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Opinion of Mr Advocate General Fennelly delivered on 21 September 2000. - José Teodoro de Andrade v Director da Alfândega de Leixões, intervener: Ministério Público. - Reference for a preliminary ruling: Tribunal Fiscal Aduaneiro do Porto - Portugal. - Release of goods for free circulation - Expiry of the period within which a customs-approved use must be assigned - Procedure for putting goods up for sale or levying an ad valorem duty. - Case C-213/99.

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Opinion of the Advocate-General

I Introduction

1. The main issue in this case is the compatibility of the procedure laid down by Portuguese law for goods in respect of which the necessary formalities have not been fulfilled within the correct time-limits (hereinafter overdue-clearance procedure) with Community customs law and the general principles of Community law.

II Legal context

2. Community customs law is contained in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (hereinafter the Customs Code or the Code).

3. Article 4 of the Customs Code provides:

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

(5) "Decision" means any official act by the customs authorities pertaining to customs rules giving a ruling on a particular case, such act having legal effects on one or more specific or identifiable persons; ... .

4. Article 6(3) states:

Decisions adopted by the customs authorities in writing which either reject requests or are detrimental to the persons to whom they are addressed shall set out the grounds on which they are based. They shall refer to the right of appeal provided for in Article 243.

5. Title III of the Code, comprising Articles 37 to 57, is entitled Provisions applicable to goods brought into the Customs territory of the Community until they are assigned a customs-approved treatment or use and Chapter 4 thereof concerns the obligation to assign goods presented to customs a customs-approved treatment or use. Article 49 lays down the time-limits which must be obeyed for the declaration of goods:

1. Where goods are covered by a summary declaration, the formalities necessary for them to be assigned a customs-approved treatment or use must be carried out within:

(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 authorities may set a shorter period or authorise an extension of the periods referred to in paragraph 1. Such extension shall not, however, exceed the genuine requirements which are justified by the circumstances.

6. Chapter 5 of Title III concerns goods in temporary storage. Article 50 defines this term as follows: until such time as they are assignated [sic] a customs-approved treatment or use, goods presented to customs shall, following such presentation, have the status of goods in temporary storage. Article 53 states:

1. The customs authorities shall without delay take all measures necessary, including the sale of the goods, to regularise the situation of goods in respect of which the formalities necessary for them to be assigned a customs-approved treatment or use are not initiated within the periods determined in accordance with Article 49.

2. The customs authorities may, at the risk and expense of the person holding them, have the goods in question transferred to a special place, which is under their supervision, until the situation of the goods is regularised.

7. Title VIII, comprising Articles 243 to 246, concerns appeals. Article 243 reads as follows:

1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually. Any person who has applied to the customs authorities for a decision relating to the application of customs legislation and has not obtained a ruling on that request within the period referred to in Article 6(2) shall also be entitled to exercise the right of appeal. The appeal must be lodged in the Member State where the decision has been taken or applied for.

2. The right of appeal may be exercised:

(a) initially, before the customs authorities designated for that purpose by the Member States;

(b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.

8. Title II of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes Common system of value added tax: uniform basis of assessment (hereinafter the Sixth VAT Directive) defines the scope of the Directive. Article 2, its sole provision, provides that:

The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.

9. Article 4 of the Sixth VAT Directive defines the notion of Taxable Persons as:

1. ... any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity; ...

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions. However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition. In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible ... .

Annex D includes warehousing.

10. In the Portuguese Republic the situation of goods not cleared in due time is covered by Articles 638 and 639 of the Regulamento das Alfândegas (Customs Regulation).

11. According to Article 638, these goods should be sold by public auction once the time-limits for fulfilment of all the legal obligations have elapsed.

12. Article 639 provides that the owners of such goods can still declare them if they apply to do so within a period of six months following the time at which the goods are made subject to compulsory sale. Goods declared in accordance with this article shall be subject to the payment of all charges and levies due, increased by five per cent of the value thereof (hereinafter the overdue-clearance charge or simply the charge).

13. Article 675 states:

The net proceeds of the auction shall be appropriated in accordance with the following order of priority: ...

In the case of goods not cleared within the statutory periods, or under the conditions laid down in Article 638(3) and (4), the net proceeds from the sale thereof, after deduction of Community own resources, national customs duties and other levies, shall be placed on deposit to the order of the State to be incorporated in revenue if not claimed within one month.

