OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 13 December 2016 (1)

Case C?571/15

Wallenborn Transports SA

v

Hauptzollamt Gießen

(Request for a preliminary ruling from the Hessisches Finanzgericht (Finance Court, Hesse, Germany))

(Taxation — VAT — International trade — Place of taxable transactions — Goods transported through a free port located in a Member State — Legislation of that Member State excluding free ports from its national territory — Incurrence of a customs debt and chargeability of VAT in cases of unlawful removal from customs supervision)

1. The Hessisches Finanzgericht (Finance Court, Hesse) is referring a question which combines both theoretical interest and practical importance. In essence, it seeks to ascertain what the legal effects on import value added tax (VAT) might be of the fact that German law considers certain free zones to be ‘foreign territory’. Specifically, the referring court is asking whether, in general, the entry of goods into one of these free zones means that they have not entered the territory of the European Union and that, as a result, import VAT has not become due.

2. The dispute has arisen because a taxpayer is contesting the import VAT which the German authorities have claimed at the same time as the customs duties due under Article 203(1) of the Community Customs Code, (2) in other words, as a result of the goods having been unlawfully removed from customs supervision when the relevant customs procedure (transit) had not ended correctly. As the chargeable event in respect of the customs debt occurred in a free zone (the port of Hamburg), which the national legislation does not regard as being ‘territory of the country’ for the purposes of VAT, the referring court is asking whether the goods were imported or not and, consequently, whether import VAT has become due.

I – **Legislative framework**

A – *EU law*

1. Directive 2006/112/EC (3)

3. By virtue of Article 2(1), ‘the following transactions shall be subject to VAT: … (d) the importation of goods.’

4. Article 5 states:

‘For the purposes of this Directive, the following definitions shall apply:

1. “Community” and “territory of the Community” mean the territories of the Member States as defined in point (2);

2. “Member State” and “territory of a Member State” mean the territory of each Member State of the Community to which the Treaty establishing the European Community is applicable, in accordance with Article 299 of that Treaty, with the exception of any territory referred to in Article 6 of this Directive;

3. “third territories” means those territories referred to in Article 6;

4. “third country” means any State or territory to which the Treaty is not applicable.’

5. Article 6 states:

‘1. This Directive shall not apply to the following territories forming part of the customs territory of the Community:

(a) Mount Athos;

(b) the Canary Islands;

(c) the French overseas departments;

(d) the Åland Islands;

(e) the Channel Islands.

2. This Directive shall not apply to the following territories not forming part of the customs territory of the Community:

(a) the Island of Heligoland;

(b) the territory of Büsingen;

(c) Ceuta;

(d) Melilla;

(e) Livigno;

(f) Campione d’Italia;

(g) the Italian waters of Lake Lugano.’

6. By virtue of Article 30:

‘“Importation of goods” shall mean the entry into the Community of goods which are not in free circulation within the meaning of Article 24 of the Treaty.

In addition to the transaction referred to in the first paragraph, the entry into the Community of goods which are in free circulation, coming from a third territory forming part of the customs territory of the Community, shall be regarded as importation of goods.’

7. Under Article 60 of the directive, ‘the place of importation of goods shall be the Member State within whose territory the goods are located when they enter the Community.’

8. Article 61 provides:

‘By way of derogation from Article 60, where, on entry into the Community, goods which are not in free circulation are placed under one of the arrangements or situations referred to in Article 156, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the place of importation of such goods shall be the Member State within whose territory the goods cease to be covered by those arrangements or situations.

Similarly, where, on entry into the Community, goods which are in free circulation are placed under one of the arrangements or situations referred to in Articles 276 and 277, the place of importation shall be the Member State within whose territory the goods cease to be covered by those arrangements or situations.’

9. Under Article 70 of the VAT Directive ‘the chargeable event shall occur and VAT shall become chargeable when the goods are imported.’

10. According to Article 71:

‘1. Where, on entry into the Community, goods are placed under one of the arrangements or situations referred to in Articles 156, 276 and 277, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the chargeable event shall occur and VAT shall become chargeable only when the goods cease to be covered by those arrangements or situations.

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 VAT shall become chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable.

2. Where imported goods are not subject to any of the duties referred to in the second subparagraph of paragraph 1, Member States shall, as regards the chargeable event and the moment when VAT becomes chargeable, apply the provisions in force governing customs duties.’

11. Under Article 156(1) of the directive, ‘Member States may exempt the following transactions: … (b) the supply of goods which are intended to be placed in a free zone or in a free warehouse; …’.

