OPINION OF ADVOCATE GENERAL ELMER

delivered on 14 September 1995 *

Introduction

1. In this case the Court is asked to decide whether the provisions of Community law relating to goods brought into the customs territory of the Community are to be interpreted as meaning that the national customs authority may authorize the importer to enter goods for release for free circulation after expiry of the periods prescribed therefor and whether they may make the notification of such an authorization conditional upon payment of a special charge.

2. Article 15 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 [1] prescribes as follows:

'1. Where goods are covered by a summary declaration, they must have been entered for release for free circulation or for another customs procedure or be covered by an application for assignment of another customs-approved treatment or use referred to in Article 14 within the periods determined by the customs authority. The said periods shall not exceed:

(a) 45 days from the date on which the summary declaration is lodged in the case of goods carried by sea,

(b) 20 days from the date on which the summary declaration is lodged in the case of goods carried otherwise than by sea.

2. Where circumstances so warrant, the customs authority may authorize an extension of the periods referred to in paragraph 1. Such extension shall not however exceed genuine needs which are justified by the circumstances.'

* Original language: Danish.

1 — OJ 1988 L 367, p. 1.

Article 19(1) of the Regulation prescribes as follows:

'The customs authority shall without delay take all measures necessary, including the sale of the goods in respect of which the formalities necessary for them to be assigned a customs-approved treatment or use referred to in Article 14 are not initiated within the periods determined in accordance with Article 15.'

3. Article 638(1) of the Portuguese Customs Regulation (hereinafter 'the Customs Regulation') provides that the customs authority after completion of the customs formalities is to sell all goods stored whether under a customs procedure or in private storage, where the prescribed storage periods are exceeded.

In addition Article 639 of the Customs Regulation provides as follows:

'1. The owners of goods in respect of which the legally prescribed storage periods have been exceeded may clear the same provided that they make application for that purpose within a period of six months as from the time at which the goods were made liable to public auction.

2. Goods cleared under this article shall be subject to payment of all the charges and imposts due, and a further 5% of their value.'

4. SIESSE — Soluções Integrais em Sistemas e Aplicações Limitada (hereinafter 'SIESSE') whose registered office is in Lisbon imported in 1993 from an unspecified third country via Le Havre, France, as a port of transhipment, a consignment of electronic data-processing equipment which was temporarily stored at the Liscont container terminal in Portugal after a summary customs declaration with a period of 20 days for customs clearance. As SIESSE had not commenced customs clearance before that period expired, it applied to the customs authority for authorization to enter the goods for release for free circulation against payment of the charge of 5% of the value of the goods, as prescribed in Article 639 of the Customs Regulation, in order to avoid sale of the goods at auction. That application was granted and SIESSE paid the amount in question.

The questions referred to the Court

5. Subsequently SIESSE brought an action before the Tribunal Fiscal Aduaneiro, Lisbon, against the Portuguese customs authority, claiming that the levying of the 5% charge was unlawful.

6. By order of 20 January 1994 the Tribunal Fiscal Aduaneiro stayed the proceedings and referred the following questions to the Court of Justice 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 the first question referred to the Court of Justice, the national court is asking to be informed whether, under the Regulation, the national customs authority may authorize the entry for release for free circulation of goods which have been covered by a summary declaration, even if the periods prescribed therefor have expired.

8. In its observations SIESSE has claimed that the Portuguese authority is not empowered in general to extend the periods prescribed in the Regulation for customs clearance by six months, as provided in Article 639 of the Customs Regulation.

The Portuguese Government thinks that the Regulation does not prevent the owner from regularizing the situation of goods for which customs formalities have not been commenced within the periods prescribed following notification of authorization to enter the goods for release for free circulation.

In the Commission's view it follows directly from Article 15(2) of the Regulation that the situation with regard to goods for which customs formalities have not been commenced within the periods prescribed may

be regularized by an authorization to enter the goods for release for free circulation, since that provision gives the national customs authority the opportunity to extend the periods prescribed. Moreover the Regulation does not contain any provisions requiring the customs authority to refuse an entry of goods for release for free circulation, even where the periods prescribed have expired. The Commission therefore thinks that the first question should be answered in the affirmative.

