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Opinion of Mr Advocate General Mischo delivered on 27 November 2001. - Liberexim BV v Staatssecretaris van Financiën. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Sixth VAT Directive - Importation by removal of goods from customs arrangements - Transport by road under the TIR arrangements or the external Community transit arrangements - Changing of tractor - Unloading of trailer and destruction of seals - Removal of goods from customs supervision. - Case C-371/99.

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## Opinion of the Advocate-General

*1 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has asked the Court to interpret Article 7(3) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, (1) as amended by Council Directive 92/111/EEC of 14 December 1992, amending Directive 77/388 and introducing simplification measures with regard to value added tax (2) (`the Sixth Directive').*

*I - Community law context*

*Fiscal provisions*

*2. Under Article 2(2) of the Sixth Directive, the importation of goods is subject to value added tax (`VAT').*

*3. Under Article 7, entitled `Imports', of the Sixth Directive:*

*`1. "Importation of goods" shall mean:*

*(a) the entry into the Community of goods which do not fulfil the conditions laid down in Articles 9 and 10 of the Treaty establishing the European Economic Community ...*

*...*

*2 The place of import of goods shall be the Member State within the territory of which the goods are when they enter the Community.*

*3 Notwithstanding paragraph 2, where goods referred to in paragraph 1(a) are, on entry into the Community, placed under one of the arrangements referred to in Article 16(1)(B), points (a), (b), (c) and (d), under arrangements for temporary importation with total exemption from import duty or under external transit arrangements, the place of import of such goods shall be the Member State within the territory of which they cease to be covered by those arrangements.*

*...'*

*4 Under Article 10(3) of the Sixth Directive:*

*`The chargeable event shall occur and the tax shall become chargeable when the goods are imported. Where goods are placed under one of the arrangements referred to in Article 7(3) on entry into the Community, the chargeable event shall occur and the tax shall become payable only when the goods cease to be covered by those arrangements.*

*However, where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event shall occur and the tax shall become payable when the chargeable event for those Community duties occurs and those duties become chargeable.*

*...'*

*5 Article 21 of the Sixth Directive, entitled `Persons liable to pay tax to the authorities', provides that, on importation, VAT is payable by the person or persons designated or accepted as being liable by the Member State into which the goods are imported.*

*Customs provisions*

*6 Article 5(2)(a), forming part of Title II, entitled `Scope', of Council Directive (EEC) No 2726/90 of 17 September 1990 on Community transit, (3) provides as follows:*

*`By way of derogation from Articles 1 and 3, the Community transit procedure shall not apply to the carriage of goods under cover of:*

*(a) TIR carnets (TIR Convention), provided that such carriage:*

*1. began or is to end outside the Community:*

*...'*

*7 Articles 20, 21 and 22 of Regulation No 2726/90 read as follows:*

*`Article 20*

*1. The goods described on a T1 document may, without the need for a new declaration to be made, be transferred to another means of transport under the supervision of the competent authorities of the Member State in the territory of which the transfer is to be made. In such a case, the competent authorities shall record the transfer on the T1 document.*

*2. The competent authorities may, subject to such conditions as they shall determine, authorise such transfer without their supervision. In such a case, the carrier shall record the relevant details on the T1 document and shall inform the competent authorities of the Member State of transfer, for the purposes of authentication.*

*Article 21*

*1. If seals are broken in the course of carriage without the carrier's so intending, the carrier shall, as soon as possible, request that a certified report be drawn up by the competent authorities of the Member States in which the means of transport is located. The authorities concerned shall, if possible, affix new seals.*

*2. In the event of an accident necessitating transfer to another means of transport, Article 20 shall apply.*

*3. In the event of imminent danger necessitating immediate unloading of the whole load or part of the load, the carrier may take action on his own initiative. He shall record such action on the T1 document. Paragraph 1 shall apply in such a case.*

*4. If, as a result of accidents or other incidents arising in the course of carriage, the carrier is not in a position to observe the time limit referred to in Article 13, he shall inform the competent authorities referred to in paragraph 1 as soon as possible. Those authorities shall then record the relevant details on the T1 document.*

*Article 22*

*1. The goods and the T1 document shall be produced at the office of destination.*

*2. The office of destination shall record on the copies of the T1 document the details of controls carried out and shall without delay send a copy to the office of departure and retain the other copy.*

*3. A Community transit operation may be concluded at an office other than that mentioned in the T1 document. That other office shall then become the office of destination.*

*4. Where the goods are produced at the office of destination after expiry of the time limit prescribed by the office of departure and where this failure to comply with the time limit is due to circumstances which are explained to the satisfaction of the office of destination and are not attributable to the carrier or the principal, the latter shall be deemed to have complied with the time limit prescribed.'*

