OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 12 June 2003 [1]

1. By an order of 17 July 2001, the Bundesfinanzhof (Federal Finance Court) made a reference to the Court of Justice for a preliminary ruling on the interpretation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [2] (hereinafter the 'Customs Code' or, simply, the 'Code'). In short, the German court asks whether there is, for the purposes of Article 203 of the Code, removal from customs supervision when non-Community goods which are subject to the customs warehousing procedure and are intended for re-export from the customs territory of the Community were not placed under the external transit procedure immediately on removal from the customs warehouse prior to being conveyed to the exit customs office.

I — Legal framework

The Customs Code

Customs supervision

2. Article 4 of the Community Customs Code lays down certain general definitions in the area and provides, in particular, that:

'For the purposes of this Code, the following definitions shall apply:

...

1 — Original language: Italian.

2 — OJ 1992 L 302, p. 1.

(13) "Supervision by the customs authorities" means action taken in general by those authorities with a view to ensuring that customs rules and, where appropriate, other provision applicable to goods subject to customs supervision are observed.

(14) "Control by the customs authorities" means the performance of specific acts such as examining goods, verifying the existence and authenticity of documents, examining the accounts of undertakings and other records, inspecting means of transport, inspecting luggage and other goods carried by or on persons and carrying out official inquiries and other similar acts with a view to ensuring that customs rules and, where appropriate, other provisions applicable to goods subject to customs supervision are observed.'

3. For the purposes of Article 37:

'1. Goods brought into the customs territory of the Community shall, from the time of their entry, be subject to customs supervision. They may be subject to control by the customs authority in accordance with the provisions in force.

2. They shall remain under such supervision for as long as necessary to determine their customs status, if appropriate, and in the case of non-Community goods and without prejudice to Article 82(1), until their customs status is changed, they enter a free zone or free warehouse or they are re-exported or destroyed in accordance with Article 182.'

The relevant customs regimes

4. It is well-known that the Customs Code provides for various customs procedures, including the external transit procedure, a 'suspensive' regime, and customs warehousing, a customs procedure which is both 'suspensive' and 'with economic impact' (Article 84(a) and (b)).

External transit procedure

5. According to Article 91(1), the external transit procedure allows, for present purposes, for the movement of non-Community goods from one point to another within the customs territory of the Community, 'without such goods being subject to import duties and other charges or to commercial policy measures'.

Customs warehousing

6. Customs warehousing, governed by Articles 98 et seq. of the Code, allows, for its part, for the storage in a customs warehouse of non-Community goods without such goods being subject to import duties or commercial policy measures (Article 98(1)).

7. According to Article 110, 'where circumstances so warrant, goods placed under the customs warehousing procedure may be temporarily removed from the customs warehouse. Such removal must be authorised in advance by the customs authorities, who shall stipulate the conditions on which it may take place'.

The incurrence of a customs debt

8. Article 201 et seq. identify the cases in which a customs debt on importation is incurred.

9. In particular, for the purposes of Article 203:

'1. A customs debt on importation shall be incurred through:

— the unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

...'.

10. Under Article 204(1), a customs debt on importation is also incurred through:

'(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary

storage or from the use of the customs procedure under which they are placed, or

(b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.'

Repayment of duties

11. Repayment of customs duties is governed by Article 235 et seq. of the Code.

12. For the purposes of the present case, Article 236(1) in particular, should be noted, according to which

'import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed'. Nevertheless, repayment will not be granted 'when the facts which led to the payment... of an amount which was not legally owed are the result of deliberate action by the person concerned'.

13. Moreover, and in so far as is relevant here, it should be borne in mind that, according to Article 239, repayment may also be granted 'in situations other than those referred to in Articles 236, 237 and 238... resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned' (Article 239(1)). In such a case, repayment will be granted 'upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor' (Article 239(2)).

