expressly provided, to be taken into account in determining the normal price as the basis for the value for customs purposes, even if that price as a result exceeds the cif price of the item of goods transported by the usual mode of transport.

Lecourt Donner Trabucchi

Mertens de Wilmars Pescatore

Delivered in open court in Luxembourg on 10 December 1970.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 19 NOVEMBER 1970[1]

Mr President,
Members of the Court,

The request for a preliminary ruling before the Court today relates to the interpretation of Regulation No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (OJ Special Edition 1968 [I], p.170), more precisely to the question whether the normal price which determines the value for customs purposes of imported goods is calculated by taking into account the actual transport costs or on the basis of the normal costs paid on the importation of such goods.

This is an important question for the plaintiff in the main action which is an import undertaking in Hamburg. It appears that it usually imports felt-tipped markers from Japan by sea but in July 1968 its urgent needs obliged it to import a certain quantity of those goods by air. It requested customs clearance from the customs office at Hamburg Airport for those goods at the spot price (which the company required to declare the value for customs purposes had indicated as DM 422). The customs office rightly understood that the plaintiff was requesting customs clearance at the normal price, in accordance with Article 1 of Regulation No 803/68 of the Council. It based its calculation of the value for customs purposes not only on the Japanese supplier's invoice (which gave the figure of DM 422 carriage and insurance Kobe) but in accordance with a decree of the Federal Minister for Finance on the determination of transport costs for air traffic it added 94% of the air freight paid by the plaintiff for transport from Kobe to Hamburg. The customs office thus arrived at a value for customs purposes of DM 1102.67 which it took as the basis for its subsequent calculations issued in an assessment on 16 July 1968 of the customs duties and import turnover tax, namely a total of DM 321.69.

However, the Edding undertaking was unwilling to accept this. In its opinion the concept of normal price includes only the normal freight as opposed to the air freight paid in exceptional cases. The calculation of the value for customs purposes should thus be based on the market price for goods which the Edding undertaking considered at its marketing stage was DM 444 cif

1 — Translated from the French version.

Hamburg with normal carriage of the goods by sea. Nevertheless, an appeal which it made in this connexion was unsuccessful. On the orders of the Oberfinanzdirektion Hamburg, it received a negative reply that having regard to Article 29(2) of the German Zollgesetz (which corresponds to Article 1 of the Community regulation on valuation for customs purposes) the Federal Minister for Finance had already decided against the importer on the question whether the costs of air transport might be included in the value for customs purposes. It must consequently be assumed that the buyer bears all the costs relating to the delivery of the goods if they are carried by air. This is also clear from Opinion VIII of the Customs Valuation Committee in Brussels.

As the Edding undertaking did not agree with the taxation assessment in question it brought the matter before the Finanzgericht, Hamburg. In the course of the proceedings the parties maintained their submissions in the form in which they have already been set out. Since the decision in this matter depends on the interpretation of a Community provision, the Finanzgericht did not give a ruling itself but by an order of 12 May 1970 suspended judgment and referred the matter to the Court of Justice in accordance with Article 177 of the EEC Treaty for a preliminary ruling on the following questions:

'Must it be considered that in principle in order to determine the "normal price", the carriage and freight, referred to in Article 7 of Regulation No 803/68 of the Council of the European Communities of 27 June 1968 (OJ Special Edition 1968 [I], p. 170) are constituted by the carriage and freight actually paid for the import in question?

If an affirmative answer is given, does it follow from Article 1(1) of Regulation No 803/68 that such carriage and freight must not be included in the "normal price" as components of the cost if such inclusion would result in fixing a higher price than the normal cif price prevailing on the market taking into account the lower costs of ordinary transport, and which constitutes the price which would have been paid by any buyer at the place of importation?'

Having had the opportunity of acquainting myself with the written and oral observations of the parties to the main action, the Government of the Federal Republic of Germany and the Commission of the European Economic Community, I shall now consider those questions.