*8 Article 34, forming part of Chapter 4, entitled `Irregularities', of Title V of Regulation No 2726/90, provides as follows:*

*`1. When it is found that, in the course of a Community transit operation, an offence or irregularity has been committed in a particular Member State, the recovery of duties or other charges which may be chargeable shall be effected by that Member State in accordance with Community or national provisions, without prejudice to the institution of criminal proceedings.*

*2. When it is found that, in the course of or in connection with a Community transit operation, an offence or irregularity has been committed and the place of the offence or irregularity cannot be determined, it shall be deemed to have been committed in the Member State in which it was detected.*

*3. When the consignment has not been produced at the office of destination and the place of the offence or irregularity cannot be established, such offence or irregularity shall be deemed to have been committed in the Member State to which:*

*- the office of departure belongs, or*

*- the office of transit at the point of entry into the Community belongs and to which a transit advice note has been given,*

*unless, within a period to be determined, proof of the regularity of the transit operation or of the place where the offence or irregularity was actually committed is furnished to the satisfaction of the competent authorities.*

*If, in the absence of such proof, the said offence or irregularity remains deemed to have been committed in the Member State of departure or in the Member State of point of entry as referred to in the first subparagraph, second indent, the duties and other charges relating to the goods concerned shall be levied by that Member State in accordance with Community or national provisions.*

*If, before expiry of the period of three years from the date of registration of the T1 declaration, the Member State where the said offence or irregularity was actually committed is determined, that Member State shall, in accordance with Community or national provisions, recover the duties and other charges (apart from those levied, pursuant to the second subparagraph, as own resources of the Community) relating to the goods concerned. In this case, once the proof of such recovery is provided, the levies and other charges initially levied (apart from those levied as own resources of the Community) shall be refunded.*

*...'*

*9 Article 2 of the Customs Convention on the international transport of goods under cover of TIR carnets, concluded in Geneva on 14 November 1975 (`the TIR Convention'), approved on behalf of the European Economic Community by Council Regulation (EEC) No 2112/78 of 25 July 1978, (4) provides as follows:*

*`This Convention shall apply to the transport of goods without intermediate reloading, in road vehicles, combinations of vehicles or in containers, across one or more frontiers between a customs office of departure of one Contracting Party and a customs office of destination of another or the same Contracting Party, provided that some portion of the journey between the beginning and the end of the TIR operation is made by road.'*

*10 Under Article 25 of the TIR Convention:*

*`If the customs seals are broken en route ... or if any goods are destroyed or damaged without breaking of such seals, the procedure laid down in Annex 1 to this Convention for the use of the TIR carnet shall, without prejudice to the possible application of the provisions of national law, be followed, and the certified report in the TIR carnet shall be completed.'*

*11 Articles 36 and 37 of the TIR Convention provide that:*

*`Article 36*

*Any breach of the provisions of this Convention shall render the offender liable, in the country where the offence was committed, to the penalties prescribed by the law of such country.*

*Article 37*

*When it is not possible to establish in which territory an irregularity was committed, it shall be deemed to have been committed in the territory of the Contracting Party where it is detected.'*

*12 Article 2(1)(c) and (d), which appear in Part A, `Customs debt on importation', of Title I, `Incurrence of customs debt', of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs*

*debt, (5) provide as follows:*

*`A customs debt on importation shall be incurred by:*

*...*

*(c) the removal of goods liable to import duties from the customs supervision involved in the temporary storage of the goods or their being placed under a customs procedure which involves customs supervision;*

*(d) the 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 non-compliance with a condition to which the placing of the goods under that procedure is subject, unless it is established that these failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.'*

*13 Article 3 of the same regulation states that:*

*`The moment when a customs debt on importation is incurred shall be deemed to be:*

*...*

*(c) in the cases referred to in Article 2(1)(c), the moment when the goods are removed from customs supervision;*

*(d) in the cases referred to in Article 2(1)(d), either the moment when the obligation, non-fulfilment of which causes the customs debt to be incurred, ceases to be met, or the moment when the goods were placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure was not in fact fulfilled.'*

*14 One of the forms (6) of `removal from customs supervision' for the purposes of Article 2 of Regulation No 2144/87 is described in Article 1 of Commission Regulation (EEC) No 597/89 of 8 March 1989 laying down provisions for the implementation of Regulation No 2144/87, (7) which is worded as follows:*

*`The presentation of a customs declaration for the goods in question, or any other act having the same legal effects, and the production for endorsement by the competent authorities of a document, shall be considered as removal of goods from customs supervision within the meaning of Article 2(1)(c) of Regulation (EEC) No 2144/87 to the extent that these acts have the effect of wrongly conferring on them the legal status of Community goods.'*