The implementing provisions

14. Commission Regulation No 2454/93, which lays down the provisions for the implementation of the Community Cus-

toms Code (hereinafter 'the implementing regulation' or simply 'the Regulation'),[3] is also relevant to the present action.

15. Of particular relevance in this respect is Article 859 et seq., laying down provisions for the implementation of Article 204 of the Code, mentioned above.

16. Article 859 provides, in particular, that:

'The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204(1) of the Code, provided:

— they do not constitute an attempt to remove the goods unlawfully from customs supervision,

— they do not imply obvious negligence on the part of the person concerned, and

— all the formalities necessary to regularise the situation of the goods are subsequently carried out:

...

6. in the case of goods in temporary storage or placed under a customs procedure, removal of the goods from the customs territory of the Community or their entry into a free zone or free warehouse without completion of the necessary formalities;

...'.

17. Article 860 specifies that:

'The customs authorities shall consider a customs debt to have been incurred under Article 204(1) of the Code unless the person who would be the debtor establishes that the conditions set out in Article 859 are fulfilled.'

3 — Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1).

18. Moreover, Article 861 adds that:

'The fact that the failures referred to in Article 859 do not give rise to a customs debt shall not preclude the application of provisions of criminal law in force or of provisions allowing cancellation and withdrawal of authorisations issued under the customs procedure in question.'

19. Article 899 et seq. laying down the implementing provisions of Article 239 of the Customs Code should also be recalled.

20. Article 899 in particular provides that '... where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239(2) of the Code is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned, it shall repay or remit the amount of import duties concerned.' Where, on the other hand, it is established 'that an application for repayment or remission... is based on grounds corresponding to one of the circumstance referred to in Article 904, it shall not repay or remit the amount of import duties concerned.'

21. Articles 900 to 903, for their part, contain a list of the situations in which repayment will be made, whereas Article 904 lists those situations in which repayment may not be made.

22. Finally, Article 905(1) provides that:

'Where the decision-making customs authority to which an application for repayment or remission under Article 239(2) of the Code has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909.

...

In all other cases, the decision-making customs authority shall refuse the application.'

23. The implementing regulation was amended most recently by Commission Regulation No 993/2001 of 4 May 2001.[4] The new provisions do not apply *ratione temporis* to the present situation but may nevertheless provide a useful aid to interpretation.

24. To this end, the new Article 512, in particular, should be recalled, since it applies to customs procedures having an economic impact and thus, as far as we are concerned, also to the customs warehousing regime. The article provides inter alia as follows:

'1. Transfer between different places designated in the same authorisation may be undertaken without any customs formalities.

2. Transfer from the office of entry to the holder's or operator's facilities or place of use may be carried out under cover of the declaration for entry for the arrangements.

3. Transfer to the office of exit with a view to re-exportation may take place under cover of the arrangements. In this case, the arrangements shall not be discharged until the goods or products declared for re-exportation have actually left the customs territory of the Community.'

II — Facts and procedure

25. The main action is the result of a request for repayment of customs duties presented to the Hauptzollamt Hamburg-St Annen, (main customs office for Hamburg-St Annen, which became the Hauptzollamt Hamburg-Stadt; hereinafter 'the Hauptzollamt' or 'the HZA') by the company Hamann International GmbH Spedition + Logistik, (hereinafter 'Hamann' or 'the appellant in the main action'), the successor in title of ROJO Terminal GmbH (hereinafter 'Rojo').

26. It may be seen from the order for reference that from 1993 onwards Rojo held an authorisation relating to the management of a type D customs warehouse, that is, a private warehouse subject to simplified customs formalities,[5] according to which 'the warehousekeeper is the same person as the depositor but is not necessarily the owner of the goods', (Article 504 of the implementing regulation).

4 — Commission Regulation (EC) No 993/2001 of 4 May 2001 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (Text with EEA relevance) (OJ 2001 L 141, p. 1).

