OPINION OF ADVOCATE GENERAL LENZ

delivered on 26 June 1997 *

A — Introduction

1. The present reference for a preliminary ruling by the Fourth Criminal Chamber of the Cour d'Appel (Appeal Court), Mons, concerns Community transit.

2. Those charged in the national proceedings stand accused of having fraudulently imported, over the period from October 1984 to March 1985, 'prêt-à-porter' garments of unknown origin from France into Belgium.

3. The criminal prosecution appears to have originated in joint investigations conducted by the competent French and Belgian authorities. In connection with those investigations, the DNED (Direction Nationale des Enquêtes Douanières — National Directorate for Customs Investigations) in Paris sent a telex message on 13 March 1985 to the Belgian services. That message stated that the house searches carried out in France had made it possible to confirm that the following offences had been committed:

'1. Exportation as contraband of garments (of *French origin*; [1] destination: Belgium, in particular Brussels); estimated value: FF 5 000 000 over a period not subject to prescription;

2. Importation as contraband of other garments *from Belgium (of Spanish origin)* [2] intended for various customers in Paris; estimated value: FF 2 000 000.'

4. The Belgian authorities thereupon brought criminal proceedings, pursuant to Belgian customs provisions, against Mr Amelynck and 29 other (natural and legal) persons. As a ground for those proceedings, the Belgian authorities argued that, failing production of the T2 or T2 L document, it was not possible for the accused to prove that the goods exported from France to Belgium had originated in the Community. They also sought payment by the accused of the corresponding customs duties.

5. In its judgment of 9 February 1993, the Tribunal de Tournai held that the criminal proceedings were time-barred. It also held that the facts alleged against the accused had to be regarded as established and ordered 28

* Original language: German.

1 — Emphasis added.

2 — Emphasis added.

of those accused to pay the duties owingplus default interest. [3] Most of those concerned appealed against that judgment to the Cour d'Appel, Mons. In the proceedings before that court, some at least of the appellants argued that it was clear from the abovementioned telex of 13 March 1985 that the goods in question had originated in the Community.

6. In order to understand the questions to which these proceedings give rise, it is necessary to consider the provisions governing the Community transit procedure in force at the material time. Those provisions were contained in Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit. [4]

7. The Court has already examined those provisions in its judgment in *Trend-Moden Textilhandel*. [5] In that case, the Court summarized those provisions as follows:

'9. Regulation No 222/77 lays down two Community transit procedures. One procedure, referred to as the external Community transit procedure, applies essentially, as is clear from Article 1(2) of Regulation No 222/77, to goods which do not satisfy the conditions laid down in Articles 9 and 10 of the EEC Treaty, namely goods which come from non-member countries and are not in free circulation in the Community; the other procedure, referred to as the internal Community transit procedure, applies essentially, as is clear from Article 1(3) of Regulation No 222/77, to goods which satisfy the conditions laid down in Articles 9 and 10 of the EEC Treaty, namely goods originating in the Member States or which are in free circulation within the Community, known as "Community goods".

10. Under Article 12(1) of Regulation No 222/77, any goods carried under the procedure for external Community transit must be covered by a declaration on a form T1.

11. Under Article 39(1) of Regulation No 222/77, any goods that are carried under the procedure for internal Community transit, in other words essentially Community goods, must be covered by a declaration on a form T2. Thus, as a general rule, form T2 is the means of proof of the Community status of goods subject to the internal Community transit procedure.

12. It must be pointed out that there are specific provisions of Regulation No 222/77 which provide for cases in which Community goods are not carried under the procedure for internal Community transit.

3 — One of the accused was acquitted in the judgment, while another had died in the interim period.

4 — OJ 1977 L 38, p. 1. This regulation was repealed by Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit.

5 — Case C-117/88 *Trend-Moden Textilhandel* v *Hauptzollamt Emmerich* [1990] ECR I-631.

13. For those Community goods which are not carried under the procedure for internal Community transit, when that procedure is not compulsory, Commission Regulation (EEC) No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (Official Journal 1977, L 38, p. 20) prescribes as the means of proof document T2 L, the contents of which are the same as those of document T2 for the internal Community procedure (see the ninth recital in the preamble and Article 1(8) of Regulation No 223/77).

14. It follows from the above that Regulations No 222/77 and No 223/77 lay down the rule that the Community status of goods may be proved only by means of document T2 or document T2 L, subject to specified exceptions.