12. By virtue of Article 202 of the directive, ‘VAT shall be payable by any person who causes goods to cease to be covered by the arrangements or situations listed in Articles 156, 157, 158, 160 and 161’.

2. The CCC

13. Article 4 states:

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

...

(7) “Community goods” means goods:

– wholly obtained or produced in the customs territory of the Community under the conditions referred to in Article 23 and not incorporating goods imported from countries or territories not forming part of the customs territory of the Community,

– imported from countries or territories not forming part of the customs territory of the Community which have been released for free circulation,

– obtained or produced in the customs territory of the Community, either from goods referred to in the second indent alone or from goods referred to in first and second indents.

(8) “Non-Community goods” means goods other than those referred to in subparagraph 7.

Without prejudice to Articles 163 and 164, Community goods shall lose their status as such when they are actually removed from the customs territory of the Community.

…

(10) “Import duties” means:

– customs duties and charges having an effect equivalent to customs duties payable on the importation of goods,

– agricultural levies and other import charges introduced under the common agricultural policy or under the specific arrangements applicable to certain goods resulting from the processing of agricultural products.

…

(15) “Customs-approved treatment or use of goods” means:

(a) the placing of goods under a customs procedure;

(b) their entry into a free zone or free warehouse;

…

(16) “Customs procedure” means:

…

(b) transit;

…’

14. According to 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.'

15. Under Article 92:

'1. The external transit procedure shall end and the obligations of the holder shall be met when the goods placed under the procedure and the required documents are produced at the customs office of destination in accordance with the provisions of the procedure in question.

2. The customs authorities shall discharge the procedure when they are in a position to establish, on the basis of a comparison of the data available to the office of departure and those available to the customs office of destination, that the procedure has ended correctly.'

16. By virtue of Article 96:

'1. The principal shall be the [holder of] the external Community transit procedure. He shall be responsible for:

(a) production of the goods intact at the customs office of destination by the prescribed time limit and with due observance of the measures adopted by the customs authorities to ensure identification;

(b) observance of the provisions relating to the Community transit procedure.

2. Notwithstanding the principal's obligations under paragraph 1, a carrier or recipient of goods who accepts goods knowing that they are moving under Community transit shall also be responsible for production of the goods intact at the customs office of destination by the prescribed time limit and with due observance of the measures adopted by the customs authorities to ensure identification.'

17. Article 166 provides:

'Free zones and free warehouses shall be parts of the customs territory of the Community or premises situated in that territory and separated from the rest of it in which:

(a) Non-Community goods are considered, for the purpose of import duties and commercial policy import measures, as not being on Community customs territory, provided they are not released for free circulation or placed under another customs procedure or used or consumed under conditions other than those provided for in customs regulations;

(b) Community goods for which such provision is made under Community legislation governing specific fields qualify, by virtue of being placed in a free zone or free warehouse, for measures normally attaching to the export of goods.'

18. Article 167 states:

'1. Member States may designate parts of the customs territory of the Community as free zones or authorise the establishment of free warehouses.

2. Member States shall determine the area covered by each zone. Premises which are to be designated as free warehouses must be approved by Member States.

3. Free zones shall be enclosed. The Member States shall define the entry [and] exit points of each free zone or free warehouse.

...'

19. By virtue of Article 170:

'1. Without prejudice to Article 168(4), goods entering a free zone or free warehouse need not be presented to the customs authorities, nor need a customs declaration be lodged.

2. Goods shall be presented to the customs authorities and undergo the prescribed customs formalities where:

(a) they have been placed under a customs procedure which is discharged when they enter a free zone or free warehouse; however, where the customs procedure in question permits exemption from the obligation to present goods, such presentation shall not be required;

…'

20. According to Article 202:

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

(a) the unlawful introduction into the customs territory of the Community of goods liable to import duties, or

(b) the unlawful introduction into another part of that territory of such goods located in a free zone or free warehouse.

For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.

…'

21. By virtue 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.

3. The debtors shall be:

– the person who removed the goods from customs supervision,

– any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

– any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and

– where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed.'

22. According to Article 204:

'1. A customs debt on importation shall be 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.

2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. The debtor shall be the person who is required, according to the circumstances, either to fulfil 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 have been placed, or to comply with the conditions governing the placing of the goods under that procedure.'

B – *National law*

1. The Law on turnover tax (Umsatzsteuergesetz) (4)

23. Paragraph 1 provides:

'1. The following transactions shall be subject to turnover tax:

...