*15 Regulation (EEC) No 2913/92 (8) does not form part of the legal context of this case because, as we shall see, the main proceedings relate to events which took place before the date on which it took effect.*

*II - The main proceedings*

*16 During October and November 1993 consignments of milk powder originating in Lithuania were imported into the Netherlands. On two occasions transport from Lithuania was effected under cover of a TIR carnet, and on seven occasions it was effected under cover of a T1 document from the borders of the Community customs area.*

*17 The consignments of milk powder were loaded in Lithuania into means of transport consisting of a truck with a semi-trailer, both registered in that country. The powder transported under cover of TIR carnets entered the Community customs area in Germany in accordance with the*

*formalities prescribed for that purpose and then continued under the cover of the TIR carnets. The other consignments were loaded onto the abovementioned means of transport and brought by ferry into the Community customs area for importation into Germany under customs supervision after arrival. A customs agent established in the port of arrival made a declaration of external Community transit in relation to the latter consignments.*

*18 In accordance with the relevant provisions, the registration numbers of the truck and semi-trailer were entered on the TIR carnets and the T1 documents, which showed that the goods were intended for delivery in Portugal.*

*19 Nevertheless, the goods were taken to the premises of Haukes Transportgesellschaft in Wyler (Germany), near a border crossing to the Netherlands. One Mr Jan Lamme, against whom, as the main suspect, criminal proceedings have been instituted in respect of the imports in question, or a member of the organisation which he had set up, was waiting there with a truck bearing Dutch number plates. The trailer was detached from the original truck and attached to the Dutch truck without the customs authorities being informed.*

*20 The goods were then transported to the Netherlands. They were not presented, accompanied by the TIR carnets or T1 documents, at the customs offices of destination shown on the documents, as required by Article 22(1) of Regulation No 2726/90, or at an office of destination in the Netherlands.*

*21 The goods were sold by Mr Lamme to Liberexim BV (`Liberexim'), which resold them to another Dutch company, and were then delivered in the same year, on behalf of the latter company, to storage facilities of some 12 companies in the Netherlands.*

*22 On 26 January 1996 the Inspecteur der Belastingdienst Arnhem (`the Inspector') wrote to Liberexim demanding the payment of a total of NLG 70 676.10 by way of VAT on the ground that Article 18(1), main clause and (c), of the Wet op de omzetbelasting (Law on Turnover Tax) of 28 June 1968 (Stbl. 329, `the VAT Law') was applicable because the consignments of milk powder had `ceased to be covered' by a customs arrangement in the Netherlands.*

*23 When Liberexim's objection was dismissed by the Inspector, it appealed against his decision to the Gerechtshof (Regional Court of Appeal) te Arnhem (Netherlands).*

*24 The Gerechtshof dismissed the appeal by judgment of 18 March 1998 and interpreted Article 18 of the VAT law as meaning that the chargeable event for an `import of goods' takes place, in particular, where the goods `cease to be covered' by a customs arrangement in the Netherlands. On the basis of the proven facts and extracts from reports, the Gerechtshof found that the goods in question had `ceased to be covered' by Community external transit arrangements in the Netherlands and not in Germany, as Liberexim had maintained.*

*25 Liberexim lodged an appeal on a point of law with the Hoge Raad der Nederlanden. It argued that VAT had become chargeable in Germany because it was proposed to transport the goods to a destination other than that shown in the declaration. Consequently, according to Liberexim, the conditions which had to be taken into account when goods were placed under Community external transit arrangements had not been fulfilled.*

*III - The questions referred*

*26 Under those circumstances, the national court took the view that the outcome of the case depended on the interpretation of Article 7(3) of the Sixth Directive and decided to stay the judgment and refer the following questions to the Court for a preliminary ruling:*

*`(1) What is to be understood by the words "cease to be covered" by the external transit arrangements within the meaning of Article 7(3) of the Sixth Directive, if such cessation does not occur in a regular manner - that is to say, otherwise than by the goods being declared for free circulation:*

*(a) is this the first operation which, in relation to the goods, is carried out contrary to any provision connected with those arrangements, and is it relevant whether in this operation there is an intention to bring the goods - inter alia through completion of the operation - into circulation within the Community contrary to that provision; or*

*(b) does such cessation occur (only) once the goods - in the present case following breaking of the seals - have been unloaded from the means of transport without compliance with the obligation to produce the goods with documentation at the office of destination in accordance with Article 22(1) of Regulation [No 2726/90]; is it relevant whether in this operation there is an intention to bring the goods - inter alia through completion of the operation - into circulation within the Community contrary to the Community provisions; or*

*(c) should the words "cease to be covered" be construed as referring to the totality of the operations which result in the goods being brought into circulation within the Community otherwise than in a regular manner?*