It is scarcely necessary to emphasize that the questions raised are of great practical importance. On the one hand, they are important because increasing use is made of air transport. On the other hand, as you know, the Common Customs Tariff provides in most cases for *ad valorem* customs duties and it is clear that in applying them uniform criteria, valid throughout the whole Common Market, are essential for the determination of the value for customs purposes in order to avoid divergent administrative practices resulting in an exceptionable deflection of the patterns of trade.

The persons concerned are agreed in emphasizing that the basic factor for the solution to the problems raised is Article 1 of Regulation No 803/68 of the Council. It is clear from this article that the sole and fundamental principle on which the regulation on valuation for customs purposes is based is that of the normal price. On the basis of this finding the plaintiff maintains that the concept of normality must be given a wide and overriding interpretation to the effect that the sole factors of moment are the normal conditions of a transaction whilst the actual price, the amount calculated on the basis of the actual costs, becomes subsidiary. Applied to the factor of transport costs this argument means that only the normal freight, the normal method of transport used for a category of goods, is to be considered (particular account being taken of the fact that the connexion between transport costs and the value of the goods varies considerably for different products). According to the plaintiff, to advocate another view with regard to transport costs would mean allowing a contradiction to appear in the system, since the normal price is based on partly theoretical and partly factual elements.

On consideration of the wording of Article 1(1) of Regulation No 803/68, in particular the definition of the normal price as the price which 'they (that is the goods imported) would fetch on a sale in the open market between a buyer and a seller independent of each other', it must be conceded that it is in fact tempting to admit that it relates quite simply to the market price, to the price determined in accordance with the rules of competition and thus, with regard to transport costs, to the normal transport costs. Nevertheless, with regard to the factor of freight which alone concerns us here, two considerations immediately prompt me to doubt the accuracy of the plaintiff's point of view. One of those considerations relates to the practicability of the system and has been mentioned by the defendant Hauptzollamt and the Federal Government. It is difficult to deny that such a calculation of 'normal freight' may frequently give rise to considerable difficulties not solely when different means of and routes for transport are involved but even if only one single means of transport is concerned. Furthermore, as is illustrated by the present case on which the dispute in the main action turns, the invoices frequently fail to supply any information on transport costs. The concept of 'normal freight' would thus introduce an element of uncertainty and result in frequent disputes. It is certain that this finding cannot be left out of account in appraising the system.

A second consideration stems from the explanations supplied by the plaintiff itself in its observations. On the basis of the fact that the regulations in force in Germany prior to 1968 with regard to *ad valorem* customs duties largely coincided with the Community regulations, the plaintiff has conceded that according to the practice adopted by the German administration it is always the actual transport costs which are taken into account. To this must be added the declaration made by the Commission's representative to a question put in the course of the oral procedure that, in the other Member States as well, before the entry into force of the Common Customs Tariff it was always the practice to take into account the actual transport costs and the costs of air transport in calculating the normal price.

In those circumstances, it seems somewhat unlikely that Regulation No 803/68 would have introduced a complete innovation with regard to transport costs, that is, the concept of 'normal freight'. Consequently, in interpreting the relevant provisions one might almost speak of a presumption that the argument propounded by the Commission, the Federal Government and the defendant Hauptzollamt is correct; at least one may deduce from it that it is necessary to provide very strong evidence in support of the opposite argument.

Ultimately, however, such evidence does not exist, as is shown by the analysis of the general scheme of Regulation No 803/68 which the Federal Government and the Commission carried out for this purpose. This analysis shows that the concept of the normal price is indeed of fundamental importance but it is not a standardized and abstract norm, constant for all goods in the same category. On the contrary, it is evident that it must be determined in conjunction with the actual conditions relating to the import in question. Such conditions must in fact constitute the basis for calculation; in order to assess the actual value of an item of imported goods and to obtain an exact impression of the service provided by the supplier (this alone is important and not the resale price) a certain measure of standardization, correction and clarification must be effected, that is to say, certain factors must be discounted in order to take account of others. This is the objective of the provisions of Article 1(1) and of Article 2 in accordance with which a specific transaction of sale must be considered and the framework of the contract thereby standardized; this is the effect of the provisions of Article 1(2) in conjunction with Article 7 and with the 'cost' factors which are listed therein and this is also how Article 3 et seq. must be interpreted (it is unnecessary at present to consider their provisions in detail). It is necessary to pay close attention to the conditions of the import in question as is clear in particular from the provisions of Article 4 (which relates to the quantity of the goods to be

