JUDGMENT OF THE COURT (Fifth Chamber)
26 October 1995 *

In Case C-36/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal Fiscal Aduaneiro de Lisboa, Portugal, for a preliminary ruling in the proceedings pending before that court between

Siesse — Soluções Integrais em Sistemas Software e Aplicações Ld[a]

and

Director da Alfândega de Alcântara,

on the interpretation of Council Regulation (EEC) No 4151/88 of 21 December 1988 laying down the provisions applicable to goods brought into the customs territory of the Community (OJ 1988 L 367, p. 1),

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J.-P. Puissochet (Rapporteur), C. Gulmann, P. Jann and L. Sevón, Judges,

* Language of the case: Portuguese.

Advocate General: M. B. Elmer,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Portuguese Government, by Luís Fernandes, Director of the Legal Service in the Directorate-General for European Community Affairs in the Ministry of Foreign Affairs, and Angelo Cortesão Seiça Neves, Legal Officer in the same directorate, acting as Agents,

— the Commission of the European Communities, by Francisco de Sousa Fialho, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Siesse, the applicant in the main proceedings, represented by João Teixeiro Alves, of the Lisbon Bar; of the Portuguese Government, represented by Angelo Cortesão Seiça Neves; and of the Commission, represented by Francisco de Sousa Fialho, at the hearing on 29 June 1995,

after hearing the Opinion of the Advocate General at the sitting on 14 September 1995,

gives the following

Judgment

1 By order of 20 January 1994, which was received at the Court on 26 January 1994, the Tribunal Fiscal Aduaneiro de Lisboa (Customs Court, Lisbon) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Council Regulation (EEC) No 4151/88 of 21 December 1988 laying down the provisions applicable to goods brought into the customs territory of the Community (OJ 1988 L 367, p. 1).

2 Those questions were raised in proceedings between Siesse — Soluções Integrais em Sistemas Software e Aplicações Ld[a] ('Siesse') and the Director da Alfândega de Alcântara-Lisboa (Director of the Alcântara Customs Office, Lisbon) concerning the levying of a surcharge for failure to comply with the time-limit laid down for customs clearance of goods.

3 Articles 14 to 19 of Regulation No 4151/88 provide, *inter alia*, that within a period to be determined by the customs authority, which may not exceed 20 or 45 days, depending on the mode of transport, goods presented to customs are to be covered by a declaration for release for free circulation or by an application for another customs-approved treatment or use. Until they are assigned a customs-approved treatment or use, the goods are to be placed in temporary storage and the customs authority, which may authorize an extension of the above periods, is to take all measures necessary, including sale, to regularize the situation of goods in respect of which the formalities are not initiated within the period.

4 In Portuguese law, Article 638 of the Regulamento das Alfândegas (Customs Regulation) provides that goods placed in storage are normally to be sold by the

customs office, after completion of the legal formalities, where the time-limits are not observed. Article 639 provides, however, that the owners of such goods may still clear them if they submit an application within six months as from the time at which the goods were entered for the public auction procedure. All the taxes and charges due must be paid in respect of goods cleared in that manner, together with a further 5% of their value.

5 In 1993 Siesse, whose head office is in Lisbon, imported a consignment of computer hardware which was covered by a summary declaration and placed in temporary storage for 20 days. Since it had not entered those goods for any customs procedure within that period, Siesse was subsequently able to obtain clearance only on payment of a sum equal to 5% of their value, in accordance with Article 639 of the Portuguese Customs Regulation. It then brought proceedings before the Tribunal Fiscal Aduaneiro de Lisboa, challenging the measure assessing the sum to be paid on the ground that it was incompatible with Community law.

6 The national court considered that an interpretation of the Community legislation was necessary in order to determine the dispute and decided to refer the following questions to the Court for a preliminary ruling:

'1. Once the periods provided for in Article 15(1)(a) and (b) of Council Regulation (EEC) No 4151/88 of 21 December 1988 have expired, may the customs authority still authorize the owners of goods to declare them for release for free circulation?

2. In such circumstances, will only the customs duties and other charges in respect of importation be payable, together with any expenses arising from the temporary storage?

