OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 12 December 2000 [1]

1. By order of 28 April 1999, the Supremo Tribunal Administrativo (Supreme Administrative Court) of Portugal submitted to the Court of Justice four questions for a preliminary ruling concerning the customs arrangements on inward processing relief and, more particularly, the interpretation of Article 11 of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements. [2]

The relevant legislation

2. Council Regulation (EEC) No 1999/85 of 16 July 1985 laid down the rules applicable to inward processing relief arrangements. According to Article 1(2) thereof:

'... inward processing relief arrangements shall ... enable the following goods to be used in the customs territory of the Community in one or more processing operations:

(a) non-Community goods intended for re-export outside the customs territory of the Community in the form of compensating products, these goods not being subject to import duties;

(b) goods released for free circulation with refund or remission of the import duties levied on such goods if they are re-exported outside the customs territory of the Community in the form of compensating products.'

3. For the purposes of the regulation, 'processing operations' means:

'— the working of goods, including fitting or assembling them or adapting them to other goods,

1 — Original language: Italian.

2 — OJ 1985 L 188, p. 1.

— the processing of goods,

— the repair of goods, including their restoration,

— the use of certain goods ... which are not to be found in the compensating products, but which allow or facilitate the production of those products, even if they are entirely or partially used up in the process.'

'Compensating products' means:

— 'all products resulting from processing arrangements'. [3]

4. Title II of the regulation concerns the 'Issue of authorisation'. Article 3 thereof provides that:

'1. The use of inward processing relief arrangements shall be conditional on the issue, by the customs authority of the Member State in which the processing operations are to be carried out, of an inward processing authorisation ... .

2. The authorisation shall be issued at the request of the person who carries out processing operations or arranges for them to be carried out.

This person shall supply, with his application, the information required for issue for the authorisation.

3. The authorisation may cover one or more processing operations as the case may be.'

5. The remainder of Title II largely regulates the conditions which have to be met in order to obtain authorisation. These conditions relate both to the person to whom the authorisation may be granted and the goods which may be covered by the inward processing relief arrangements (Articles 5 and 6).

6. For the purposes of this case, it ought particularly to be noted that Article 11,

3 — See Article 1(3)(h) and (i).

contained in Title II and the subject of this reference for a preliminary ruling, reads as follows:

'1. The conditions under which the arrangements are used shall be set out in the authorisation.

2. The holder of the authorisation is required to notify the customs authority of all factors arising after the issue of the authorisation which are likely to influence its continuation or contents.

3. Where the circumstances under which the authorisation was issued are found to have changed, the customs authority shall amend the authorisation accordingly.'

7. Title III of the regulation concerns the 'Functioning of the arrangements' and essentially sets out the rules governing the placing of goods under the inward processing relief arrangements.

More particularly, Article 15 concerns the 'rate of yield' of the operation, defined in Article 1 of the regulation as '... the quantity or percentage of compensating products obtained from the processing of a fixed quantity of import goods.'

According to Article 15(1):

'... the customs authority shall fix either the rate of yield of the operation or, where necessary, the method of determining such rate. This rate shall be determined on the basis of the actual circumstances in which the processing operation is, or is to be, carried out.'

8. Next, Article 17 of the regulation provides that:

'The customs authority may take any measures of supervision or control which it considers necessary to ensure that the regulation is implemented correctly by the holder of the authorisation or by the operator where this is a different person.'

9. Lastly, the regulation provides, in Articles 18 and 21 in particular, that the inward processing relief arrangements are finally discharged when the compensating products have been re-exported. However, they can also be released for free circulation in the Community subject, of course, to payment of the appropriate customs duties. Similarly, the waste products which usually result from processing may be re-exported or released for free circulation. In the latter case, they will obviously be subject to the customs duties payable on waste products.

10. For the purposes of this case, it is also worth drawing attention to Council Regulation (EEC) No 3677/86 of 24 November 1986 laying down provisions for the implementation of Regulation (EEC) No 1999/85 on inward processing arrangements. [4] In accordance with Article 14 of that regulation: '... authorisations shall be made out in writing and shall conform to the model set out in Annex II.' Paragraph 6 of the model includes an entry on the rate of yield. According to the explanatory note, that entry must indicate the rate of yield or method by which the rate will be established.