valued), and from Article 5 (which relates to the material time for valuation for customs purposes) and from Article 6 (dealing with the place of introduction into the customs territory — and here we should note in particular the wealth of practical detail set out in paragraph 1(b)). Reference should further be made to Article 9 according to which the price paid may be accepted as the value for customs purposes, that is to say, it may constitute a factor to be taken into consideration in determining the normal price (subject naturally to the adjustments to be made in accordance with paragraph 2). It is thus evident that a similar attitude may be adopted with regard to the transport costs, that is to say, the factors listed in Article 1(2)(b) and in the first indent of Article 7(1), in other words to treat the actual transport costs as decisive.

Contrary to the plaintiff's view, this argument is not weakened in any way by the wording of said provisions. As the Court is aware the plaintiff has in this connexion relied on the wording of Article 1(2)(b): the costs, charges and expenses which 'are ... included in the normal price' (implying that it is now the 'cost' factor which must be standardized); it emphasized that this provision refers to the 'goods', that is to say, it employed the abstract plural (although the provisions previously in force in Germany — Article 29 of the Zollgesetz and Article 8 of the Wertzollordnung referred to the 'delivery of the item of goods' and the 'item of goods to be valued' thereby indicating very clearly the specific nature of this consideration). In addition it pointed to the abstract nature of the 'carriage and freight' of Article 7 of Regulation No 803/68 and contrasted it with the more specific turn of phrase in the German text 'the costs of transport of the item of goods to be valued' appearing in the implementing provision issued by the Federal Minister for Finance. To this line of argument the objection may in fact be made, apart from the general reservation prevailing for all such arguments on the basis of wording, that one might talk of a clear transfer of the concept of standardization to the transport costs only if Article 1(2)(b) did not refer to 'all the costs, charges and expenses' but to the costs, charges and expenses normally paid. Furthermore, the plaintiff must meet with the objection that persuasive conclusions may not be drawn from comparison of the German wording with that used by another legislature and in addition that the use of the word 'goods' in the plural and of the expression 'transport costs' by no means precludes appraisal of the actual costs. In this connexion it may be claimed above all that the Brussels Convention of 1950 on the Valuation of Goods for Customs Purposes, to which all the Member States are Contracting Parties and which consequently constitutes an admissible factor for interpretation, employs identical wording imposing in principle the obligation to proceed from the actual conditions of the import in question and to appraise an import 'by reference to its particular characteristics' (as is clear from the Explanatory Notes and other information such as the model declarations drawn up within the framework of the Brussels Convention.[1]

Moreover, what is now of prime importance is the fact that various provisions of Regulation No 803/68 themselves clearly emphasize the need to base the calculation of the normal price on the actual transport costs. Contrary to the plaintiff's view, Article 6 which deals with the place of introduction into the customs territory may be cited in this connexion. It speaks quite specifically of 'goods carried' and relates essentially to the means of transport selected. Article 8 relating to the proportional assessment of transport costs in certain specified cases must also be quoted. Paragraph 1 thereof states:

'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

1 — Customs Cooperation Council, Explanatory Notes, 1960, p. 100.