*(2) If the answer to the first question is in accordance with heading (c), where does this cessation occur; does it occur in the place where the first irregular operation is carried out, or in the place where a subsequent operation is carried out, in particular the place where the goods - in the present case following breaking of the seals - are unloaded from the means of transport?'*

*IV - The submissions before the Court*

*27 The positions taken by the different interveners with regard to the first question may be summarised as follows.*

*28 According to Liberexim, `it follows from Article 34 [of Regulation No 2726/90] that a customs debt is incurred where, first, an irregularity and, second, an offence occurs. No conditions are laid down with regard to such irregularities or offences for the purposes of those provisions'. Therefore, according to Liberexim, `in principle any offence or irregularity means that import duties become payable'.*

*29 Consequently Liberexim proposes that `the Court should rule that the reply to point (a) of the first question from the Hoge Raad must be in the affirmative since, having regard to the acts described in the Hoge Raad judgment, which were in breach of the provisions of Community law in general and those of Regulation (EEC) No 2855/85 in particular, import duties became payable.'*

*30 The Netherlands Government considers that, `to determine the place where value added tax becomes payable on importation in the case of goods which are covered by the external transit arrangements referred to by Article 7(3) of the Sixth Directive and then cease to be covered by those arrangements, it is necessary to determine the place where the customs debt is incurred'.*

*31 According to the Netherlands Government, the customs debt was incurred when the goods were unloaded from the means of transport - in the present case, after the seals were broken - without presentation of the goods and documents at a customs office of destination, because that act constituted removal of the goods from customs supervision pursuant to Article 2(1)(c) of Regulation No 2144/87.*

*32 The Netherlands Government adds that the question whether the change of truck, referred to in question 1(a) from the national court, gives rise to a customs debt for the purpose of Article 2(1)(d)*

*of Regulation No 2144/87 is irrelevant because an act which incurred a customs debt within the meaning of Article 2(1)(c) of that Regulation was detected. According to the Netherlands Government, the general scheme of those provisions has the consequence that the criterion of non-fulfilment of one of the obligations or non-compliance with one of the conditions of Article 2(1)(d) of Regulation No 2144/87 can no longer apply.*

*33 Therefore the Netherlands Government proposes that the Court's reply should be that `goods "cease to be covered" by the external transit arrangements for the purpose of Article 7(3) of the Sixth Directive - if such cessation is irregular, that is to say, otherwise than by means of a declaration that the goods are in free circulation - only where the goods - after the seals are broken, as the case may be - are unloaded from the means of transport without the obligation to present the goods and the document at the office of destination being fulfilled.'*

*34 The Italian Government submits that only acts which indicate an unambiguous intention on the part of the operator concerned to obtain power to dispose of goods subject to particular customs arrangements, without previously carrying out the customs formalities prescribed for that purpose, are such as undoubtedly to cause in an irregular manner the goods in question to `cease to be covered' by such arrangements. Therefore defects of a purely formal nature, which by law can be rectified at a later date, cannot constitute conditions for a customs debt and, consequently, a tax liability, to arise.*

*35 Therefore, according to the Italian Government, the mere change of trucks cannot, in the absence of unequivocal evidence of an intention to remove the goods from customs supervision and not to present them at the office of destination, be regarded as an act irregularly causing the goods to `cease to be covered' by the customs arrangements to which they were subject. Consequently, in the main proceedings, the goods could not be deemed to have `ceased to be covered' by the TIR customs arrangements and the external transit arrangements in Germany. Indeed, according to the Italian Government, this took place in the Netherlands, where the goods in question were illegally put into circulation, without supervision by the customs authorities.*

*36 According to the United Kingdom Government, when goods `cease to be covered' by the transit arrangements, this coincides with the incurrence of the customs debt. The basic purpose of the external transit arrangements is to suspend customs duties. Once the customs debt is incurred, the goods must be considered as having ceased to be covered by the external transit arrangements.*

*37 The United Kingdom Government considers that the customs debt is incurred at the time of the first act which must be treated as removal of the goods from customs supervision within the meaning of Article 2(1)(c) of Regulation no 2144/87, whether as the non-fulfilment of an obligation or non-compliance with a condition within the meaning of Article 2(1)(d) of the same regulation. If an act is treated in this way, a customs debt is incurred as a result and no subsequent event can affect that. The United Kingdom Government adds that the intentional element is irrelevant in making the necessary assessment. Only objective criteria should be taken into account.*

*38 Specifically, the United Kingdom Government considers that the customs debt was incurred in Germany and therefore the goods `ceased to be covered' by the external transit arrangements also in Germany because the change of truck had to be treated as removal from customs supervision and also as non-compliance with one of the conditions for placing the goods under the transit arrangements.*