9. Let me first stress that it may be seen directly from Article 15(2) that the national customs authority may extend the periods prescribed where circumstances so warrant. In my view that must also apply even when the periods laid down under Article 15(1)(a) and (b) have expired, since the essential function of the customs rules is to ensure that duties and charges are paid as quickly as possible and since there does not seem to be any real interest in providing otherwise.

10. That conclusion moreover is supported by Article 19(1) of the Regulation on the obligations of the Member States in the event of importers' exceeding the periods determined under Article 15(1). That provision requires the customs authority to take without delay all measures *necessary*, including the sale of the goods, to regularize the situation of goods which have not been assigned a customs treatment within the periods prescribed. Thus Article 19(1) merely provides the possibility for taking measures necessary for regularizing the situation of goods which have not been assigned a customs treatment within the periods prescribed. The provision states that such a regularization of the situation may be effected for example by the sale of the goods. It does not therefore require the national authority to regularize the situation of the goods in question in any given manner. The Member States' customs authorities must therefore have the right to release the goods when the amounts due are paid and to extend the period with a view to voluntary payment. In such a case it is not necessary to resort to compulsory sale or other coercive steps to recover the amounts.

11. Socio-economic interests and the interests of the debtor also militate in favour of that conclusion. A regularization of the situation of the goods by authorization to enter them for release for free circulation is in practice more effective, less expensive and possibly less loss-making than for example sale by compulsory auction.

12. The first question must accordingly be answered to the effect that the customs authority may, irrespective of whether the

periods determined in accordance with Article 15(1)(a) and (b) have expired, give the owner of the goods an authorization to enter them for release for free circulation.

The second question

13. By the second question the national court is wishing to be informed whether, in cases in which authorization is given to enter the goods for release for free circulation after the periods determined in accordance with Article 15(1)(a) and (b) have expired, other amounts may be demanded in addition to duty and other charges owed for the importation and any expenses in connection with temporary storage. The national court is here alluding to the charge of 5% of the value of the goods demanded from SIESSE under Article 639 of the Customs Regulation.

14. The Commission has stated that the national customs authority may charge, in addition to duty and other charges owed for the importation and any expenses resulting from the temporary storage, only such amounts as will make good losses actually incurred or as constitute a fee for services actually performed for the importer. In the Commission's opinion the contested charge is in addition incompatible with Article 9(1) of the Treaty on the common customs tariff in relations with third countries. A charge imposed only on imported goods and not representing payment for a service or constituting a measure necessary for regularizing the situation of the goods in question must in the Commission's view be regarded as a duty on goods originating in third countries.

15. The Portuguese Government has stated, in support of the legality of the charge made, that the 'measures necessary' which the Member States are to take under Article 19(1) of the Regulation, in addition to measures intended to guarantee payment of duty and other expenses, may also comprise such measures as ensure the effectiveness of the periods prescribed for customs formalities. The national customs authority may thus apply measures which, by penalizing unlawful conduct, involve an incentive for owners of goods to act within the periods laid down. Such a measure may, as in this case, consist in the levying of a charge for exceeding the period prescribed. Such a charge cannot, in the government's view, be assumed to be incompatible with Article 9 et seq. of the Treaty on the common customs tariff in relations with third countries, since the charge is not imposed on every importer but only on individual importers as a result of irregularities in the form of failure to observe the periods prescribed for customs formalities.

16. My view is that the customs authority must be entitled by way of compensation to charge, in connection with customs clearance of goods after the expiry of the periods prescribed therefor, over and above duty and charges payable, amounts covering expenditure in relation to temporary storage and such amounts, for example in the form of interest on overdue payments, as will cover loss of interest incurred as a result of late payment. The customs authority must also, in my view, be entitled on similar grounds to require payment of a fee to cover the customs department's extra work and inconvenience in the matter as a consequence of the fact that the importer has not cleared the goods in time.

17. The problem in this case is, however, whether the national customs authority can in addition charge amounts which are neither specifically nor more generally intended to cover the department's loss and inconvenience in the matter, but on the contrary have the nature of an administrative penalty for exceeding the prescribed periods in the form of demands for payment to the State Treasury of a percentage of the value of the goods in question.

18. The Court has consistently held, [2] with regard to penalties, that where a Community regulation does not specifically provide any penalty for infringements or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. The choice of penalties is within the discretion of the Member States, but they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to infringements of national law of a similar nature and importance and penalties must in all circumstances be effective, proportionate to the infringement and dissuasive.