(4) the importation of goods into the territory of the country … (import VAT);

...

2. For the purposes of this law “territory of the country” is the territory of the Federal Republic of Germany with the exception of … the free zones of control type I in accordance with the first sentence of Paragraph 1(1) of the Law on customs administration (Zollverwaltungsgesetz) (free ports), ... For the purposes of this law “foreign territory” is the territory that under this law is not territory of the country. …

3. The following transactions performed in the free ports … are to be treated as transactions carried out within the territory of the country;

(1) supplies and intra-Community acquisitions of goods that are intended for use or consumption within the designated areas ...;

...

(4) the supply of goods that at the time of supply ...

...

(b) are in free circulation for the purposes of import VAT; ...

...’

24. By virtue of Paragraph 13(2), ‘Paragraph 21(2) is applicable in respect of import VAT.’

25. In accordance with Paragraph 21:

‘…

2. The rules on customs duties shall apply *mutatis mutandis* to import VAT;

...

2 a. Customs clearance locations located on foreign territory at which authorised German customs officials carry out official acts … also form part of the territory of the country in this respect. …’

II – **Facts**

26. On 11 June 2009, textiles that had entered the customs territory of the European Union the previous day at Frankfurt am Main airport and been presented to customs were declared and released for the external Community transit procedure. The transit procedure was to be completed by 17 June 2009.

27. The consignee of the goods was a company based in the free port (free zone) of Hamburg. The carrier of the goods, which had been duly sealed, was Wallenborn Transports (‘Wallenborn’).

28. However, the goods never reached the customs office of destination. Investigations during the enquiry procedure established that they were unloaded at the consignee’s premises within the free port of Hamburg on 11 June 2009, the seal having been broken, and sent by sea on 16 June to Finland, from whence they were then re-exported to Russia.

29. On 2 September 2010, the Hauptzollamt Gießen (Customs Office, Gießen) issued a notice of assessment of customs duty and import VAT both to the principal as authorised consignor and to Wallenborn as carrier.

30. Payment, however, was only sought from Wallenborn, since the Customs Office took the view that the principal had demonstrated that the consignment and the accompanying document had been duly handed over, whereas Wallenborn had failed to end the transit procedure. The recipient of the goods informed the Customs Office that, on accepting the consignment, it had assumed that the goods had been given customs clearance; it also stated that the transit accompanying document had not been provided.

31. Having unsuccessfully contested the VAT assessment using administrative procedures, Wallenborn then brought an action in the Hessisches Finanzgericht (Finance Court, Hesse). It argued that the customs debt was incurred when the lorry was unloaded, once the seal had been removed in the free port, but that the free port, as a free zone, does not constitute part of the territory of the country and that therefore there was no transaction liable to VAT.

III – **Question referred**

32. Under those circumstances, the Hessisches Finanzgericht (Finance Court, Hesse) referred the following questions to the Court of Justice for a preliminary ruling on 6 November 2015:

‘Question 1:

Is the VAT rule of a Member State which states that free zones of control type I (free ports) do not form part of the territory of the country one of the situations referred to in Article 156 as specified in the first paragraph of Article 61 and in the first subparagraph of Article 71(1) of [the VAT Directive]?

If this question is answered in the affirmative:

Question 2:

Where goods are subject to customs duties, does the chargeable event also occur and VAT also become chargeable in accordance with the second subparagraph of Article 71(1) of [the VAT Directive] when the chargeable event in respect of those duties occurs and those duties become chargeable, if the chargeable event in respect of those duties and the chargeability of those duties occurs within a free zone of control type I and the VAT legislation of the Member State to which the free zone belongs provides that free zones of control type I (free ports) do not form part of the territory of the country?

If Question 2 is answered in the negative:

Question 3:

Where goods transported under the external transit procedure without that procedure ending in a free zone of control type I are removed from customs supervision in the free zone so that a customs debt is incurred in respect of the goods under Article 203(1) of the [CCC], does the chargeable event occur and VAT become chargeable in respect of goods at the same time in accordance with another chargeable event, namely under Article 204(1)(a) of the [CCC], because, prior to the act by means of which the goods were removed from customs supervision, the goods were not presented to customs at one of the customs offices competent in respect of the free zone situated within the territory of the country and the transit procedure was not ended there?’

IV – **Procedure before the Court of Justice and submissions of the parties**

33. Wallenborn, the Greek Government and the Commission have submitted written

observations but none of those parties requested a hearing.