Facts and the questions referred for a preliminary ruling

11. In March and April 1988, Fábrica de Queijo Eru Portuguesa L^{da} ('Eru Portuguesa') imported several drums and boxes of cheese intended for processing. These were imported under inward processing relief arrangements, after the requisite authorisation had been obtained from the customs authorities.

12. In that authorisation, and as requested by Eru Portuguesa, the rate of yield for the grated cheese was fixed at 97%, and the rate of waste, consequently, at 3%.

13. On 31 August 1988, the Secretariado de Estado dos Assuntos Fiscais (Secretary of State for Fiscal Matters) ordered an inspection of the premises of Eru Portuguesa. The inspection established that the rate of waste for the grated cheese amounted to only 1% and that, therefore, the rate of yield from the processing was 99% and not 97% as set out in the authorisation. The inspection was completed in June 1990.

14. It is clear from the order for reference that the outcome of the inspection was not disputed by Eru Portuguesa, as is apparent from the fact that, from 30 November 1988, in its requests for inward processing authorisations, Eru Portuguesa gave a rate of yield of 99% for the grated cheese and a rate of waste of 1%.

15. Once the reported difference in the rate of yield had been confirmed, the Chefe de Delegaçao Aduaneira do Jardim do Tabaco (the competent customs authority) calculated the tax due on the quantity of raw material which had not been processed on the basis of a 2% over-declaration of waste by Eru Portuguesa, and demanded payment thereof in January 1992.

16. Eru Portuguesa challenged that tax assessment before the Tribunal Fiscal

4 — OJ 1986 L 351, p. 1.

Aduaneiro (Customs Tax Court), Lisbon, which dismissed the action as unfounded.

17. Eru Portuguesa was more successful with its subsequent appeal to the Tribunal Tributário de Segunda Instância (Tax Court of Second Instance), which set aside the judgment of the lower court and, thereby, the customs authority's notice of assessment. In response, the representative of the Fazenda Pública (Treasury) lodged an appeal before the Supremo Tribunal Administrativo.

18. In the proceedings before the latter court, the main issue in dispute between the parties concerned the interpretation of Article 11 of Regulation No 1999/85. [5] According to the arguments put forward by Eru Portuguesa, and accepted in the judgment under appeal, Article 11 governs only the conditions and requirements for the issue of inward processing authorisations. It does not therefore apply to circumstances where the rate of yield fixed in the authorisation differs from the actual rate of yield. According to Eru Portuguesa, that is an aspect more properly related to the functioning of the inward processing relief arrangements, which is governed by the provisions in Title III of the regulation. Consequently, in circumstances of the kind described above, the customs authority could not rely on Article 11(3) to alter the contents of an authorisation which had already been issued, but could only adjust the rate of yield in subsequent authorisations.

5 — See point 6 above.

19. According to the Fazenda Pública, however, the abovementioned Article 11 covers all the terms and conditions laid down in the authorisation document with which the beneficiary must comply if he is to be able to make use of the arrangements. Therefore, if, as in this case, the customs authority establishes that any of those terms and conditions, including the rate of yield, have changed, it may unilaterally amend the authorisation, in accordance with Article 11(3).

20. The Supremo Tribunal Administrativo decided that the outcome of the dispute depended on the interpretation of Article 11 of Council Regulation No 1999/85 and, accordingly, submitted the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 11 of Council Regulation No 1999/85 of 16 July 1985 concerned with the conditions (obligations, rules) laid down in the document granting the beneficiary of the arrangements authorisation for the use (functioning) thereof?

2. Or, on the contrary, is it concerned with the conditions, requirements or bases for the issue of the inward processing authorisation?

3. Once the rate of yield has been fixed by the customs authority, may the latter unilaterally alter that rate on the ground that the holder of the authorisation, when making use of the arrangements, has in fact obtained a higher rate of yield than that initially envisaged and approved?

