificates of origin could not be submitted, in the present case the absence of the relevant certificates may not be held against the Firm M. or the firm Bonapharma. In my view no significance needs to be attached to the fact that the *Huygen* case concerned criminal proceedings whilst the present case merely concerns a dispute concerning the legality of duties. The view expressed by the Commission's representative at the oral hearing that in its judgment in the *Huygen* case the Court itself had in mind the specific nature of the main proceedings receives no support in the judgment itself.

19. It seems appropriate to draw a parallel here with the cases of *force majeure*. In *Huygen* the Court was asked whether an importer may rely on *force majeure* where the customs authorities of the exporting State are not in a position to establish the origin of goods by means of a subsequent

15 — Cited above in footnote 9, paragraph 21.

16 — Cited above in footnote 9, paragraph 27.

17 — Whether that was indeed the case does not require investigation here, as should be emphasized once again.

verification. In its reply the Court first referred to the judgment in the *Valsabbia* case in which it was emphasized that the event in question must objectively render it impossible for the person concerned to comply with his obligations. [18] However, it went on to explain that *force majeure* must be understood as encompassing unusual and unforeseeable events outside the influence of the economic operator concerned and whose consequences could not have been avoided in spite of the application of the requisite prudence. [19] As I have already explained in another place, the concept of *force majeure* is not limited to cases of objective impossibility. [20]

20. As this comparison shows *subjective impossibility* may arise only where the economic operator concerned has undertaken all *requisite and reasonable steps* in order to perform his duties. Account should be taken of that in the reply to the question submitted.

It was certainly requisite and reasonable for the Firm M. to take steps to obtain the requisite documents from its suppliers and if appropriate to attempt to persuade the Austrian customs authorities, in view of the special circumstances of the case, to issue the certificates of origin on the basis of other means of proof. Whether the Firm M. (or the firm Bonapharma) satisfied this obligation is naturally a matter to be determined by the national court. However, it may be inferred from the order for reference that the national court appears to take the view that those concerned did everything in their power in order to produce the requisite certificates of origin, although their efforts did not meet with success. The national court mentions in this connection an action before the civil courts against one of the suppliers of the Firm M. which was dismissed on appeal by the Austrian Supreme Court. [21] It is apparent from this judgment that an action was also brought before the Austrian administrative courts against the Austrian customs authorities but was unsuccessful. [22] Nor is there any indication of intervention by the competent government authorities in Austria in this matter although the exporter asked them for their support.

21. The question referred by the national court also focuses on the fact that the cus-

18 — Judgment in Joined Cases 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78 and 264/78 and 39/79, 31/79, 83/79 and 85/79 *Valsabbia* v *Commission* [1980] ECR 907, paragraph 140; quoted in the *Huygen* judgment, cited above in footnote 9, at paragraph 31.

19 — Cited above in footnote 9, paragraph 31.

20 — See my opinion in Case C-50/92 *Molkerei-Zentrale Süd* [1993] ECR I-1035, I-1044, especially at paragraph 18 and the judgment of the Court in the same case, in particular at paragraph 16.

21 — Judgment of 15 December 1992, WBl 1993, p. 264: cf. on this Thomas Eilmansberger, *Parallelhandel und Ursprungsnachweise*, WBL 1993, p. 237.

22 — Judgment of the Austrian administrative court of 18 January 1990. This judgment was apparently not published. Cf. however on the same set of problems the judgment of the administrative court of 14 December 1989 WBl 1990, p. 373.

toms authorities of the exporting country 'leave it to the exporter alone to prove entitlement to preferential treatment without undertaking its own investigations.' In my view that is not the question. The EUR.1 certificate is only issued upon written application (Article 10(1) of Protocol No 3). Pursuant to Article 15(1) of the protocol the exporter must annex to his application all necessary documents as proof that the certificate may be issued. At the same time he is obliged at the request of the competent authorities to furnish all additional evidence deemed necessary in order to prove whether the goods being considered for preferential treatment are in fact originating products. [23] Therefore, in my view, the Austrian authorities were perfectly entitled merely to request submission by the Firm M. of the requisite certificates without themselves undertaking any investigations. The fact that the Austrian customs authorities took this position once again makes clear that it was not possible for the Firm M. in the present case to produce the requisite certificates of origin in accordance with the provisions of Protocol No 3.