5 — See, in particular, Articles 253 and 278(3)(c) of the implementing regulation.

27. By a document dated 5 March 1996, the Hauptzollamt accused Rojo of removing from the warehouse, for the purposes of their re-exportation, two lots of goods imported from Canada and subjected to the customs warehousing procedure, without first placing them under the external transit procedure. The HZA thus imputed to Rojo the payment of the duties and customs taxes relating to those two lots, amounting to DEM 6 283.30 and DEM 4 488.08, respectively.

28. On 7 March 1997, Hamann requested repayment of these sums from the Hauptzollamt, enclosing the relevant re-exportation documentation for the two lots in question, including in particular certain Polish documents certifying the payment of customs duties at the Polish-German border.

29. By a decision of 30 April 1997, the Hauptzollamt refused the request, holding that the goods in question had been removed, albeit temporarily, from customs supervision. The HZA observed that non-Community goods subject to the customs warehousing procedure and destined for re-export cannot be transferred from the customs warehouse to the customs office at the point of exit without first having been placed under the external transit procedure.

30. Hamann appealed against the decision of the HZA to the Finanzgericht (Finance Court) Hamburg, asserting amongst other things that the external transit procedure had been opened for the first lot of goods in Padborg, Denmark, and at the German-Polish border for the second lot of goods. The appeal was dismissed on the ground that there had been removal of the goods from customs supervision and hence a customs duty had, for the purposes of Article 203(1) of the Code, been incurred.

31. Hamann appealed against this decision to the Bundesfinanzhof, which, having doubts as to the interpretation of the concept of removal from customs supervision, decided to suspend the proceedings and submit the following question to the Court of Justice for a preliminary ruling:

'Is there a removal from customs supervision of re-exported non-Community goods resulting in the incurring of a customs debt under Article 203(1) of Council Regulation (EEC) No 2913/92 solely by virtue of the fact that the goods intended for re-export from the customs territory of the Community were not placed under the external transit procedure immediately on removal from the customs warehouse?'

32. In the proceedings thus initiated before the Court, written observations were submitted by the appellant in the main action and by the Commission. Both parties also participated in the oral hearing of 5 February 2003, at which the Hauptzollamt was also present.

III — Legal Analysis

33. As noted above, the referring court has submitted a single question to the Court asking, essentially, if there is, for the purposes of Article 203 of the Code, 'removal from customs supervision' when non-Community goods which are subject to the customs warehousing procedure and are intended for re-export from the customs territory of the Community are not placed under the external transit procedure immediately on removal from the customs warehouse.

Arguments of the parties

34. Hamann does not dispute the fact that in the present case the obligation, laid down in the provisions which were in force at the time, to place the goods under the external transit procedure was breached. However, it maintains that that breach does not, for the purposes of Article 203(1) of the Code, amount to a removal of the goods from the supervision of the customs authorities, but rather constitutes a breach 'which, in practice, had no effect on the correct operation of the procedure' within the meaning of Article 204 of the Code and Article 859 of the implementing regulation, read together.

35. The Commission, for its part, submits in the first place that the order of referral does not explain the facts sufficiently, making legal evaluation rather difficult.

36. In any event, the Commission claims that the behaviour in question should, in principle, be categorised as a removal from customs supervision for the purposes of Article 203 of the Code because the case-law of the Court clearly favours a very broad interpretation of such a notion, covering any action or omission which inhibits access by the competent customs authority to the goods under customs supervision.

37. According to the Commission, it thus falls to the referring court to assess whether, in the present case, the competent authority was in fact able to have access to the goods in question.

38. As a secondary point, the Commission adds that the present case may also be examined with reference to Article 239 of the Code, even though the national court did not make specific reference to this provision.

39. The Commission considers that the conditions for a proper application of that provision are present in this case, although it falls in any event to the referring court to determine whether they are in fact satisfied.