4. Do the principle of legal certainty and the rules on inward processing relief arrangements allow the competent customs authority to alter the rate of yield fixed in the processing authorisation if it is proved that the said customs authority has been supervising and controlling the operation of the undertaking in question since the inception of the arrangements in Portugal (in 1986)?'

The first and second questions

21. I consider that the first two questions can be answered together. By those questions, the national court is essentially seeking to ascertain whether, when Article 11 of Regulation No 1999/85 requires the beneficiary of the inward processing relief arrangements to notify the customs authority of all factors arising after the issue of the authorisation (Article 11(2)), and when it gives the customs authority the power to amend the authorisation accordingly (Article 11(3)), it is referring exclusively to those factors which relate to the authorisation document or whether it also covers those factors which relate to the conditions of use of the arrangements.

22. For a variety of reasons, including primarily a number of pointers contained in the wording of Article 11, the second of those alternatives seems to me to be the better. I would in fact point out that, as regards the notification requirement, Article 11(2) specifically refers to 'all factors' arising after the issue of the authorisation which are likely to affect its *continuation* or *contents*. [6] Now, while it is clear that the first of those terms is intended to refer to factors relating to the issue of the authorisation under Articles 3 to 6 of Title II, it seems to me to be equally clear — and this is indirectly confirmed by Article 11(1) — that the second is intended to refer to factors relating to the conditions of use of the arrangements set out in the authorisation. According to Regulation No 3677/86 and Annex II thereto, [7] those conditions include the rate of yield.

23. But if Article 11(2) refers both to the conditions for the issue of the authorisation and the conditions for the use of the arrangements, it must follow that, in permitting the customs authority to amend the authorisation if circumstances have chan-

6 — See point 6 above.
7 — See point 10 above.

ged, Article 11(3) is referring to circumstances pertaining to both sets of conditions. In other words, if the provisions of that article are logically and systematically construed and the need to guarantee the internal coherence of the system is taken into account, it has to be considered that the circumstances to which Article 11(3) refers exactly mirror those factors, mentioned in Article 11(2), which may affect both the issue and the contents of the authorisation and, therefore, the use of the arrangements.

24. Nor does it seem to me that this conclusion is open to challenge on the ground that, as highlighted in the judgment which is the subject of the appeal before the Supremo Tribunal Administrativo, Article 11 is to be found in Title II of Regulation No 1999/85, which concerns the issue of the authorisation, [8] whereas it is Title III which covers the functioning of the arrangements. I do not see where the article ought to have been located if not at the end of Title II, together with Article 12 on revocation of the authorisation. Both articles effectively complete, under the appropriate Title, the general rules on authorisation, by laying down, in a structured and logical sequence, the rules governing the issue, amendment and revocation of authorisation.

25. Solely in the light of the above considerations, then, it seems to me to be difficult to endorse the argument, advanced by Eru Portuguesa in particular, that the scope of Article 11 of the regulation is limited to the conditions for the issue of the authorisation, with the effect that only if those conditions change could the customs authority amend the authorisation. But it also appears to me that, by isolating completely, within the arrangements at issue, the stage at which the authorisation is issued, that argument produces results at variance not only with the logic and internal coherence of the arrangements but with their very purpose.

26. There is no doubt that the system under consideration depends on an authorisation issued at the request of the person concerned and based on the information that person supplies. This — as the Commission points out in its observations — is a mechanism clearly designed to avoid a situation in which the customs authority has to make a complete check of the *de facto* circumstances of every operation and therefore places on the person making the application the burden of providing all the requisite information. [9]

27. The stage of issuing the authorisation clearly does not complete the functioning

8 — See point 18 above.

9 — As laid down in the second sentence of Article 3(2) of Regulation (EEC) No 1999/85. See point 4 of this Opinion.

of the arrangements, however, nor is it to be taken in isolation from them. In particular, it does not preclude the possibility of carrying out supervision and controls after the authorisation has been issued. On the contrary, as we have seen, the regulation specifically provides for that possibility, [10] for reasons that seem to me to be self-evident.

28. It is in fact clear that the arrangements can function properly not only if the applicant provides the correct information but also only if the competent authority is able to carry out the necessary supervision and controls, adjusting the authorisation in accordance with any different findings on its part. Were that not the case, the conclusion would have to be that the customs authority may not amend the authorisation even if it establishes that one of the conditions for the functioning of the arrangements — and, moreover, an important condition, such as the rate of yield — does not correspond (or no longer corresponds) to the real economic conditions of the processing activity. Not only would that conclusion be paradoxical, it would be blatantly incompatible with the objective of the inward processing relief arrangements.

29. I would point out here that the Court has made clear that 'it appears from the preamble to Regulation No 1999/85 that the inward processing relief arrangements were established so as not to put at a disadvantage internationally Community undertakings which use goods from non-member countries in order to manufacture products for export by giving them the possibility of acquiring such goods under the same conditions as undertakings from non-member countries.' [11]

30. In the context of these arrangements, therefore, the non-payment of customs duties is specifically designed to enable Community producers to obtain the production materials they need at the same cost as producers outside the Community, thereby guaranteeing conditions of basic equality between these producers on the international market.

31. However, if the arrangements are to function properly, the conditions laid down for use of the inward processing relief arrangements must obviously be fully complied with to avoid the risk of distortion and abuse. That applies particularly to the

10 — As provided for by Article 17 of Regulation (EEC) No 1999/85. See point 8 of this Opinion.

11 — Case C-437/93 *Temic Telefunken* [1995] ECR I-1687, paragraph 18. See also Case C-325/96 *Fábrica de Queijo Eru Portuguesa* [1997] ECR I-7249, paragraph 3.

conditions relating to the rate of yield. If, in fact, as the French Government rightly points out in its observations, the rate of yield is underestimated — and the percentage of waste consequently overestimated — the goods corresponding to the difference between the anticipated percentage and the actual percentage will remain in Community customs territory without the payment of any import duties and will therefore be able to be placed on the market in the form of raw materials or finished products. That would both damage Community finances and give the producer an unfair advantage, thereby seriously distorting the system.

32. On the basis of the above consideration and those I set out earlier, I therefore propose to answer the first and second questions from the national court to the effect that Article 11 of Regulation No 1999/85 governs all elements of the inward processing relief arrangements, that is to say both the conditions concerning the issue of the authorisation and the conditions concerning the use and functioning of the arrangements themselves.

The third and fourth questions

33. The above analysis makes it easier to answer the remaining questions, the third and fourth questions, submitted by the national court. By those questions, the national court is essentially seeking to ascertain whether the customs authority may unilaterally amend the rate of yield fixed in an authorisation if it finds that rate to be lower than the actual rate, or whether the Community rules in force, as well as the principle of legal certainty, preclude it from making such amendment.

34. In the final analysis, these two questions raise the same issue and can therefore be answered together. The only differences concern, in the fourth question, the reference to the principle of legal certainty, and the final sentence which mentions the fact that the customs authority has been supervising and controlling the operation of Eru Portuguesa since the inception of the arrangements in Portugal (in 1986). In fact, the latter circumstance is very probably behind the reference to the principle of legal certainty. The sentence implies, albeit very indirectly, that the customs authority was already familiar with the real economic conditions in which the inward processing was taking place, at a point before it decided to alter the authorisation. That conduct on the part of the customs authority specifically gave rise to legitimate expectation on the part of Eru Portuguesa. I shall return to that point below. I should straightaway point out, however, that, save for the vague and fleeting allusion at the end of the fourth question, there is no trace of the issue which is now being raised in the order for reference, from which it is, if anything, clear that the dispute between the

parties related exclusively to imports made from March to April 1998.

35. To return to the questions, I would first point out that what I have already said in relation to the interpretation of Article 11 of Regulation No 1999/85 in itself argues for the legitimacy of unilateral action by the customs authority in the circumstances raised in both questions. That conclusion is borne out by Article 15 of the regulation, which makes it clear that the customs authority has sole responsibility for fixing the rate of yield on the basis of the actual circumstances in which the processing operation is carried out, [12] as well as from Article 17 of the regulation, cited on several occasions, which authorises the customs authority to take any measures of supervision or control which it considers necessary. [13]

36. It is clear from all of those provisions, as well as the general objectives of the system, as described above, that not only does the customs authority have the power unilaterally to alter the rate of yield fixed in the authorisation to reflect the economic reality of the operation, but it is under a duty to do so — especially if, as appears to have happened in this case, the beneficiary has failed to meet the requirement laid down in Article 11(2) to provide notification of new factors arising after the issue of the authorisation.

37. Nor, in my view, is that conclusion open to challenge on the basis of the principle of legal certainty. As I have pointed out on a number of occasions, it is the regulation itself, and in particular Articles 11 and 17 thereof, which authorises the customs authority to verify that the economic conditions in which the processing operation is taking place are still the same and, if necessary, amend the authorisation — which has already been issued — accordingly. That means, as the Commission is right to point out, that the authorisation does not confer on its holder a position in law that is absolute and irrevocable; it simply accords him the right to import certain goods under the conditions laid down in the authorisation, if and so long as those conditions accurately reflect the economic realities of the operations carried out.

38. Moreover, in its written observations in this case, Eru Portuguesa has cited a number of factors which gave rise to legitimate expectation on its part. In particular, in addition to challenging the methods and results of the controls carried out by the customs authority, it criticised the latter's failure to state the reasons which led it to alter the rate of yield. According to Eru Portuguesa, that is all the more serious because, during 1987, that is to say the year prior to that of the events which gave rise

12 — See point 7 above.
13 — See point 8 above.

to this case, the same customs authority had carried out controls on other processing operations by Eru Portuguesa, including those concerning grated cheese, on conclusion of which it accepted and confirmed the rate of yield of 97%.

39. I should state at the outset, however, that none of these issues appears in the order of reference, which indicates merely that, as I stated in point 14 above, Eru Portuguesa had accepted the new rate of yield. In any event, it is not for the Court to assess the validity of possible objections to the methods and results of the controls or the reasons why the customs authority, which had accepted a given rate of yield until 1988, then decided to alter it: in particular, whether the alteration was made as a result of a change in the economic conditions in which the processing operations took place or simply on the basis of more accurate checks. Assessments of that nature require the kind of verification which is clearly a matter for the national court.

40. It is, however, for the Court of Justice to interpret the significance and scope of the relevant Community rules. In those terms, what has still to be emphasised, to complete the answer to the third and fourth questions, is that even if the rate of yield was altered in order to correct an earlier error of assessment by the customs authority regarding the congruence between the authorised rate of yield and the actual rate of yield, Eru Portuguesa could still not rely on the principle of legal certainty. In those circumstances, in fact, the alteration would merely be bringing the conduct of the customs authority into line with the requirements of Regulation No 1999/85. It would therefore reflect the abovementioned power and duty of the customs authority to ensure that the inward processing relief arrangements are properly implemented and, therefore, for the purposes of this case, that the operations are fully consistent with economic reality. I would, moreover, point out that the Court has ruled in relation to similar circumstances that '... a trader is not entitled to expect that, when he has benefited from decisions of a national authority that do not comply with a clear and unequivocal rule of Community law, the same authority will adopt a further decision in breach of Community law.' [14]

41. I therefore consider that it may be concluded that the beneficiary of inward processing relief arrangements cannot rely on legitimate expectation that the conditions fixed in the authorisation will continue to apply if, even correcting earlier decisions, the customs authority establishes that those conditions do not correspond to the economic reality of the operation.

14 — Case C-325/96 *Fábrica de Queijo Eru Portuguesa* [1997] ECR I-7249, paragraph 22.

Conclusion

42. I therefore propose that the Court give the following answers to the questions submitted by the Supremo Tribunal Administrativo:

(1) Article 11 of Council Regulation (EEC) No 1999/85 of 16 July 1985 governs both the conditions (obligations, rules) for the use of inward processing relief arrangements which the authorisation imposes on the beneficiary of those arrangements and the conditions, requirements or bases for the issue of the authorisation.

(2) Neither the principle of legal certainty nor the rules on inward processing relief arrangements preclude the customs authority from unilaterally altering the rate of yield, after it has been fixed in the authorisation, where that authority establishes, while the arrangements are being used, that the holder of the authorisation has obtained a rate of yield higher than that initially envisaged and approved.