Moreover, with regard to the upper limit of the Member States' choice of penalties for infringement of provisions of Community law, the Court declared, most recently in a judgment delivered on 16 December 1992, [3] that:

'It should be noted first that in the absence of harmonization of Community legislation in the field of customs offences, the Member States are competent to adopt such sanctions as appear to them to be appropriate ... When

2 — See for example the judgments in Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraphs 23 and 24, in Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17, and in Case C-7/90 *Vendevenne and Others* [1991] ECR I-4371, paragraph 11.

3 — Case C-210/91 *Commission* v *Greece* [1992] ECR I-6735.

making use of that competence they are, however, obliged to respect Community law and its general principles, and must consequently comply with the principle of proportionality.

As the Court has repeatedly held, the administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued ...' (paragraphs 19 and 20).

In so far as the rules of Community law do not prescribe penalties, the Member States are thus empowered to lay down penalties for infringement of those rules. Such penalties must be compatible with the principle of proportionality, that is, the penalty must be necessary to ensure the observance of the rules of Community law and must not exceed what is essential. The infringement of the relevant Community provision must in addition be penalized according to the same rules as apply under national law for infringements of a similar nature and importance.

19. As a first step therefore, it is necessary to consider whether the Regulation, in particular Article 19(1), governs the possibility for Member States to impose penalties on importers for omitting to carry out customs formalities within the periods prescribed. In my view that question must be answered in the negative. On the one hand the Regulation does not require the Member States to penalize such infringements. On the other hand I think the provisions of the Regulation cannot prevent the Member States from laying down such penalties with a view to encouraging importers where appropriate to take the necessary measures to complete customs formalities concerning the goods before the periods expire. In particular Article 19(1) of the Regulation does not deal with the question of the right to impose penalties on importers in connection with such omissions to take the necessary actions *before* the expiry of the periods. What Article 19(1) does deal with, on the other hand, is the extent to which the customs authority is to take measures *after* the expiry of the periods with a view to ensuring payment of sums owing. The fact that the customs authority has an obligation to collect amounts owing, for example by sale of the goods, does not preclude the Member States from imposing on the importers in addition criminal or administrative penalties on the ground that they have not taken due steps to complete customs formalities in time, so that the customs authority is not obliged to undertake enforced collection with consequent risk of loss.

20. In accordance with the case-law of the Court, a penalty must not go further than

necessary to ensure that the time-limits are observed. A charge proportional to the value of the goods imported will give importers of goods of no small value a powerful incentive to ensure that customs formalities are completed within the periods prescribed. On the other hand the penalty for exceeding the periods under such a system of calculation is comparatively slight in the case of goods of little value, so that the penalty in the case of such goods is not the same deterrent as with more valuable goods. However, in the case of extremely valuable goods, a charge of a percentage of their value may be deemed to be disproportionate to the nature of the infringement which, according to circumstances, may be of a merely formal nature, and to the amount of the charge thus paid out of time. It is for the national court to estimate whether such a charge calculated as a percentage of the value of the goods is in the specific case compatible with the principle of proportionality. It should be noted in this respect that during the oral procedure the Portuguese Government stated that in Portugal no charge is levied, in addition to the 5% of the value of the goods, in respect of interest for late payment or despatch fees. Part of the charge of 5% of the value of the goods thus covers expenses for the late payment of duty and the like, which the national court may include in its assessment of whether the penalty is compatible with the principle of proportionality.

21. It is likewise for the national court to assess whether the penalty corresponds to the penalties applicable under national law for infringements of a similar nature and importance.

22. With regard to the Commission's argument that the charge is incompatible with Article 9 et seq. of the Treaty on the common customs tariff, I would observe that in connection with trade between the Member States the Court has consistently declared that 'the concept of charges having equivalent effect to customs duties on imports and exports encompasses any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier'. [4]

23. In so far as concerns the adoption of the common customs tariff in relations with third countries the Court has declared that 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. [5] The establishment of the common customs tariff means however that Member

4 — See most recently the judgment in Case C-130/93 *Lamaire* v *NDALTP* [1994] ECR I-3215, paragraph 13.

5 — See the judgment in Joined Cases 2/69 and 3/69 *Diamantarbeiders* v *Brachfeld* [1969] ECR 211.