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 means of transport thus plays a decisive role in this matter. According to paragraph 2 of that article 'Where goods are invoiced at a uniform free domicile price which corresponds to the price at the place of introduction, transport costs within the Community shall not be deducted from that price. However, such deduction shall be allowed if evidence is produced to the customs authorities that the free-frontier price would be lower than the uniform free domicile price'. This provision also shows that the actual means of transport is clearly the important factor. Furthermore, Article 8(3) emphasizes even more strongly than those two latter provisions, if that is possible, the actual means of transport and thereby the costs relating thereto. It is stated that where transport is free or provided by the buyer 'transport costs to the place of introduction, calculated in accordance with the schedule of freight rates normally applied for the same modes of transport, shall be included in the value for customs purposes'. Indeed it is not surprising that this provision mentions the 'schedule of freight rates normally applied' in view of the individual nature of specific cases. However, it is noteworthy that it relates only to a schedule normally applied. In view of all the considerations which have been set out, I am inclined to the view that the Community provisions on valuation for customs purposes undoubtedly require the inclusion of the actual transport costs in calculating the normal price. Nor do these provisions provide for any exceptions to this principle. This is clear from Article 7 of Regulation No 803 and, as the Commission has rightly emphasized, it is impossible to concede that such exceptions have been authorized by implication in certain cases. This may be said because other provisions in Regulation No 803, for example Article 3(2), Article 4(2) and Article 8(1) and (4), expressly provide certain exceptions which shows that the provisions in question are exhaustive. Finally, one may also rely on the fact that when Regulation No 803 was drafted it seems that the authors considered in certain cases leaving out of account air freight and effecting the calculation solely on the basis of the lower costs relating to other methods of transport but in the end they excluded such exceptions from the provisions of the regulation. Furthermore, additional support for this view is found outside Regulation No 803/68. In this connexion Regulation No 1769/68 of the Commission of 6 November 1968 on air transport costs to be included in the value for customs purposes (OJ Special Edition 1968 [II], p. 532). Although this regulation also envisages a degree of standardization (in that it provides that only direct distances are to be taken into account), with regard to the proportional assessment of the transport costs it clearly proceeds from the necessity of including the actual costs of air transport in the normal price.

Within the framework of the Convention on the Valuation of Goods for Customs Purposes which, as I have said, is of considerable interpretative weight in the present context, mention must be made of the decision of the Customs Valuation Committee of 12 May 1966 on the transport costs to be taken into consideration for imports into Rwanda, which was mentioned at the hearing by the Federal Government's representative. Mention should also be made of Opinion VIII of the Customs Valuation Committee. In the first part it is expressly stated, and this must consequently be considered a principle, that 'the costs of transporting goods by air or by any other means ensuring rapid delivery constitute a part of the normal price referred to in the definition'. Nevertheless, it must be said with regard to various exceptions listed in that Opinion that they are applicable only 'if they are allowed by the national rules'; this thus indicates that they do not constitute an integral part of the system of the Convention on the Valuation of Goods for Customs Purposes and that they may at the most be applied within the framework of the discretion which the Convention leaves to the Member States. It is definitely impossible to graft this concept onto the Community system with regard to valuation for customs

purposes, which is of necessity uniform, as the Commission has shown convincingly (for example, with regard to Article 13 of the Wertzollordnung of 29 November 1961). It must further be added that the terms of the derogating provision do not relate to the matter at issue in the main action; in fact it concerns 'certain categories of a particular import ... for which the use of air transport is fortuitous or does not increase the value of the item of goods transported, since the costs are generally borne by the sender'. In fact it does not appear to be relevant to rely on this provision with regard to the rapid delivery of an item of goods in order to maintain a constant supply to customers, so as to exclude thereby any increase in value.

Finally, for the sake of thoroughness I should like to observe further that this clear interpretation of Regulation No 803/68 is not weakened by the references to Article 3(e) and (f) of the EEC Treaty made by the plaintiff during the hearing. This seems evident, in that Article 3(e) makes a very general reference to the adoption of a common policy in the sphere of transport. The same must hold good with regard to the institution, laid down in Article 3(f), of a system ensuring that competition in the Common Market is not distorted. This does not prevent account being taken of the costs of air transport in calculating the value for customs purposes since such a principle applies to anyone who for commercial reasons considers it expedient to use air transport to maintain rapid deliveries.

In view of the foregoing I consider that the two questions to the Court should be answered as follows:

The carriage and freight which must be taken into account under Article 7 of of Regulation No 803/68 of the Council of the European Communities of 27 June 1968 in calculating the normal price referred to in Article 1 thereof are in principle the carriage and freight actually paid for the import in question.

It is clear from Article 1 of Regulation No 803/68 that the normal price must be identical to the normal cif price ruling on the market taking into account the normal transport costs. The normal price includes the transport costs (including the costs of air transport) actually paid to the place of introduction into the Community, even if this results in a higher price than that which any buyer at the place of import would have paid for an item of goods carried by another means of transport.