*39 Finally, the Commission's examination of the question from the national court leads it to propose that the Court reply as follows:*

*`1. Where goods cease to be covered by external transit arrangements within the meaning of Article 7(3) of the Sixth Directive, such cessation is irregular if:*

*- either the goods placed under those arrangements are removed from customs supervision;*

*- or one of the obligations arising from the fact that the goods have been placed under external transit arrangements is not fulfilled, unless it is established that that type of failure had no effect on the correct operation of the arrangements, within the meaning of Article 3 of Council Regulation No 2144/87 of 13 July 1987.*

*2. The first operation which is carried out contrary to the external transit arrangements does not necessarily mean that the goods cease to be covered by those arrangements. The first operation which compromises customs supervision, where that irregularity is not rectified in accordance with the provisions of Council Regulation No 2726/90, does mean that the goods cease to be so covered.*

*3. Where customs supervision is compromised by a series of irregularities, the first irregularity which cannot be regarded as of minor importance is the one which will be taken into account to establish the place where the goods ceased to be covered by the external transit arrangements.*

*4. An irregularity can never be regarded as of minor importance where it has the object of compromising customs supervision.'*

*40 To sum up, it follows from the foregoing observations that Liberexim and the United Kingdom Government submit that, in substance, the goods `ceased to be covered' by the external transit arrangements in Germany, while the Netherlands and the Italian Governments consider that this took place in the Netherlands. The Commission, for its part, makes no comment on the circumstances of the main proceedings but, in my opinion, it finds that the gravity of the two successive offences must be compared.*

*V - Assessment*

*41 In essence, the Hoge Raad wishes to know whether goods can be deemed to have `ceased to be covered' by the external transit arrangements as soon as they have been unloaded - after breaking of the seals, if any (9) - and put into circulation without compliance with the obligation to produce the goods and the T1 document at the office of destination or whether, even in that case, it is conceivable that they may have `ceased to be covered' earlier as a result of the disregard of any provision connected with those arrangements.*

*42 To enable the Hoge Raad to determine this question, it has asked the Court to interpret the phrase `cease to be covered' in Article 7(3) of the Sixth Directive, which reads as follows: `Notwithstanding paragraph 2, where goods referred to in paragraph 1(a) are, on entry into the Community, placed under one of the arrangements referred to in Article 16(1)(B), points (a), (b), (c) and (d), under arrangements for temporary importation with total exemption from import duty or under external transit arrangements, the place of import of such goods shall be the Member State within the territory of which they cease to be covered by those arrangements.' (10)*

*43 As this provision refers to different `arrangements' and as it is clear from the order for reference that the goods which are the subject of the main proceedings entered the Community under two different arrangements, namely the external transit arrangements and the TIR arrangements, I think the phrase `cease to be covered' must be considered in the context of each of them for the sake of completeness, even though the actual questions from the national court refer only to the external transit arrangements.*

*44 Consequently the first point I wish to consider is the time at which the goods may be deemed to have `ceased to be covered' by external transit arrangements.*

*45 The relevant Regulation No 2726/90 gives an explicit reply to this question only in relation to an operation which has been correctly carried out. Under Article 23 of the Regulation, `the Community transit operation shall end when the goods and the corresponding T1 document are produced at the office of destination'.*

*46 Where an operation is carried out incorrectly, Article 34(1) of the same regulation provides that `when it is found that, in the course of a Community transit operation, an offence or irregularity has been committed in a particular Member State, the recovery of duties or other charges which may be chargeable shall be effected by that Member State in accordance with Community or national provisions, without prejudice to the institution of criminal proceedings.'*

*47 It follows that an offence must be prosecuted in the Member State where it was committed, if it is possible to determine that State. If the offence is such that it must give rise to the recovery of duties or other charges, they must be recovered in that Member State.*

*48 It is clear that, in a case such as that to which the main proceedings relate, all the requirements of Article 34 of Regulation No 2726/90 are satisfied:*

*- the offence consisting in the breaking of the seals and unloading of the goods was detected in the Netherlands, because otherwise the case would not have been brought before the Netherlands courts;*

*- the offence was also committed in that Member State;*

*- it unquestionably put an end to the transit operation and caused the goods to `cease to be covered' by the transit arrangements;*

*- therefore the duties and other charges must be recovered in the Netherlands.*

*49 However, the defendant contends that another offence was previously committed in another Member State. Could this fact be such as to remove the matter from the jurisdiction of the Netherlands authorities and courts? Is it conceivable that the goods may, in spite of everything, have `ceased to be covered' (which can obviously take place only once) on the occasion of a previous offence? Article 34 of Regulation No 2726/90 does not enable this question to be answered because that article does not take into account situations where irregularities or offences are committed successively in more than one Member State, just as it does not specify the situations where duties and charges must be recovered. It is therefore necessary to ascertain whether the rule to be followed in such a case is supplied by any other provision.*