34. Wallenborn submits that the first two questions should be answered in the affirmative and proposes, in the alternative, that question 3 should be answered in the negative.

35. Wallenborn argues that Article 204 of the CCC applies only in exceptional situations where the conditions for the application of Article 203 of the CCC are not met. Where, as in the circumstances of the main proceedings, the customs seal is removed and the goods are unloaded and not presented at customs, this constitutes an exceptional situation which does not result in Article 204 of the CCC being brought into play.

36. The Greek Government proposes that the first question be answered in the negative. It argues that under Article 166 of the CCC, non-Community goods in free zones are considered, for the purpose of import duties and commercial policy measures, as not being on EU customs territory. It follows from this that those zones cannot be regarded as ‘third territory’ as they are subject to all the same national and EU customs regulations as the rest of the customs territory of the relevant Member State. It notes that under Articles 5 and 6 of the VAT Directive, free zones are not excluded from the scope of that directive.

37. The Greek Government argues in the alternative, with respect to questions 2 and 3, that Articles 61 and 71 of the VAT Directive refer to the provisions of the CCC which relate to the incurrence of a customs debt. From this it infers that, in the present case, the customs debt, and consequently the VAT debt, would have arisen at the moment when the obligations under the transit procedure in which the goods had been placed were not observed.

38. It submits that the incurrence of the customs debt should be viewed in the light of Article 204 of the CCC, which would mean that, given the insignificance of the irregularity on a practical level, no customs debt or VAT debt would have been incurred, provided that the conditions set out in Article 859 of the implementing regulation have been met.

39. The Commission maintains, as a preliminary point, that the constitutive parts of import VAT must be examined separately from the question of whether or not there is a customs debt, given the differences between the two taxes in terms of their purpose and concept. In the circumstances of the case, there would be a customs debt under Article 203 of the CCC since the goods were removed from customs supervision as a result of the seal being broken.

40. On question 1, the Commission argues that Article 61 and Article 71(1) of the VAT Directive do not relate to the conditions for the application of Article 156 of the directive, but merely to the situations and customs arrangements referred to in that article. Since Article 156(1)(b) of the VAT Directive specifically mentions free zones and warehouses, the ‘situations referred to in Article 156’ include situations relating to such zones and warehouses, for the purposes of Articles 61 and 71 of the VAT Directive.

41. On question 2, the Commission observes that, according to the first subparagraph of Article 71(1) of the VAT Directive, the chargeable event only occurs and import VAT only becomes chargeable when the goods are removed from a customs arrangement or one of the situations referred to in Article 156 of the VAT Directive. In the present case, the removal of the goods from customs supervision, due to the breaking of the seal, would have resulted in a customs debt under Article 203 of the CCC being incurred and would have meant that the goods were no longer covered by the transit procedure, thus fulfilling the requirements for an importation under Article 70 and the first subparagraph of Article 71(1) of the VAT Directive. However, as the removal took place outside the fiscal territory of Germany, no importation within the meaning of Article 61 of the directive would have taken place.

42. Regarding question 3, the Commission contends that Article 204 of the CCC is applicable only if Article 203 of the CCC is not, in other words, if the goods have not been removed from customs supervision. It cites the principle that only one customs debt can be incurred, so that any subsequent acts or omissions involving the goods in relation to which the debt was incurred do not, in principle, give rise to a further debt of the same type.

43. The Commission reiterates that import VAT and customs duties must be considered separately, with the result that neither Article 203 nor Article 204 of the CCC will automatically lead to a VAT debt being incurred.

V – **Assessment**

A – *Question 1*

44. I would like to start my examination of question 1 by restating the words of the referring court: ‘Is the VAT rule of a Member State which states that free zones of control type I (free ports) do not form part of the territory of the country one of the situations referred to in Article 156 as specified in the first paragraph of Article 61 and in the first subparagraph of Article 71(1) of [the VAT Directive]?’

45. The Hessisches Finanzgericht (Finance Court, Hesse) does not directly ask whether the fact that goods are located in a free zone means that they are in one of the ‘arrangements or situations’ referred to in Article 156 of the VAT Directive and mentioned in Articles 61 and 71 of that directive. Its doubt does not concern free zones as defined in Article 166 of the CCC, but rather those which German law considers to be ‘foreign territory’ for VAT purposes (Paragraph 1(2) of the UStG). It is not, therefore, free zones as customs territories that are at issue, but free zones as areas where goods are not liable to import VAT upon entry.

46. In the circumstances of the case, I think that the distinction made by the referring court is an artificial one. Article 61 of the VAT Directive provides, as far as is relevant for the present purposes, that goods must be deemed to have been imported in the place where they cease to be covered by an arrangement or situation referred to in Article 156 of the directive. Article 71(1) of the VAT Directive provides that the chargeable event shall occur and VAT shall become chargeable only when the goods cease to be covered by those arrangements or situations.

47. The arrangements or situations referred to in Article 156 of the VAT Directive include ‘1. … (b) the supply of goods which are intended to be placed in a free zone or in a free warehouse’. This implies that, under Article 61 of the VAT Directive, such goods are not considered to have been imported until they leave the free zone, at which point the chargeable event will occur and import VAT will become chargeable (Article 71(1) of the VAT Directive).

48. Thus, under both EU law and German law, free zones are simultaneously ‘external to the Union’ and ‘foreign territory’, so that ‘the supply of goods which are intended to be placed in [them]’ does not constitute an importation and, consequently, VAT does not become due. (5)

49. Admittedly, Article 156 of the VAT Directive is of relevance to ‘the supply of goods which are intended to be placed in a free zone or in a free warehouse’ in that these are transactions that the Member States may exempt from VAT. The referring court infers from this that the article is assuming the existence of an importation in every case, since a chargeable event can only be exempted if it is, in principle, liable to the relevant tax. This gives rise to a degree of contradiction with Paragraph 1(2) of the UStG, which, by designating free zones as ‘foreign territory’, immediately excludes even the possibility of an importation. That is why the Hessisches Finanzgericht (Finance Court, Hesse) harbours doubts as to whether the German free zones can be equated with the free zones under Articles 61 and 71 of the VAT Directive.

50. I think that they can. In referring to Article 156, Articles 61 and 71 of the VAT Directive are not referring to a tax exemption, but to a provision which names a number of ‘arrangements or situations’. Although they are arrangements or situations which, in the context of Article 156 of the directive, are relevant to a potential tax exemption, they are mentioned in Articles 61 and 71 for a very different reason (which is related to the purpose of the legislation), namely determining the place and time at which the importation will be deemed to have taken place and VAT will become due.

51. Consequently, the only aspect of Article 156 of the VAT Directive which is relevant for the purposes of Articles 61 and 71 of the directive, is the reference to ‘the supply of goods which are intended to be placed in a free zone or in a free warehouse’. In terms of those two articles, supplies of this kind, which have a very specific destination, amount to a factual situation which, when it ceases to exist, results in import VAT becoming due and chargeable.

52. I therefore take the view that question 1 should be answered in the affirmative. The free zones to which the UStG refers can only be those mentioned in Article 156 of the VAT Directive and referred to in the first paragraph of Article 61 and in the first subparagraph of Article 71(1) of that directive. For VAT purposes, German law and EU law treat free zones as ‘external zones’, meaning that, under certain circumstances, goods stored there are considered to have been imported into the territory of the European Union only once they are removed from the free zone and enter the territory of a Member State.

53. In short, to reword the question, I am of the view that the reference in the first paragraph of Article 61 and the first subparagraph of Article 71(1) of the VAT Directive to ‘the arrangements or situations referred to’ in Article 156 of the directive includes free zones in the sense of possible zones for the importation of goods into the territory of the European Union.

B – *Question 2*

54. Having answered the previous question in the affirmative, I am required to examine question 2, by which the referring court essentially seeks to establish whether, if customs duties become due within a free zone, import VAT is also due on goods which have not left the free zone.

55. The view of the Hessisches Finanzgericht (Finance Court, Hesse) is that, since in this case the goods have been removed from customs supervision, a customs debt has been incurred under Article 203(1) of the CCC. However, as the removal occurred within a free zone, we cannot speak in terms of an importation of goods and it would not therefore be appropriate to claim import VAT.

56. As I have already stated, free zones may be ‘external’ to the European Union as far as both VAT and customs duties are concerned, provided that the conditions set out in Article 166 of the CCC are met (for the present purposes, if the goods are not placed under a customs procedure).

57. The goods brought into the free port of Hamburg were placed under the external transit procedure so that, even though they were in a free zone, as the referring court has stated, ‘the requirements in respect of the fiction that, for the purpose of import duties, non-Community goods in a free zone are considered as not being on Community customs territory …, were not met’. (6)

58. Having entered the customs territory of the European Union, the goods in question could therefore give rise to a customs debt. To be more precise, the relevant debt would be under Article 203(1) of the CCC, arising from the unlawful removal of the goods from customs supervision, evidenced by the seal being broken when it should not have been and the transit procedure being brought to an end as a result. (7)

59. It is common ground between the parties that, in the circumstances of the case, the customs debt under Article 203(1) of the CCC was correct; the dispute relates solely to the question of whether import VAT can also be charged. Matters relating to payment of the former levy (the customs debt) are therefore beyond the scope of the debate. (8)

60. The ending of the transit procedure in which the goods had been placed would, under Articles 61 and 71 of the VAT Directive, have meant that they should have been deemed imported in the place where they ceased to be covered by that procedure and VAT would have been due accordingly. What happens, however, where the territory of the Member State in which the goods cease to be covered by the transit procedure is a free zone, which, under Articles 61 and 71 of the VAT Directive, is a place which goods must leave in order to be considered imported?

61. Under these conditions, where, as I have already mentioned, it is not disputed that a customs debt has been incurred, has a second tax consequence been triggered, namely that VAT becomes due? In principle, this could be the case if: (a) ceasing to be covered by the transit procedure were, of itself, sufficient for the goods to be deemed imported; or (b) the customs debt under Article 203 of the CCC having been incurred, this automatically were to mean that VAT became payable, even if the goods could not be considered to have been imported (because they still have the status of goods located in a free zone).

62. I think that the first option can be ruled out, because under Articles 61 and 71 of the VAT Directive the various arrangements and situations which give rise to an importation of the relevant goods when the goods cease to be covered by them are treated as alternatives and not as mutually exclusive. It is, moreover, possible for such arrangements or situations to occur successively: Article 170(2)(a) of the CCC, for example, refers to the entry into a free zone of goods which have been placed under a customs procedure ‘which is discharged when they enter a free zone or free warehouse’.

63. It could, however, be argued that it is only possible for such arrangements or situations to occur successively if, in moving from one procedure to another, the first is properly extinguished. In the present case, the irregular manner in which the external transit procedure was brought to an end would prevent the goods from being treated, for VAT purposes, as goods placed in a free zone and would mean that they should therefore be treated as imported goods. However, to adopt this approach would be to distort the nature of VAT and turn it from a tax on consumption to a means of controlling unlawful conduct. (9)

64. It seems to me that the same reasoning (which concerns respecting the nature and purpose

of VAT) also excludes the second of the above options, according to which VAT is automatically due when customs duties are due, based on a literal interpretation of the second subparagraph of Article 71(1) of the VAT Directive. (10)

65. As I noted in my Opinion in Joined Cases *Eurogate Distribution and DHL Hub Leipzig*, (11) according to the case-law of the Court of Justice, 'import VAT and customs duties display comparable essential features since they arise from the fact of importation of goods into the European Union and the subsequent distribution of those goods through the economic channels of the Member States' and that parallel nature is 'confirmed by the fact that the second subparagraph of Article 71(1) of the VAT directive authorises Member States to link the chargeable event and the date on which the VAT on importation becomes chargeable with those laid down for customs duties'. (12)

66. However, as I noted in that Opinion, (13) 'comparable does not mean identical, which is why the Court proposed that the incurrence of the customs debt and VAT should be examined separately. It has to be that way because the two are different in nature and that difference is accentuated when the customs debt was not in fact incurred as a result of the entry of goods into the customs territory under a regular arrangement but rather as a result of failure to fulfil certain conditions or obligations.'

67. The decisive factor as far as the chargeable event for import VAT is concerned is that the goods on which it is charged should be able to form part of the economic network of the European Union and, consequently, be consumed at a later stage. The Court of Justice has confirmed this in its judgment of 2 June 2016, *Eurogate Distribution and DHL Hub Leipzig*: 'in addition to the customs debt, there may also be a requirement to pay VAT where, based on the particular unlawful conduct which gave rise to the customs debt, it can be presumed that the goods entered the economic network of the Union and, consequently, that they may have undergone consumption, that is, the act on which VAT is levied'. (14)

68. It is certainly true that, as I argued in my Opinion in *Eurogate Distribution and DHL Hub Leipzig*, (15) one of the situations in which that presumption may reasonably be applied 'is the case provided for in Article 202(1)(a) of the CCC (unlawful introduction into the customs territory of goods liable to import duties) *and Article 203(1) of the CCC (unlawful removal from customs supervision of goods liable to import duties)*', (16) which, in terms of the second option, is the situation which concerns us here.

69. Even so, the presumption is not a conclusive but rather a rebuttable one and, as such, may be dislodged in the light of facts established in court. To be more specific, although it may be presumed that goods not located in a free zone had entered the economic network, the presumption would be weaker if it were established that they had been located in one, had not undergone any other transactions there, had been removed to another Member State and had then been re-exported.

70. This is what seems to have happened in this case. According to the referring court, the seal on the goods was removed when the goods were unloaded in the free port of Hamburg on 11 June 2009. On 15 June they were placed in a container and loaded onto a ship which left the free port of Hamburg the following day. (17) The Hessisches Finanzgericht (Finance Court, Hesse) states that during the whole of this period, 'there is no distribution through the economic channels of the Member State to whose territory the free zone belongs because, after their removal from customs supervision, the goods initially remained in the free zone and were neither released for consumption nor consumed or used there, which, in certain circumstances, would have had to have been treated as transactions carried out within the territory of the country under Paragraph 1(3) UStG.' (18)

71. Even had the question of the goods being located in a free zone been, hypothetically speaking, irrelevant as far as the reference to Article 156 in Articles 61 and 71 of the VAT Directive is concerned, the fact is that, given the very particular factual circumstances in this case, the goods could not have been used or consumed in the territory of the European Union.

72. In the abstract, if Article 156 of the VAT Directive were irrelevant, this would mean that, for the purposes of Articles 61 and 71 of that directive, the goods in question would be considered to have been 'imported' once the transit procedure had ended. Taking that approach, the second subparagraph of Article 71(1) of the VAT Directive (19) would be applicable. It is my understanding, however, that this can only be the case where importation entails the goods having access to the economic network of the European Union, which it normally does. Where, by contrast, it can be incontrovertibly established by an unambiguous judicial finding that there was no possibility of access to that economic network, then that 'importation' does not constitute a legal act which triggers the obligation to pay VAT.

73. It is, therefore, my view that Articles 61 and 71 of the VAT Directive must be interpreted as meaning that when a customs debt under Article 203(1) of the CCC is incurred due to the removal from customs supervision of goods in a free zone, this gives rise to the chargeable event and import VAT becoming chargeable if it is reasonable to presume that the goods were able to enter the economic network of the European Union, which is a matter for the national court to determine.

C – *Question 3*

74. As the Commission notes, (20) the referring court's third question assumes that Articles 203 and 204 of the CCC can be simultaneously applicable.

75. The Hessisches Finanzgericht (Finance Court, Hesse) is asking whether, where a customs debt has been incurred under Article 203 of the CCC because goods have been removed from customs supervision within a free zone, a VAT debt may also be incurred if there has been a failure to fulfil the obligation to end the transit procedure in the customs office situated within the territory of the country, as referred to in Article 204(1)(a) of the CCC.

76. I believe that the answer is provided by the settled case-law of the Court of Justice: 'it is clear … that Article 204 of the [CCC] … applies only to situations which do not fall within the scope of Article 203 of the [CCC]'. (21)

77. Consequently, if the referring court finds that the circumstances under consideration in the main proceedings correspond to those set out in Article 203 of the CCC, then Article 204 of the CCC should not be simultaneously applied in order to achieve a result (VAT becoming due) that, in the circumstances of the case, is not clear from the former article.

78. My proposed answer must be that where a customs debt has arisen under Article 203 of the CCC and it has been established that, due to the circumstances of the case, no VAT debt has been incurred, Article 204 of the CCC cannot be applied for the sole purpose of providing a basis for charging VAT.

VI – **Conclusion**

79. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred for a preliminary ruling:

‘1. The first paragraph of Article 61 and the first subparagraph of Article 71(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Directive 2007/75/EC, must be interpreted as meaning that:

(a) the reference to “the arrangements or situations referred to” in Article 156 of the directive includes free zones in the sense of possible zones for the importation of goods into the territory of the European Union; and

(b) when a customs debt under Article 203(1) of the Community Customs Code is incurred due to the removal from customs supervision of goods in a free zone, this gives rise to the chargeable event and import VAT becoming chargeable if it is reasonable to presume that the goods were able to enter the economic network of the Union, which is a matter for the national court to determine.

2. Where a customs debt has been incurred under Article 203 of the Community Customs Code and it has been established that, due to the circumstances of the case, VAT is not chargeable, Article 204 of the Community Customs Code cannot be applied in order to give rise to a VAT charge.’