15. That interpretation is borne out by Article 9 of Regulation No 222/77, which provides that where, in the cases provided for in the regulation, "the provisions of the Treaty establishing the European Economic Community which relate to free movement of goods are only applied on presentation of an internal Community transit document issued to establish the Community status of the goods, the party concerned may, for any valid reason, obtain that document subsequently from the competent authorities of the Member State of departure". That provision incorporates the Community legislature's intention to exclude other means of proof while at the same time facilitating the task of the party concerned. A similar provision contained in Article 71 of the implementing regulation, Regulation No 223/77, provides that the document T2 L may be issued retroactively.' [6]

8. Under Article 39(2) of Regulation No 222/77, the provisions on external Community transit contained in Title II (Articles 12 to 38) of the regulation apply *mutatis mutandis* — with the exception of a few special rules (which are not relevant here) — to internal Community transit.

Those provisions include Article 37 of the regulation, which is worded as follows:

'1. The T1 documents issued in accordance with the rules, and the identification measures taken by the customs authorities of one Member State, shall have the same legal effects in other Member States as the T1 documents issued in accordance with the rules and the identification measures taken by the customs authorities of each of those Member States.

2. The findings of the competent authorities of a Member State made when inspections are carried out under the Community transit procedure shall have the same force in other

6 — Cited above (footnote 5), paragraphs 9 to 15.

Member States as findings of the competent authorities of each of those Member States.'

9. The Cour d'Appel, Mons, formed the view that it required an interpretation of the above provisions of Community law in order to reach a decision in the proceedings before it. It has accordingly referred the following question to the Court for a preliminary ruling under Article 177 of the EC Treaty:

'Do Community Regulations No 222/77 and No 223/77, laying down the rule that, save where otherwise provided, proof that goods originate in the Community may be provided only by transit document T2 or T2 L, comply with Articles 9 and 10 of the EEC Treaty and are they compatible with Articles 37(2) and 39(2) of Regulation No 222/77 which provide that the findings of the competent authorities of a Member State are to have the same force [in other Member States] as findings of the competent authorities of each of those Member States?'

10. A total of 11 of the appellants in the national proceedings, the Kingdom of Belgium, the Federal Republic of Germany, the Council and the Commission took part in the proceedings before the Court.

B — Analysis

11. The question submitted by the Cour d'Appel, Mons, consists of two parts. First, it asks whether the requirement that proof of the Community status of goods is in principle to be provided exclusively by transit document T2 or transit document T2 L is compatible with Articles 9 and 10 of the EC Treaty. Second, the Cour d'Appel seeks to ascertain whether this requirement is consistent with Articles 37(2) and 39(2) of Regulation No 222/77.

The first part of the question

12. As the Belgian Government and the Commission have argued, the answer to the first part of the question submitted has already been provided by the Court's abovementioned judgment in *Trend-Moden Textilhandel*. The Council takes the same view.

13. The Court stated as follows in that judgment:

'18. The order making the reference refers to Trend-Moden's argument that the combined effect of the burden of proof and the limitation of the means of proof may be that customs duties will be levied on goods which

are not covered by the prescribed transit documents but for which there is other proof of Community status, a result which is contrary to the provisions of Articles 9 and 10 of the Treaty.

19. It must be pointed out in that regard that Articles 9 and 10 of the Treaty are silent as to the means of proof and the burden of proof of the Community status of goods. They leave it to secondary Community legislation to settle those matters.

20. Next, it should be recalled that the rules set out above are justified by the need to facilitate the movement of goods across the Community's internal frontiers, which is one of the basic principles of the common market. Providing those on whom the burden of proof normally falls with a standard and simple means of proving the Community status of goods, combined with the possibility of producing such proof even after the frontier has been crossed, is consistent with that purpose and cannot therefore be regarded as contrary to Articles 9 and 10 of the EEC Treaty.

21. In view of the foregoing considerations, the reply must be that consideration of the question raised has disclosed no factor of such a kind as to make it appear that the exclusion by Council Regulation (EEC) No 222/77 and Commission Regulation (EEC) No 223/77, subject to specified exceptions, of the possibility of establishing the Community status of goods *vis-à-vis* the customs authorities of the Member State of destination by means of any evidence other than transit documents T2 or T2 L affects the validity of the said regulations.' [7]

14. I consider this analysis to be convincing. The soundness of that decision, moreover, has not been called in question by any of the parties to the present proceedings.

The second part of the question

15. In contrast, the answer to the second part of the question submitted is not quite so straightforward. The issue here is whether proof of the Community status of goods can also be provided by reference to corresponding 'findings' by the customs authorities of a Member State within the meaning of Article 37(2) of Regulation No 222/77 (which, by virtue of Article 39(2), is also applicable to the internal Community transit procedure). This matter has not as yet been clarified by the Court.

7 — Cited above (footnote 5), paragraphs 18 to 21.