*50 The United Kingdom and Netherlands Governments, like the Commission, consider that the solution to the problem may be found in Regulation No 2144/87.*

*51 At first sight this is not an obvious approach if reference is made to Article 10(3) of the Sixth Directive which, after stating that, for goods placed under one of the arrangements referred to in Article 7(3), the chargeable event occurs and the tax becomes chargeable only when the goods*

*cease to be covered by those arrangements, continues by providing that `[h]owever, (11) ... the chargeable event shall occur and the tax shall become payable when the chargeable event [for customs duties and levies to which imported products are subject] occurs and those duties become chargeable.'*

*52 The word `however' at the beginning of that paragraph gives the impression that there may be ways in which goods `cease to be covered' which do not coincide with incurrence of the customs debt.*

*53 On the other hand, the argument that the goods must `cease to be covered' by the external transit arrangements at the time when the customs debt is incurred seems to me undeniably logical.*

*54 As the Italian Government points out, customs duty is suspended in the situation where goods are covered by external transit arrangements. This suspension of the customs debt is not a peripheral effect of those arrangements but, as the United Kingdom Government also observes, a fundamental characteristic, or even the reason for their existence. It is difficult to see what purpose the external transit arrangements could have other than the suspension of customs duties as far as the place of destination.*

*55 It is clear that, although the legislation, in particular Regulation No 2144/87, provides that in certain, specific, irregular situations, a customs debt is incurred for goods subject to the external transit arrangements, it must be concluded, at least in principle, that, on the same occasion, the goods `cease to be covered' by those arrangements because, from that time onwards, the goods no longer have the benefit of the essential characteristic of those arrangements.*

*56 Therefore I consider that, notwithstanding Article 10(3) of the Sixth Directive, the problem must be examined from the viewpoint of Regulation No 2144/87.*

*57 Let us see the cases where it provides for a customs debt to be incurred.*

*58 Under Article 2 of that regulation, the situations in question are as follows:*

*`1. A customs debt on importation shall be incurred by:*

*(a) the placing of goods ... in free circulation;*

*(b) the unlawful introduction into the customs territory of the Community of goods ...;*

*...*

*(c) the removal of goods liable to import duties from the customs supervision involved in ... their being placed under a customs procedure which involves customs supervision;*

*(d) the non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, ... from the use of the customs procedure under which they are placed, or non-compliance with a condition to which the placing of the goods under that procedure is subject, unless it is established that these failures have no significant effect on the correct operation of the ... customs procedure in question;*

*...'*

*59 It is immediately apparent that the situations which give rise to a customs debt and which are relevant in the present case are those described in (c) and (d).*

*60 In this particular case it cannot be denied that the acts which the national court has to consider took place in the Netherlands and that they must be treated as constituting a removal from customs supervision, that is to say, the unloading of goods after breaking of the seals and their being put into circulation without fulfilment of the obligation to present the goods and the T1 document at the office of destination.*

*61 Nevertheless, should the goods be deemed to have `ceased to be covered' at an earlier moment in time on the ground that an act had previously taken place in another Member State, namely a change of truck, which, although it may fall within the types of situation referred to in (c) and (d), appears less serious than the acts which took place in the Netherlands?*

*62 According to one argument, supported by the United Kingdom Government and, as to its conclusion, also by Liberexim, the goods `cease to be covered' by the external transit arrangements at the time of the first act which constitutes either removal from customs supervision or non-fulfilment of one of the obligations arising from the use of the external transit arrangements or non-compliance with a condition to which the placing of the goods under those arrangements is subject.*

*63 In support of this argument, it may be asserted that the external transit arrangements are an exception to the general rule that goods imported into the Community are taxed at the time when they cross the customs border.*

*64 As those arrangements are exceptional, it follows that the goods can only benefit from the legal fiction of extraterritoriality as long as all the obligations imposed by the rules for external transit arrangements are strictly fulfilled. This conclusion is particularly compelling in so far as the goods circulate on Community territory without being subject to constant supervision by the customs authorities. Therefore operators enjoy a kind of `trust relationship' in return for complying with the conditions entailed by the arrangements.*

*65 Consequently goods necessarily `cease to be covered' by the external transit arrangements if one of the obligations entailed is no longer fulfilled, that is to say, simultaneously with an act which must be treated either as removal from customs supervision or as non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from the use of the customs procedure in question, or as non-compliance with a condition to which the placing of the goods under that procedure is subject, unless it is established that the latter types of failure have no significant effect on the correct operation of the customs procedure in question.*