3. In the event of an affirmative answer to Question 1, may the said authority, by virtue of Article 19(1) of the abovementioned Community regulation, make its authorization conditional upon the payment of a specified sum of money unconnected with the duties, other charges and expenses referred to in Question 2, that sum representing revenue for the Member State?'

The first question

7 By its first question, the national court seeks to ascertain whether Regulation No 4151/88 precludes the customs authority from accepting, after the expiry of the periods provided for in Article 15(1), a declaration for release for free circulation of goods brought into the customs territory of the Community.

8 As both the Portuguese Government and the Commission propose, that question must be answered in the negative.

9 Under Article 15(1) of Regulation No 4151/88, where goods are covered by a summary declaration, they must then be entered for free circulation or for another customs procedure or be covered by an application for assignment of another customs-approved treatment or use within the periods determined by the customs

authority. Those periods are not to exceed 45 days from the date on which the summary application is lodged in the case of goods carried by sea or 20 days from that date in the case of goods carried by another form of transport. Article 15(2) allows the customs authority to authorize an extension of those periods, provided however that such extension does not exceed genuine needs which are justified by the circumstances.

10 Furthermore, Article 19(1) provides that the customs authority is to take without delay all measures necessary, including the sale of the goods, to regularize the situation of goods in respect of which the formalities are not initiated within the periods laid down. Under Article 19(2), the customs authority may, at the risk and expense of the person holding them, have the goods in question transferred to a special place, which is under its supervision, until their situation is regularized.

11 It is clear from those provisions that the customs authority may authorize an extension of the periods laid down when the circumstances so justify and must regularize their situation after the expiry of such periods. Although Article 19 makes provision for sale of the goods in the last resort, it in no way precludes the possibility that their situation may be regularized by accepting a declaration for release for free circulation.

12 The answer to the first question must therefore be that Regulation No 4151/88 does not preclude the customs authority from accepting, after the expiry of the periods provided for in Article 15(1), a declaration for release for free circulation of goods brought into the customs territory of the Community.

The second and third questions

13 By these questions, the national court wishes to know whether Article 19 of Regulation No 4151/88 precludes the customs authority from requiring the payment of a sum, other than the customs duties and any expenses arising from the temporary storage of the goods, for accepting a declaration for their release for free circulation after the expiry of the periods provided for in Article 15(1). It is clear from the reasoning in the order for reference that the question relates specifically to whether it is possible, in the light of the Community legislation, to levy a charge such as the 5% surcharge provided for in the Portuguese legislation, on the value of goods cleared through customs after the expiry of the statutory periods.

14 The Portuguese Government considers that the surcharge is a necessary and appropriate measure to penalize a failure to comply with the formalities and time-limits provided for in Regulation No 4151/88 and to encourage compliance by traders. It further submits that the surcharge cannot be regarded as a charge having equivalent effect to a customs duty within the meaning of Article 9 et seq. of the Treaty, since it arises out of the fact not that goods have crossed a frontier but merely that the statutory time-limits for customs clearance have not been complied with.

15 The Commission, on the other hand, takes the view that the surcharge in question must be classified as a charge having equivalent effect inasmuch as it applies only to imported goods, does not represent consideration for any service provided and is not a measure necessary to regularize the situation of goods within the meaning of Article 19 of Regulation No 4151/88.

16 The question whether such a surcharge constitutes a charge having equivalent effect, prohibited by Article 9 et seq. of the Treaty, does not arise in the circumstances described by the national court. That court's question concerns the interpretation of the Community legislation applicable to goods brought into the customs territory of the Community, prior to their release for free circulation in the Member States. It is clear from Article 9(2) of the Treaty that the provisions prohibiting customs duties and charges having equivalent effect between Member States do not apply to such goods.

17 As regards trade with non-member countries, the Treaty contains no express provisions similar to those which prohibit the imposition of charges having an effect equivalent to customs duties in trade between Member States (Joined Cases 2/69 and 3/69 *Sociaal Fonds voor de Diamantarbeiders* v *Brachfeld and Another* [1969] ECR 211, paragraph 28). Nevertheless, the establishment of the Common Customs Tariff means that the Member States may not subsequently introduce, unilaterally, new charges on goods imported directly from non-member countries or raise the level of those in existence at that time (Joined Cases 37/73 and 38/73 *Sociaal Fonds voor de Diamantarbeiders* v *Indiamex and Another* [1973] ECR 1609, paragraph 22).