22. Under these circumstances, therefore, it seems understandable for the national court to say that the Firm M. and the applicant in the main proceedings were urgently in need of proof. If in view of these circumstances one were to insist on a strict application of the provisions of Protocol No 3, this would mean that the export of goods (originating in the Community) from Austria into the Community could be banned by the conduct of certain undertakings. Such an outcome would be hard to reconcile with the underlying objective of the free trade agreement, namely to remove restrictions on trade and thereby to guarantee the free movement of goods. Otherwise one would be permitting undertakings to set up trading restrictions which the contracting parties wished to remove.

As already mentioned, the present case concerns re-imports, that is to say the import of goods which were first exported to Austria. That the advantages of the agreement are also to apply to such goods is already implicit from the judgment in *Huygen*. The carrying out of such re-imports is also a perfectly legitimate activity. If an economic operator turns to account the price difference existing between Austria and a Member State of the Community he is only availing himself of the possibilities offered to him by the agreement.

23. There need also be no fear that a decision to the effect I have suggested could lead to serious consequences in regard to the functioning of the provision concerning the origin of goods provided for in Protocol No 3. The present case — just like the judgment in the *Huygen* case — solely concerns

23 — In accordance with Article 15(3) this applies 'by analogy' also to the declarations to be given under Article 8(1)(a) and (b).

re-imports, that is to say the importation of products into the Community which come from the Community and were first exported to Austria. In addition, the circumstances of the present case appear to be so unusual that it is scarcely to be expected that a decision giving priority to equity in such an exceptional case before considerations of legal certainty will lead to considerable ramifications in this area. In addition, as I would like to repeat once again, the judgment in *Huygen* has shown that in exceptional cases a departure of this nature from the formal strictness of the legal provisions to be applied is permissible.

24. The Commission's representative referred at the hearing to the judgment in the *Anastasiou* case. [24] That case concerned *inter alia* the question whether on the importation of products from Cyprus only the EUR.1 movement certificates issued by the Republic of Cyprus are recognized or whether the competent authorities of the Member States may also accept other documents. The documents in question had been issued by the authorities of the so-called Turkish Republic of Northern Cyprus. The Court decided that only the means of proof expressly provided for in the relevant agreement between the Community and Cyprus could be used. It went on to explain that other means of proof could not be unilaterally adopted but 'must be discussed and decided upon by the Community and the Republic of Cyprus within the framework of the institutions established pursuant to the association agreement, and then applied in a uniform manner by the two contracting parties'. [25]

25. That judgment is not however opposed to the view I have formed in this opinion. In the *Anastasiou* case the question was which authority in Cyprus is responsible for issuing movement certificates for exports of *goods produced* in Cyprus into the Community. The present case, on the other hand, concerns re-imports into the Community; that affects therefore only *goods originating in the Community*. It seems to me also significant that in its judgment in *Anastasiou* the Court several times cited its judgment in *Huygen* with approval.

C — Conclusions

26. I therefore propose that the Court should give the following answer to the question submitted by the Finanzgericht, Düsseldorf:

24 — Judgment in Case C-432/92 *Anastasiou* [1994] ECR I-3087.

25 — Cited above in footnote 24, paragraph 46.

Where imports from Austria are in fact re-imports from the Community, it is permissible by way of exception to dispense with production of the proof of origin provided for in Title II of Protocol 3 to the agreement between the European Economic Community and Austria, if the issue of such proof is prevented by a cartel as referred to in Article 23(1) of the agreement and the exporter has taken all necessary and reasonably practicable steps in order to obtain such proof of origin.