Assessment

Introduction

40. I believe, as was also suggested by the Commission, that the legislative provisions governing this case must first be clarified.

41. I am of the opinion that to this end it must first be established whether conduct such as that in question constitutes 're-moval of goods from customs supervision' [6] and thus gives rise to a customs debt for the purposes of Article 203 of the Code.

42. Should the behaviour not fall to be thus categorised, it will be necessary to evaluate it with reference to Article 204 of the Code in order to establish whether there has been a breach of the terms and conditions of the applicable customs procedure, to which the abovementioned provision links the incurring of a customs debt, or whether there has been a 'non-performance lacking any effect on the correct functioning of the [customs] procedure' in question, in which case Article 204 precludes the incurring of such a debt.

43. In the latter case, it will have to be concluded that the duties in question were not legally owed and the interested party will thus have a right to repayment under Article 236 of the Code.

44. If, on the other hand, it is concluded that, by virtue of Article 203 or Article 204, a customs debt has arisen and that the duties under dispute were therefore legally owed, it will then have to be considered

6 — Note that the term 'controllo' used in the Italian language version of Article 203 appears not to correspond exactly to the other language versions of the Customs Code, which refer to customs 'supervision', 'vigilanza' ('surveillance', 'Überwachung', 'vigilancia').

whether, in circumstances such as those of the present case, repayment may be made on the basis of one of the exceptions in Article 239 of the Code.

The notion of removal

45. As has been noted, the Commission is of the opinion that the notion of removal, while not defined by any Community norm, can easily be inferred from the case-law of the Court. In *Wandel* and *Liberexim*, the Court stated that 'any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from monitoring them as provided for in Article 37(1) of the Customs Code' [7] constitutes removal for the purposes of Article 203. The definition of the notion is thus certainly broad enough to include the circumstances of the case before the referring court.

46. It should be noted, however, that this interpretation was developed by the Court in relation to cases in which the goods subject to customs supervision were put into circulation on the Community market, and thus into competition with other Community goods, and seems to derive its *raison d'être* from that very fact.

47. In *Wandel*, goods introduced into the Community customs territory and declared for release into free circulation were put on the market in Germany before the customs inspector had carried out the necessary customs examination and release formalities. Similarly, in *Liberexim* consignments of milk powder from a third country were irregularly imported into the customs territory of the Community and then sold on in the Netherlands. [8]

48. On the other hand, in the present case, the goods were introduced only temporarily into the Community customs territory since they were not intended to be put into circulation on the internal common market and were in fact, after having been declared for export to customs, re-exported to a third country without ever having entered into competition with goods produced in the Community. It must be asked therefore whether, in view of those distinguishing elements, the abovementioned case law can be extended to cover such cases as the one at hand.

7 — Case C-66/99 *Wandel* [2001] ECR I-873, paragraph 47, and Case C-371/99 *Liberexim* [2002] ECR I-6227, paragraph 55.

8 — See *Wandel*, paragraphs 27 to 29, and *Liberexim*, paragraphs 16 to 21.

49. It seems to me, for the following reasons, that the answer to that must be in the negative.

50. It is well known, and was pointed out by the Bundesfinanzhof (and, in essence, by all the intervening parties), that within the framework of the common commercial policy the imposition of customs duties on import is designed to protect goods produced in the Community; it is thus goods imported from third countries which are hit by these duties, on the basis that they are released into the Community system and therefore enter into competition with goods having a Community origin.

51. In the light of the above, the differences between the various situations under consideration seem clear. In *Wandel* and *Liberexim*, the violations of customs procedure of which the parties were accused carried the risk of an unauthorised circumventing of the Community customs tariff in so far as they prevented the customs authorities from inspecting the goods in order to determine the applicable customs duty before they were put into free circulation. Understandably, therefore, the existence of such a risk required a strict interpretation of the scope of the notion of removal.