*66 In concrete terms, if criminal proceedings are commenced in the Member State where the goods were placed under external transit arrangements, it is for the competent court of that Member State to ascertain whether an offence has actually been committed under those arrangements in the territory of that State.*

*67 If the offence can be treated as removal of the goods from customs supervision, the court must uphold the decision to recover duties.*

*68 If, on the other hand, the offence consists in non-fulfilment of an obligation or non-compliance with a condition to which the placing of the goods under the procedure in question is subject, the court will consider whether it can be shown that the offence did not prevent the operation from being completed correctly. For this purpose, the operator in question must prove that the goods were actually presented, still sealed and with the T1 document intact, at the office of destination. Accordingly the court of the country of departure may take account of the subsequent stages of the transit operation in the territory of other Member States.*

*69 By contrast, if no objective offence was committed in the Member State of the court before which the case is brought, that court must decline jurisdiction.*

*70 What, then, is the situation where, as in the present case, an offence was detected and proceedings were instituted in a Member State where the transit operation was continued or completed? In that case the court will, of course, examine the nature of the offence committed in its country. If it is informed that there was a previous offence in another Member State, it will have to decide which of the two offences caused the goods to `cease to be covered' by the external transit arrangements.*

*71 It seems to me obvious that, where goods are placed under arrangements entailing customs supervision from the beginning to the end of the operation, the removal of the goods from supervision is the most serious offence possible. It is that which necessarily causes the goods to `cease to be covered' by the arrangements in question.*

*72 In support of this view, I may also mention the fact that, under Article 2(1)(d) of Regulation No 2144/87, `non-fulfilment of one of the obligations' or `non-compliance with a condition' does not give rise to a customs debt where it is established that such failures have no significant effect on the correct operation of the customs procedure in question. Under those circumstances it is permissible to discuss the actual gravity of the offence.*

*73 This alone shows - and here I refer to point (a) of the first question from the national court - that any kind of `first operation which, in relation to the goods, is carried out contrary to any provision' connected with the external transit arrangements does not necessarily automatically cause the goods to `cease to be covered' by those arrangements.*

*74 On the other hand, no proviso of that kind is laid down in relation to the `removal of goods from customs supervision'. As soon as removal is established, the debt is automatically incurred.*

*75 A court faced with a situation such as that in the main proceedings must therefore determine whether one of the two offences may be regarded as a removal of goods from the supervision of the customs authorities.*

*76 But what happens where two successive offences appear, at first sight, to be capable of being treated as `removal'?*

*77 In that case, it seems to me that the national court is right to decide which of the two offences has the clearest characteristics of a removal.*

*78 In the present case, the first offence is described as follows by the Hoge Raad: because of the replacement of the original truck (of which the customs authorities were not informed as required by Article 20 of Regulation No 2726/90), `the transport ceased to correspond to the declaration of external transit, on which the registration numbers of both the truck and trailer were shown for purposes of identification and the maintenance of customs control'. These particulars are required by two regulations cited by the Hoge Raad.*

*79 The United Kingdom Government considers that changing the trucks in that way is a case of removal of the goods from customs supervision.*

*80 However, I consider that acts such as those found in the Netherlands, far more than the change of trucks, conform to the definition of removal which the Court gave in the D. Wandel judgment (12) (delivered after the decision to refer the present questions), paragraph 47 of which reads as follows:*

*`removal must be understood as encompassing 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 (13) under customs supervision and from monitoring them as provided for in Article 37(1) of the Customs Code'.*

*81 Where goods are still in the part of the vehicle in which they were placed under seals by the customs office of departure, it remains possible for a customs or police patrol intercepting the vehicle to gain access to the goods to check whether the seals are those affixed by the office of departure or whether the goods correspond in nature and quantity to those presented at that office at the beginning of the transit operation.*

*82 Therefore I reach the conclusion that, in circumstances such as those of the main proceedings, it is the breaking of the seals, the unloading of the goods and their being put into circulation which, taken together, cause the goods to `cease to be covered' by the external transit arrangements.*

*83 In my opinion, this conclusion is supported by two considerations. First, it is necessary to safeguard the effectiveness of the provisions relating to transit arrangements. This would be jeopardised if the act or omission in question could not be prosecuted in the Member State where it was found beyond doubt that the goods had been unloaded and put into circulation there, merely because there was a previous irregularity in another Member State which was not detected and punished. Furthermore, in many cases it may be difficult to establish the exact nature of the irregularity and the person responsible.*

*84 Secondly, where there are two successive irregularities in the course of one and the same transit operation, the first of which was not discovered in time and only the second of which led to the goods actually being put into circulation, it accords more with the spirit of the VAT system if the VAT is recovered by the Member State where they were put into circulation rather than by the Member State through whose territory they merely passed in transit.*