States may not introduce, in a unilateral manner, new charges on goods imported directly from third countries or raise the level of those in existence at that time. [6]

24. The charge in question is imposed upon importers into Portugal of goods originating in third countries as an administrative penalty only in special situations in which they have not observed the customs rules and that charge is levied only in cases in which the importer himself wishes to avail himself of the opportunity to complete customs formalities, as laid down in the Customs Regulation, after the expiry of the periods prescribed. By no means every importer into Portugal of goods from third countries is required to pay the charge. The charge is levied, moreover, only after the expiry of a relatively long period, so that the importer has a real opportunity to complete customs formalities on his goods before then. The charge at issue cannot therefore, in my view, be regarded as a duty or charge which Portugal imposes in general in a unilateral manner on goods imported from third countries and which therefore affects the Community's common customs tariff. It is therefore without significance for my view of this case whether the Court's wide definition of a charge having equivalent effect to a customs duty in trade between Member States is applied in the same way to charges which a Member State imposes on goods originating in a third country.

6 — See the judgment in Joined Cases 37/73 and 38/73 *Diamantarbeiders* v *Indiamex* [1973] ECR 1609.

25. The second question must accordingly be answered to the effect that in addition to customs duties and other charges due on importation of a consignment of goods, together with any expenses arising from storage, on the one hand sums may be levied to cover interest and expenses as well as extra work and inconvenience connected with notifying authorization to enter the goods for release for free circulation after the periods prescribed therefor have expired, and on the other hand the importer may be required to pay an amount as a penalty for failure to observe the periods prescribed. That penalty must comply with the principle of proportionality and must correspond to the penalties applicable under national law for infringements of a similar nature and importance. It is for the national court to assess whether in a specific case these conditions may be regarded as met.

The third question

26. Finally the national court wishes to be informed whether the national customs authority may make the notification of an authorization to enter goods for release for free circulation after the expiry of the periods determined in accordance with Article 15(1)(a) and (b) of the Regulation conditional upon the payment to the State

Treasury of a specified sum apart from duties, other charges and any expenses.

I understand that question as meaning that the national court really wishes to be informed whether the customs authority may make notification of authorization to enter goods for release for free circulation after expiry of the said periods conditional upon payment of the charge of 5% of the value of the goods prescribed under Article 639 of the Customs Regulation and of the other amounts mentioned in the second question. I shall therefore consider only whether that is possible and not whether the customs authority may make the authorization conditional upon the payment of other sums which may be owed by an importer.

27. The levying of the amounts which according to the answer to the second question may lawfully be charged by the customs authority is closely connected with the notification of the authorization to enter the goods for release for free circulation after the expiry of the periods prescribed. In order to make sure of the recovery of these amounts it is in my view natural for the national customs authority to make notification of such an authorization conditional upon payment of the sums mentioned. There are expenses in the widest sense which may be a charge on the goods so that the customs authority may obtain satisfaction from the goods in priority to other claimants if payment is not made. Such a secured right can be preserved only by the customs authority's effectively depriving the owner of the right to dispose of the goods until the amounts charged thereon have been paid. They must therefore be able to make the notification of the authorization to enter the goods for release for free circulation conditional upon payment of such amounts.

28. The answer to the third question should accordingly be that the customs authority may make notification of authorization to enter the goods for release for free circulation after expiry of the periods determined in accordance with Article 15(1)(a) and (b) of the Regulation conditional upon payment of the sums mentioned in the answer to the second question.

Conclusion

29. On those grounds I shall propose that the Court answer the questions referred to it as follows:

(1) The customs authority may, irrespective of whether the periods determined in accordance with Article 15(1)(a) and (b) 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 have expired, give the owner of the goods an authorization to enter them for release for free circulation.

(2) In addition to customs duties and other charges due on importation of a consignment of goods, together with any expenses arising from storage, on the one hand sums may be levied to cover interest and expenses as well as extra work and inconvenience connected with notifying authorization to enter the goods for release for free circulation after the periods prescribed therefor have expired, and on the other hand the importer may be required to pay an amount as a penalty for failure to observe the periods prescribed. That penalty must comply with the principle of proportionality and must correspond to the penalties applicable under national law for infringements of a similar nature and importance. It is for the national court to assess whether in a specific case these conditions may be regarded as met.

(3) The customs authority may make notification of authorization to enter the goods for release for free circulation after expiry of the periods determined in accordance with Article 15(1)(a) and (b) 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 conditional upon payment of the sums mentioned in the answer to the second question.