1– Original language: Spanish.

2– Council Regulation (EEC) No 2913/92 of 12 October 1992 (OJ 1992 L 302, p. 1), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1) (‘the CCC’).

3– Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Directive 2007/75/EC (OJ 2007 L 346, p. 13) (‘the VAT Directive’).

4– Law of 21 February 2005 (BGBl 2005 I, p. 386); (‘UStG’).

5– I would emphasise that I am only dealing here with free zones in the context of the combined application of Articles 61, 71 and 156 of the VAT Directive. In a general sense, as well as in relation to VAT, ‘a customs warehouse is “within the territory of the country” where it is situated in the territory of a Member State’ (judgment of 8 November 2012, *Profitube* (C?165/11, EU:C:2012:692), paragraph 59). In the context of these proceedings, it is only possible to say whether free zones are *external* in any way on the basis of specific legal acts performed in or from such zones.

6– Page 15 of the original version of the order for reference.

7– In the words of the judgment of 11 July 2002, *Liberexim* (C?371/99, EU:C:2002:433), paragraph 53, ‘the time and place at which the goods cease to be covered by the external Community transit arrangements is necessarily the time and place at which the first irregularity

which can be regarded as a removal of the goods from customs supervision was committed.'

8– The goods, which were originally in a situation (a transit procedure) which meant that they could be considered goods that had not been imported, immediately took on a new status (that of location in a free zone), which, under the VAT Directive, also meant that they could be so considered. The switch from one situation to the other, due to an irregularity, has had an initial consequence, which was that the customs debt became due.

9– Moreover, this association with the control of unlawful conduct cannot even be made in respect of the customs debt arising as a result of the transit procedure being ended in an irregular manner. In the words of the judgment of 6 September 2012, *Döhler Neuenkirchen* (C?262/10, EU:C:2012:559), paragraph 43, 'the incurrence of a customs debt does not … have the nature of a penalty, but must rather be regarded as the consequence of the finding that the conditions required to obtain the advantage derived from the application of the inward processing procedure in the form of a system of suspension have not been fulfilled. The procedure implies the granting of a conditional advantage, which cannot be granted if the applicable conditions are not respected, thereby making the suspension inapplicable and consequently justifying the imposition of customs duties'.

10– Under this article, 'where imported goods are subject to customs duties …, the chargeable event [in respect of VAT] shall occur and VAT shall become chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable'.

11– C?226/14 and C?228/14, EU:C:2016:1, point 90.

12– I was referring in that case to the judgment of 11 July 2013, *Harry Winston* (C?273/12, EU:C:2013:466), paragraph 41, citing the judgments of 6 December 1990, *Witzemann* (C?343/89, EU:C:1999:445), paragraph 18, and of 29 April 2010, *Dansk Transport og Logistik* (C?230/08, EU:C:2010:231), paragraphs 90 and 91.

13– Opinion in *Eurogate Distribution and DHL Hub Leipzig* (C?226/14 and C?228/14, EU:C:2016:1), point 91.

14– C?226/14 and C?228/14, EU:C:2016:405, paragraph 65. This paragraph of the judgment specifically refers to point 97 of my Opinion in *Eurogate Distribution and DHL Hub Leipzig* (C?226/14 and C?228/14, EU:C:2016:1), where I stated that: 'where the debt incurred under Articles 202 to 205 of the CCC relates to goods which have already been re-exported, the fact that those goods have left the territory of the Union has no bearing on the obligation to pay customs duties. In addition to that customs debt, there may also be a requirement to pay VAT where, based on the particular unlawful conduct which gave rise to the customs debt, it can be presumed that the goods entered the economic network of the Union and, consequently, that they may have undergone consumption, that is, the act on which VAT is levied.'

15– C?226/14 and C?228/14, EU:C:2016:1, point 98.

16– C?226/14 and C?228/14, EU:C:2016:1, point 98. Emphasis added.

17– Page 4 of the original version of the order for reference.

18– Page 17 of the original version of the order for reference.

19– Which states that ‘where imported goods are subject to customs duties …, the chargeable event [with respect to VAT] shall occur and VAT shall become chargeable when the chargeable event in respect of [the customs] duties occurs and [the customs] duties become chargeable’.

20– In point 82 of its written observations.

21– In this regard see, for example, judgment of 12 February 2004, *Hamann International* (C?337/01, EU:C:2004:90), paragraph 29.