16. The Belgian Government argues that it is not at all certain that the telex of 13 March 1985 from the French customs authorities contained or was intended to contain a finding as to the origin of the goods in question. It refers in this regard to the content and context of that document. This is evidently a question of fact which the national court making the reference alone may answer. For the purpose of replying to the second part of the question, I shall therefore, in what follows, proceed on the assumption that the telex referred to did indeed contain such a finding. [8]

17. The wording of Article 37 is unquestionably compatible with the possibility that the 'findings' referred to in Article 37(2) may also relate to the Community status of goods. Article 37(2) of Regulation No 222/77 would then have to be regarded as a derogating provision, allowing proof of Community status to be provided, not by production of the document otherwise prescribed, but by an equivalent finding by the customs authorities of a Member State.

18. The German Government, on the other hand, argues that Article 9 of the regulation, which provides that the Member State of departure is responsible for issuing the transit document, constitutes a special rule *vis-à-vis* Articles 37(2) and 39(2) and therefore takes precedence over those provisions. It must, however, be borne in mind that Article 9 belongs to the 'general provisions' of Title I of the regulation, whereas Articles 37 and 39 feature in the special provisions on external (Title II) and internal (Title III) Community transit. The German Government's argument does not therefore appear to me to be directly conclusive.

19. However, I share the view taken by the German and Belgian Governments and the Commission that, even in the light of Articles 37 and 39 of Regulation No 222/77, proof of the Community status of goods can as a rule — that is to say, apart from the exceptions which that regulation itself allows — be provided only by the documents already mentioned several times.

20. As the Court has already held, the rules of the Community transit procedure to be examined here have as their purpose 'to facilitate the transport of goods within the Community by simplifying and standardizing the formalities to be carried out when internal frontiers are crossed'. [9] Such a *simplification* and *standardization* of formalities, however, would be illusory if, instead of

8 — Such an interpretation may, for instance, find support in the fact that the telex mentioned draws a clear distinction between the 'origin' of the goods and the place from which they were imported.

9 — *Trend-Moden Textilhandel*, cited above (footnote 5), paragraph 16.

using the prescribed transit documents, traders were free to use any other documents issued by the customs authorities in question with corresponding findings as proof of the Community status of goods. Nor, in my view, are there any grounds whatever for arguing that the Community legislature might have intended to attribute such a broad meaning to Article 37(2). In this connection — and to this extent the argument put forward by the German Government is highly relevant — it should be borne in mind that Article 9 of the regulation provides the possibility of obtaining even retroactively an internal Community transit document. As the Court has already stated in *Trend-Moden Textilhandel*, this provision 'incorporates the Community legislature's intention to exclude other means of proof'. [10]

21. As the Belgian Government has correctly argued, the rules contained in Articles 37(2) and 39(2) serve rather to facilitate cooperation among customs authorities. The Commission submits in this connection that those provisions thereby refer to 'inspections' in the context of transit procedures for which the prescribed transit document has already been issued (or — one might add — applied for). Since in the present case the goods were not, to all appearances, being transported 'under the Community transit procedure', Article 37(2), the Commission argues, is therefore not applicable. The Belgian Government has expressed a similar view. It is not here necessary to decide whether this is a correct interpretation of the provisions in question. [11] It seems clear to me in any event that findings made by customs authorities under Articles 37(2) and 39(2) of Regulation No 222/77 *cannot* replace the proof of transit required under that regulation. Those articles are therefore not applicable in the present case.

22. A number of the appellants argue that this case involves criminal proceedings in which the accused must be presumed innocent until the contrary has been proved. At least in proceedings of this kind, they argue, and also in the absence of the prescribed transit documents, attention must therefore be paid to the actual origin of the goods if — as is here the case — this can be established in any other way. This argument cannot be dismissed out of hand. That said, however, my view is that the Court need not here examine that question — the resolution of which is in any event ultimately a matter for the national court alone. It must be borne in mind that the offences alleged against the accused are time-barred and that the judgment of the Tribunal de Tournai ordered only payment of the customs duties plus default interest.

10 — Judgment cited above (footnote 5), paragraph 15.

11 — The wording does not in any case impose such a restrictive interpretation.

C — Conclusion

23. I accordingly propose that the Court reply as follows to the question referred by the Cour d'Appel, Mons:

The rule set out in Council Regulation (EEC) No 222/77 and in Commission Regulation (EEC) No 223/77 that, save as otherwise provided, proof of the Community status of goods can be provided only by means of transit documents T2 or T2 L is compatible with Articles 9 and 10 of the EC Treaty and also with Articles 37(2) and 39(2) of Regulation No 222/77, which provide that findings of the competent authorities of a Member State are to have the same force in other Member States as findings of the competent authorities of each of those Member States.