*85 The national court also wishes to know whether any importance should be attached to the fact that the act is connected with an intention to put the goods into circulation in the Community without complying with the rules for the arrangements in question.*

*86 I think the reply to this question must be in the negative.*

*87 In the D. Wandel judgment, cited above, the Court also had occasion to give a ruling on the relevance of the element of intent where goods are removed from customs supervision. It held that `for the purposes of Article 203(1) of the Customs Code, removal of goods from customs supervision does not require intent: it is sufficient if certain objective conditions are met ...'. (14) In my opinion, there is no reason for concluding that the situation would be different in the case of non-fulfilment of an obligation or non-compliance with a condition for the purposes of Article 2(1)(d) of Regulation No 2144/87 or an irregularity within the meaning of Article 34 of Regulation No 2726/90.*

*88 The fact that it is sufficient if `certain objective conditions' are met also means that the court cannot conclude that an offence has been committed solely on the basis of the presumed intention of the economic operator concerned.*

*89 On the other hand, the element of intent may be relevant to the question whether Liberexim can be regarded as liable for VAT. In the D. Wandel judgment, cited above, the Court observed that `intention is relevant only when it comes to ascertaining who is liable for the debt arising as a result of the removal of goods. Although the person who removed the goods from customs supervision is unconditionally liable for the debt, persons who participated in their removal, or who acquired or held the goods in question, are debtors only if they were aware or should reasonably*

*have been aware that the goods were being removed from customs supervision for the purposes of Article 203(1) of the Customs Code'.*

*90 However, the question whether Liberexim is liable for VAT depends on Article 21 of the Sixth Directive, which is not the subject of the present reference for a preliminary ruling. Consequently this point does not call for further consideration.*

*91 The final question, which should be examined for the sake of completeness, is whether the foregoing observations relating to external transit arrangements also apply to the TIR procedure to which, under Article 5(2)(a) of Regulation No 2726/90, the rules for external transit arrangements do not apply.*

*92 On this point, it must be observed that the provisions of Articles 36 and 37 of the TIR Convention are similar to those in Article 34 of Regulation No 2726/90. Therefore I consider that the same criteria should be applied to the TIR procedure as those for the external transit arrangements.*

*VI - Conclusion*

*93 For all the reasons given above, I propose that the Court reply as follows to the questions from the Hoge Raad der Nederlanden:*

*(1) As a general rule, where goods `cease to be covered' in an irregular manner by external transit arrangements within the meaning of Article 7(3) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, as amended by Council Directive 92/111/EEC of 14 December 1992, amending Directive 77/388 and introducing simplification measures with regard to value added tax, such cessation of cover occurs at the time of the first act constituting:*

*- removal of the goods from customs supervision, within the meaning of Article 2(1)(c) of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt, or*

*- non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from the use of the customs procedure under which they are placed, or non-compliance with a condition to which the placing of the goods under that procedure is subject, unless it is established that these failures have no significant effect on the correct operation of the customs procedure in question, within the meaning of Article 2(1)(d) of Regulation No 2144/87.*

*(2) However, where, in circumstances such as those of the main proceedings, in the course of one and the same external transit operation, an irregularity occurs which is not discovered until the occasion of a subsequent irregularity consisting in the breaking of seals, the unloading of goods and their being put into circulation, without fulfilment of the obligation to present the goods and the document at the office of destination, it is the second irregularity which causes the goods to `cease to be covered' by the external transit arrangements within the meaning of Article 7(3) of the Sixth Directive 77/388/EEC, as amended by Directive 92/111.*

*(3) No importance is to be attached to the intention of the person responsible for the irregularity.*

*(1) - OJ 1977 L 145, p. 1.*

*(2) - OJ 1992 L 384, p. 47.*

*(3) - OJ 1990 L 262, p. 1.*

*(4) - OJ 1978 L 252, p. 1.*

*(5) - OJ 1987 L 201, p. 15.*

*(6) - See the first recital of this Regulation.*

*(7) - OJ 1987 L 65, p. 11.*

*(8) - Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, `the Customs Code'). Under Article 253 of the said Regulation, it applies from 1 January 1994.*

*(9) - Under Article 14(4) of Regulation No 2726/90, the office of departure may, subject to certain conditions, dispense with sealing.*

*(10) - Emphasis added.*

*(11) - Emphasis added.*

*(12) - Case C-66/99 [2001] ECR I-873, paragraph 47. Although this definition was given on the basis of provisions of the Customs Code, I do not think that the definition of `removal' could have been different under the regulations preceding the Customs Code.*

*(13) - Emphasis added.*

*(14) - See the D. Wandel judgment, cited above, paragraph 48.*