52. In the present case, however, the breach of the provisions relating to the transfer of goods from the customs warehouse to the customs office of exit did not lead, and could not have led, to unauthorised entry of the goods onto the Community market. This must therefore be considered to be a less serious offence from the point of view of its consequences and, as such, permits of a more 'flexible' interpretation of the notion of removal.

53. Only in the other cases mentioned is there strictly speaking a violation of the applicable customs regime, such as to constitute removal of the goods from customs supervision within the meaning of Article 203 of the Code, because there is a risk of unlawful circumvention of the Community customs tariff only in those cases where it is impossible for the competent customs authority to gain access to the goods under customs supervision and to monitor them as provided for in Article 37(1) of the Customs Code. Conversely, in cases such as this one, one can only speak, at most, of procedural irregularities within the meaning of Article 204 of the Code.

54. Likewise, it does not appear to me that such an interpretation of the notion of removal would be in contradiction with that already accepted by the Court in the cases mentioned above; rather, it appears to me that such an interpretation merely clarifies that of the Court by emphasising the *ratio legis* of Article 203.

55. Still other arguments support this thesis. Above all, it appears to be in line with a systematic interpretation of the Customs Code and, in particular, a combined reading of Articles 203 and 204.

56. As mentioned above, Article 204 governs the non-performance of obligations linked to the placing of goods under a particular customs procedure, or of the conditions to which that is subject, and provides that such non-performance will not result in the incurring of a customs debt if 'they have not had, in practice, any effect on the proper functioning... of the customs procedure in question'.

57. As the Commission pointed out, it is true that the rule laid down in Article 204 appears to be a provision of residual application, given that it applies 'in cases other than those under Article 203'. Nevertheless, it seems to me, as it does to Hamann, that an overly narrow interpretation of the notion of removal under Article 203 would unduly restrict the scope of Article 204, depriving it essentially of any useful effect.

58. That becomes especially apparent if that article is read together with the relevant implementing rules. According to Article 859 of the implementing regulation, Article 204 applies, inter alia, precisely in the situation here, namely that in which goods placed under a particular customs procedure leave the customs territory of the Community without the necessary formalities having been properly completed (Article 859(6)). Thus it seems that Hamann is correct in observing that, were such a violation to be categorised as 'removal from customs supervision' within the meaning of Article 203, Article 204, in combination with Article 859(6), would be essentially deprived of normative effect.

59. Finally, I would add that the recent simplification and rationalisation of the rules governing customs procedures having an economic impact, and in particular the introduction in the implementing regulation of the new Article 512, provides indirect support for that approach. As also noted by Hamann, that amendment abrogates the very formality the non-observance of which is at the root of the dispute between Rojo and the Hauptzollamt, and now enables the transfer of goods to the customs office of exit with a view to their re-exportation out of the Community to be brought within the scope of the customs warehousing procedure without the need for the goods to be placed under the external transit procedure.

60. If that amendment is assumed to have come at a time when the legislative context remained unaltered, I believe that it justifies the conclusion that the formalities in question were not indispensable to ensuring

customs supervision of the goods, thereby allowing one to at least doubt that their omission could have led, under the previous procedure, to any real violation of the rules on customs supervision rather than a simple procedural irregularity.

61. The observations set out above lead me to conclude that a violation of the customs rules such as the one in the present case does not amount to 'removal from customs supervision' within the meaning of Article 203, but rather to a failure to comply with Article 204. More specifically, it seems to me that this is a case of 'non-performance devoid of any consequences for the proper functioning of the procedure' of customs warehousing, within the meaning of Article 204 of the Code and Article 859 of the implementing regulation, provided that there has not been obvious negligence and that the necessary formalities were subsequently completed in order to regularise the situation of the goods. Under Article 860 of the implementing regulation it will fall to the interested party to prove that in the case at hand these two conditions are satisfied.