18 As the Advocate General stated at point 24 of his Opinion, a levy such as the surcharge in issue applies only in specific situations, where the importer has failed to comply with certain customs rules and wishes himself to take advantage of a possibility for regularizing the position. It may not, therefore, be regarded as a customs duty or a charge imposed generally on products imported from non-member countries, undermining the unity of the Common Customs Tariff.

19 Regulation No 4151/88 has not provided for any specific administrative penalty in the event of infringement of Article 15, which requires that the declaration for release for free circulation or the application for assignment of another customs-approved treatment or use be submitted within the periods laid down. As noted in paragraph 10 above, Article 19 of the regulation nevertheless leaves it to the customs authority to take all measures necessary, including sale, to regularize the situation of the goods after the expiry of those periods.

20 It is settled case-law, confirmed in Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraph 55, and Case C-383/92 *Commission* v *United Kingdom* [1994] ECR I-2479, paragraph 40, that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national legislation, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

21 As regards customs offences, the Court has pointed out that in the absence of harmonization of the Community legislation in that field, the Member States are empowered to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with Community law and its general principles, and consequently with the principle of proportionality (see Case C-210/91 *Commission* v *Greece* [1992] ECR I-6735, paragraph 19).

22 The purpose of a levy such as the surcharge in issue, which is intended to penalize traders who have failed to comply with the formalities and time-limits provided for in Article 15 of Regulation No 4151/88, does not appear to be contrary to Community law. As the Portuguese Government submits, in the absence of such a measure a failure to comply with the prescribed formalities would in fact be without consequence for a trader authorized to regularize his position after the expiry of the time-limits. The penalty incurred is thus intended to encourage traders to act within the periods laid down and to penalize those who, having failed to do so, place the customs authorities in the position of having to sell the goods, in the last resort, as provided for in Article 19 of Regulation No 4151/88, with the risk of loss which that entails.

23 Nor does it appear to be contrary to Community law to make the regularization of the situation of the goods conditional upon the payment of such a penalizing levy. Such a requirement is merely a safeguard measure intended to ensure the actual payment of the corresponding levy.

24 The amount of such a penalty must be determined, in accordance with the case-law cited above, under conditions which are analogous to those applicable in national law to infringements of the same nature and gravity and which, in any event, make the penalty effective, proportionate and dissuasive. It is for the national court to determine whether the 5% levy provided for in the Portuguese rules on the value of goods cleared through customs after the expiry of the statutory time-limits is consistent with those principles.

25 The answer to the second and third questions must therefore be that Article 19 of Regulation No 4151/88 does not preclude the customs authority from requiring the payment of a sum, other than the customs duties and any expenses arising

from the temporary storage of the goods, for accepting a declaration for their release for free circulation after the expiry of the periods provided for in Article 15(1), provided that the amount of that sum is determined in accordance with the principle of proportionality and under conditions which are analogous to those applicable in national law to infringements of the same nature and gravity. It is for the national court to determine whether the surcharge in issue is consistent with those principles.

Costs

26 The costs incurred by the Portuguese Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Tribunal Fiscal Aduaneiro de Lisboa by order of 20 January 1994, hereby rules:

1. **Council Regulation (EEC) No 4151/88 of 21 December 1988 laying down the provisions applicable to goods brought into the customs territory of the Community does not preclude the customs authority from accepting, after the expiry of the periods provided for in Article 15(1), a declaration for**

release for free circulation of goods brought into the customs territory of the Community.

2. Article 19 of Regulation No 4151/88 does not preclude the customs authority from requiring the payment of a sum, other than the customs duties and any expenses arising from the temporary storage of the goods, for accepting a declaration for their release for free circulation after the expiry of the periods provided for in Article 15(1), provided that the amount of that sum is determined in accordance with the principle of proportionality and under conditions which are analogous to those applicable in national law to infringements of the same nature and gravity. It is for the national court to determine whether the surcharge in issue is consistent with those principles.

Edward Puissochet Gulmann

Jann Sevón

Delivered in open court in Luxembourg on 26 October 1995.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber