OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 13 December 1991 *

Mr President,
Members of the Court,

The subject-matter of these proceedings is the Portuguese legislation on the making of customs declarations on behalf of another person by a category of traders, namely forwarding undertakings, who are in competition — as regards the provision of that service — with official customs agents. In the Commission's view, that legislation is incompatible with Regulation (EEC) No 3632/85 inasmuch as it prohibits forwarding undertakings from making customs declarations on behalf of another person, at least as a regular part of their activity.

Let me briefly summarize the essential provisions of the relevant Community and national legislation, the rest of which is set out in the Report for the Hearing.

The Community system

Regulation No 3632/85 lays down the conditions under which a person may be allowed to make customs declarations. To that end, Article 2 of the regulation lays down that the declaration may be made by any person able to produce or cause to be produced to the competent customs authority both the goods in question and the documents stipulated. Under Article 3, the person concerned may make the declaration in one of three ways:

(a) in his own name and on his own behalf;

(b) in the name and on behalf of another person, and therefore as an agent with representation;

(c) in his own name but on behalf of another person, as an agent without representation.

Article 3(2) lays down, however, that the option referred to in (c) may be exercised only if the Member States have so provided.

Where a Member State authorizes customs declarations to be made by persons in their own name but on behalf of another person, Article 3(3) lays down that that State may limit to persons pursuing the activity of making customs declarations on a self-employed basis (either as their principal

* Original language: Italian.

occupation or as a secondary activity) the right:

(a) either to make declarations in the name and on behalf of another person or, *alternatively*,

(b) to make declarations in their own name but on behalf of another person.

In addition, Article 6 provides that the regulation does not preclude the application of national provisions which limit, in accordance with Article 3(3), pursuit of the activity of making customs declarations either in the name and on behalf of another person or in their own name but on behalf of another person, to persons authorized to pursue such an activity by the competent authorities of the Member State concerned, on conditions laid down by the latter with regard specifically to the professional qualifications required and the guarantees deemed necessary for the pursuit of the activity.

National legislation

As regards the national legislation relevant to this case, I shall confine myself to its salient features.

To begin with, the Portuguese customs system provides that a customs declaration may be made either by an agent with representation or by an agent without representation (as well as, evidently, by a person in his own name and on his own behalf).

Secondly, the Portuguese legislation provides for a specific professional category, namely the official customs agents referred to in Article 426(4) of the Customs Reform Law,[1] to pursue the activity of making customs declarations on behalf of another. They are the only ones who are permitted by law to act as agents without representation and are therefore guaranteed the exclusive right to undertake that kind of agency. They may also act as agents with representation.

Thirdly, it is also undisputed that the legislation in question permits persons other than official agents to make customs declarations on behalf of another person,[2] but subject to a twofold restriction:

such persons may act only in the name and on behalf of another person, since agency without representation is reserved exclusively to official agents;

such persons, unlike official agents, *may not make declarations as a regular part of their activity*, inasmuch as they are authorized to represent only one principal, as opposed to several.

Fourthly, as regards forwarding undertakings in particular, which are commercial undertakings whose activities are governed by Decree Law No 43 of 25 January 1988,

1 — Decree Law No 46311 of 27 April 1965, as amended by Decree Law No 450 of 7 October 1980.

2 — These are persons authorized under Article 426(1), (2) and (3) of the Customs Reform Law.

Article 7(4) of that decree provides that 'they may not carry on the activity referred to in Article 426' of the Customs Reform Law, that is to say the making of customs declarations.

The arguments of the parties

These infringement proceedings turn in point of fact on the compatibility of Article 7(4) of Decree No 43/83 with Article 3(3) of Regulation No 3632/85.

The Commission claims in that regard that Article 7(4) imposes an *absolute* prohibition on forwarding agents making customs declarations. Accordingly, they may not act either as agents without representation (a kind of agency which, in any event, is reserved by the Portuguese legislation to official customs agents alone) or as agents with representation.

That situation is evidently incompatible with Article 3(3) of the regulation. That provision, according to the Commission, permits the Member States to reserve to a given professional category only *one* of the two kinds of agency. The other kind, however, may not be subject to an exclusive reservation and must therefore be freely accessible to all the traders concerned. In those circumstances, the effect of Article 7(4) of Decree No 43/83 is to preclude forwarding undertakings from acting under *either* kind of agency.

The Portuguese Government acknowledges that Article 7(4) would be incompatible with the regulation if it *absolutely* prohibited forwarding undertakings from acting as agents. However, it maintains by way of reply that the Commission's allegation is unfounded precisely because it is based on a misinterpretation of the national legislation in question. Notwithstanding its wording, Article 7 does not impose an absolute prohibition on forwarding agents making customs declarations on behalf of another person. If interpreted systematically, that is to say in the light of the general provisions set out in the Customs Reform Law, the provision in question merely seeks to prevent forwarding agents from doing so *as a regular part of their activity.* Accordingly, forwarding agents may, by analogy with the other persons referred to in Article 426 of the Customs Reform Law, make declarations in the name and on behalf of another person, but they are authorized exclusively *to represent a single principal.*

As I said earlier, the Commission's rejoinder to that argument is that even on the assumption that Article 7(4) has the scope ascribed to it by the Portuguese Government, that is insufficient to remedy the infringement alleged.

According to the Commission, Article 3(3) of Regulation No 3632/85 ensures that one of the two kinds of agency is not reserved to a professional category and may therefore be freely undertaken by the traders concerned. Since the regulation does not set any limits thereto, it must be possible for them to undertake the kind of agency not covered by the reservation *as a regular part of their activity as well.* Accordingly, the

restriction imposed by the Portuguese legislation is in any event incompatible with the Community legislation.

The scope of Article 7(4) of Decree No 43/83

With regard to the interpretation of Article 7(4), I would point out that at the hearing the Commission laid emphasis on the absolute prohibition which the provision imposes on forwarding agents making customs declarations, whereas the defendant Government promptly reaffirmed that forwarding agents may make such declarations in the name and on behalf of another person, provided they do not do so as a regular part of their activity.

In view of that difference of opinion, it seems to me that neither the documents before the Court nor the oral procedure have made it possible to dispel the doubts which exist in that regard and to establish the actual scope of the contested provision with any degree of certainty.

It is true that the wording of that provision, in so far as it lays down in general terms and without further qualification that forwarding agents may not carry on the activity referred to in Article 426 of the Customs Reform Law, would seem to bear out the Commission's interpretation.

Article 426 specifies the different categories of persons who are authorized to make customs declarations. If a logical approach is taken, therefore, the restriction referred to in Article 7(4) would in fact appear to be aimed at excluding forwarding agents from those classes of persons.

It is also true, however, that the Portuguese Government has given assurances that Article 7(4) has never been so construed and applied. In other words, forwarding agents have never been prohibited in practice from making declarations in the name and on behalf of another person, but only from doing so as a regular part of their activity.

It should also be pointed out that the Commission has not provided any evidence to refute that assertion. In particular, it has made no reference either to an administrative procedure or even to a single specific case in which a forwarding agent has been prohibited from making declarations in the name and on behalf of another person otherwise than as a regular part of his activity. And it must be emphasized that it would not in all probability have been excessively difficult for the Commission to obtain evidence of that kind, in view of the fact that it acted in cooperation with the forwarding agents concerned, whose complaint, moreover, lies at the root of these proceedings.

It seems to me, therefore, that in the circumstances the scope of the contested legislation has not been clearly established, and the Court cannot therefore declare that the Portuguese Republic has infringed Community law by maintaining in force legislation which *absolutely* precludes a category of traders, namely forwarding undertakings, from making a customs declaration in the name and on behalf of another person.

This does not mean, however, that the application must be dismissed.

In that regard, it may be observed in the first place that the wording of Article 7(4) is ambiguous to say the least, in so far as it may objectively convey the impression that forwarding agents are absolutely prohibited from making customs declarations. Accordingly, that provision is open to criticism at least in so far as it does not provide the requisite degree of legal certainty, thereby preventing those to whom it is addressed, and third parties in general, from taking full cognizance of the scope of their rights.

That uncertainty could constitute in itself a failure to fulfil obligations under Community law since the right of a forwarding agent, as of any other unofficial trader, to make customs declarations on behalf of another person is recognized by Article 3(3) of Regulation No 3632/85. It follows that the uncertainty resulting from the wording of the provision may adversely affect the exercise of rights guaranteed by Community law, which, as is clear from the case-law of the Court concerning the implementation of directives, amounts to an incorrect application of the relevant provisions of Community law (see, most recently, the Court's judgment of 28 February 1991 in Case 131/88 *Commission* v *Federal Republic of Germany* [1991] ECR I-865).

Having said that, however, I do not think that is the approach which should be taken in this case. The subject-matter of these proceedings is not the uncertain and ambiguous nature of the provisions of Article 7(4) of Decree No 43/83 but their substantive incompatibility with Article 3(3) of Regulation No 3632/85, which would persist — according to the Commission — even if Article 7(4) in fact had the scope ascribed to it by the defendant Government.

Moreover, that is the reason why the Commission itself, although well aware ever since the pre-litigation procedure (as is clear from the letter of formal notice) of the lack of clarity of Article 7(4), has not requested the Court, in the alternative, to give a decision on that point, and consequently declare that the Portuguese Republic has failed to fulfil its obligations under Community law by maintaining in force an ambiguous provision which, in view of its wording, could be interpreted as wholly denying to certain traders rights which are guaranteed to them by Community legislation.

What the Commission is asking the Court to establish — although this is not specifically set out in the form of order sought by the applicant — is that Article 7(4), even if it were construed in the manner indicated by the Portuguese Government, would still be incompatible with Article 3(3) of Regulation No 3632/85. Accordingly, the question which needs to be examined is whether the provisions of Article 7(4), interpreted in conjunction with those of the Customs Reform Law, conflict with the aforesaid regulation in so far as they prevent a category of traders, namely forwarding undertakings, from making customs declarations in the name and on behalf of another person *as a regular part of their activity.*

The scope of Article 3(3) of Regulation No 3632/85

In that regard, it may be advisable to point out that, as the Commission emphasized at the hearing, Regulation No 3632/85 constitutes the point at which two different systems of regulating customs declarations converge. The negotiations involved States in which that activity is reserved exclusively to a given professional category and those in which no such reservation exists and in which any trader can therefore make declarations on behalf of another person.

Viewed against that background, the rationale of Article 3(3) of the regulation is quite apparent. That provision constitutes a compromise solution designed, as far as possible, to reconcile two requirements. On the one hand, it makes it possible to maintain a reservation in favour of official customs agents, on the other it expressly limits that reservation to no more than one of the two kinds of agency, thereby ensuring the development of freedom of competition amongst the traders in question with regard to the kind of agency not covered by the exclusive reservation.

In other words Article 3(3) provides limited, even minimal, recognition to the professional category of official customs agents, inasmuch as it is aimed at preventing them from obtaining an absolute monopoly over the service in question which would guarantee them in some measure an income by virtue of their position whose effects on intra-Community trade could only be detrimental. The system established by the regulation, which, moreover, is in keeping with the views expressed by the Court in its judgment of 25 October 1979 in Case 159/78 (*Commission* v *Italy* [1979] ECR 3247), is therefore designed to ensure that importers are not compelled to resort exclusively to official agents in order to make customs declarations but enjoy some freedom of choice amongst the various types of competitors.

Furthermore, that aim is quite consistent with the wider requirement of safeguarding the free movement of goods. The need to 'pass' through the intermediary of official agents in fact leads to a waste of resources and, above all, an increase in costs which has an adverse impact on the imported goods.

It is self-evident, moreover, that if the rationale of Article 3(3) consists in guaranteeing to importers, albeit under a specified kind of agency, the freedom to resort where appropriate to agents other than official agents, it must be possible for that choice to be made in an *effective* manner. This means that it must be possible for agents other than official agents to make declarations *as a regular part of their activity.*

I would even go so far as to say that if (unofficial) agents, who are already placed at a disadvantage by reason of the fact that they are allowed to act under *only one* kind of agency, were also precluded from making customs declarations *as a regular part of their activity,* importers would in effect be deprived of any freedom of choice. If an (unofficial) agent were not allowed to represent more than one importer, the possibility for importers to have recourse to

agents other than official agents would be limited to such an extent as not to constitute in commercial terms a genuine and effective alternative to official agents themselves.

I therefore consider that, in accordance with its rationale, Article 3(3) provides for and ensures a *practical* alternative between official agents and others (albeit as regards the kind of agency not subject to reservation).

It follows that if — as the Portuguese Government maintains — the aim of Article 7(4) of Decree No 43/83, interpreted in conjunction with the provisions of the Customs Reform Law, is merely to restrict the making of customs declarations by forwarding agents as a regular part of their activity, such a restriction is in any event incompatible with Article 3(3) of Regulation No 3632/85. That restriction means that the alternative between official agents and rival operators is merely potential and is of no practical value.

Admittedly, it may be true, as the Portuguese Government states, that the interpretation put forward here appreciably restricts the freedom of action of official agents. It may not suit traders who avail themselves of the services of a forwarding agent for the importation of goods to have recourse to an official agent for the customs declaration since the forwarding agent himself can also represent them for the completion of the formalities relating to that declaration.

Nevertheless, in my view, such difficulties cannot have any effect on the interpretation of Article 3(3). That article — as repeatedly emphasized — is certainly not designed to provide official agents (who are in any event guaranteed an exclusive reservation with regard to one of the two kinds of agency) with an income by virtue of their position; instead its purpose is to give importers effective freedom of choice which, not being of a purely formal nature, must be capable of being exercised on a professional basis.

Conclusion

In the light of the foregoing considerations, I suggest that the Court:

1. declare that the Portuguese Republic has failed to fulfil its obligations under Regulation No 3632/85 inasmuch as Article 7(4) of Decree Law No 43 of 25 January 1983 prevents a category of traders, namely forwarding undertakings, from making customs declarations in the name and on behalf of another person as a regular part of their activity;

2. order the Portuguese Republic to pay the costs.