62. I am therefore of the opinion that the fact that non-Community goods — temporarily brought into the customs territory of the Community, placed under the customs warehousing procedure with a view to their re-export, declared to the customs authorities for re-export and subsequently in fact re-exported out of the customs territory of the Community — were not placed under the external transit procedure immediately on their removal from the warehouse for transfer to the customs office of exit does not constitute 'removal from customs supervision' within the meaning of Article 203 of the Community Customs Code, and therefore does not lead to the incurring of a customs debt.

63. Nor does such a situation lead to the incurring of a customs debt under Article 204 of the Code, provided always that it is demonstrated, in accordance with Article 859 of the implementing regulation, that there has not been obvious negligence on the part of the person concerned and that all the formalities necessary to regularise the situation of the goods are subsequently carried out.

64. It falls to the national court to verify whether, in the given case, it has been proven that the conditions of Article 859 have been fulfilled.

Repayment within the meaning of Article 239 of the Customs Code

65. As already noted above, should it be held that the conditions in Article 859 of the implementing regulation have not been fulfilled, it will also be necessary to deter-

mine whether, in light of the circumstances of the particular case, any of the exceptions laid down in Article 239 of the Customs Code and in the related provisions in the implementing regulation may apply so as to permit repayment of a legally owed duty.

66. In particular, according to Community case-law, it will first be necessary to determine 'whether "an application for repayment... is based on grounds corresponding to one of the circumstances" referred to in Articles 900 to 904 of the implementing regulation'. [9] Where none of the situations listed in that provision exist, it will be necessary, again according to the case-law of the Court, to determine 'whether there is any evidence of the existence of a special situation within the meaning of Article 905(1) of the regulation, which does not entail any deception or manifest negligence on the part of the person concerned'. [10]

67. The Court has also stated that such a 'special situation' will arise when 'having regard to the objective of fairness underlying Article 239 of the Customs Code, factors liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business are found to exist'. [11]

68. As regards the present case, I agree with the Commission that the complexity of the provisions applicable to the facts in question and the fact that the experience of the interested parties is limited to the management of a customs warehouse of type D, subject to relatively simplified rules, tend to justify the conclusion that we are in the presence of one of those 'special situations', 'which does not entail any deception or manifest negligence on the part of the person concerned' and in relation to which one may therefore legitimately apply Article 239 and thus permit, according to equitable principles, a repayment of the duty which was none the less legally owed.

69. It falls to the national court to determine whether these conditions have been fulfilled in the present case.

9 — Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 88.

10 — Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraph 19, and *Söhl & Söhlke*, paragraph 91.

11 — Case C-253/99 *Bacardi* [2001] ECR I-6493, paragraphs 56 and 59. See also *Trans-Ex-Import*, paragraph 22.

IV — Conclusion

70. In the light of the observations laid out above, I would propose that the Court reply to the Bundesfinanzhof as follows:

'The fact that non-Community goods — temporarily brought into the customs territory of the Community, placed under the customs warehousing procedure with a view to their re-export, declared to the customs authorities for re-export and subsequently in fact re-exported out of the customs territory of the Community — were not placed under the external transit procedure immediately on their removal from the warehouse for transfer to the customs office of exit does not constitute "removal from customs supervision" within the meaning of Article 203 of the Community Customs Code, and therefore does not lead to the incurring of a customs debt.

Nor does such a situation lead to the incurring of a customs debt under Article 204 of the Code, provided always that it is demonstrated, in accordance with Article 859 of the implementing regulation, that there has not been obvious negligence on the part of the person concerned and that all the formalities necessary to regularise the situation of the goods are subsequently carried out.

It falls to the national court to verify whether, in the given case, it has been proven that the conditions of Article 859 have been fulfilled.

Should the national court hold that those conditions have not been fulfilled, it will also be required to determine whether, in the light of the circumstances of the particular case, any of the exceptions laid down in Article 239 of the Customs Code and in the related provisions in the implementing regulation may apply so as to permit repayment of a legally owed duty.'