14. Finally, this Court has already answered a preliminary reference concerning the Portuguese Customs Regulation in Siesse. Subsequent to this judgment, the Supremo Tribunal Administrativo (Supreme Administrative Court) and the Tribunal Constitucional (Constitutional Court), Portugal, found that the overdue-clearance charge was compatible with the principles of Community law outlined by the Court.

III The facts and national proceedings

15. According to the order for reference Mr de Andrade (hereinafter the applicant) imported seven palettes of cowhide into the European Community where they arrived on 11 June 1995. The

applicant requested an extension of the time-limit for specifying a customs destination for the goods. A 45-day extension was granted by the customs office. The goods were declared to the Leixões customs office for customs warehousing on 15 September 1995 and they were released in batches for free circulation and consumption between 19 September 1995 and 2 January 1996. On 9 May 1996, the Leixões customs office initiated overdue-clearance proceedings in respect of the goods.

16. On initiating the overdue-clearance proceedings, the customs authorities demanded that the applicant pay the sum of PTE 905 483, a customs debt comprising PTE 310 stamp duty, PTE 773 652 overdue-clearance charge, and PTE 131 521 VAT calculated at 17% of the amount of the overdue-clearance charge. The applicant paid this amount but then brought an action before the Tribunal Fiscal Aduaneiro do Porto (Customs Court, Oporto) seeking its repayment.

17. Considering that the case brought by the applicant raised questions of Community law on which a decision is necessary to enable it to give judgment, the Tribunal Fiscal Aduaneiro do Porto referred the following questions to the Court for a preliminary ruling pursuant to Article 234 EC:

1. Is the national administrative customs procedure, in so far as it means that, automatically and without prior notice, goods remaining uncleared beyond the statutory periods are to be subject to the overdue-clearance procedure (sale), compatible with Article 53 of the Customs Code, in particular Article 53(1)?

2. In so far as the national administrative customs procedure provides, as the only measure (applied automatically, as indicated above) to be taken by the national customs authorities, for recourse to the overdue-clearance procedure, the sole object of which is to ensure sale of the goods, may it not be regarded as a disproportionate measure infringing taxpayers' rights of defence and classifiable as an obstacle to the free movement of goods, particularly since, being applied automatically, that measure may take effect forthwith, that is to say on the first day following the end of the statutory storage period, without the importer of the goods even being warned or advised?

3. By immediately putting up the goods for "sale" in the circumstances described above, does the national customs administrative procedure infringe Article 6(3) of the Community Customs Code?

4. Does the national customs administrative procedure, by not making any notification compulsory in the overdue-clearance procedure, as provided for in Article 638 et seq. of the Customs Regulations, infringe Article 243 of the Community Customs Code?

5. In the event that the overdue-clearance charge provided for in Article 638 et seq. of the Customs Regulations falls to be classified as a procedural administrative penalty (the view taken in the national case-law), is that charge subject to VAT?

6. If the hypothesis outlined in the Fifth Question (that the charge constitutes an administrative penalty) is accepted, may the fact that that charge is levied on an ad valorem (objective) basis, but without any reference to fault on the part of the agent or to charges actually borne by the customs authorities in respect of measures relating to precautionary supervision, warehousing and other matters, be regarded as constituting an infringement of the principle of proportionality?

7. If it were accepted, on the contrary, that the said charge is not in the nature of a penalty but in fact represents remuneration for services provided by the customs authorities, would the levying of VAT be justified?

IV Observations and analysis

18. Written observations were submitted to the Court by the applicant, by the Portuguese Republic, and by the Commission of the European Communities.

19. The national court's questions cover four areas which I will deal with in turn; the proportionality of the sanction (part of Question 2 and Question 6), rights of the defence (Question 1, part of Question 2, Questions 3 and 4), free movement of goods (part of Question 2), and VAT (Questions 5 and 7).

20. A preliminary remark may be in order before I consider the substance of the questions referred by the national court. It appears from the facts as they are contained in the order for reference, that the applicant declared the goods in question to the customs office for customs warehousing on 15 September 1995 and that they were released for free circulation between 19 September 1995 and 2 January 1996. Thus when the customs office, on 9 May 1996, initiated overdue-clearance proceedings in respect of the applicant's goods, these goods were already in free circulation in the Community and removed from any premises owned by the customs office. Therefore there was never any possibility of the applicant's goods being sold by the customs authorities subsequent to initiation of the overdue-clearance proceedings in this case. For this reason, when considering compliance of the proceedings with the principle of proportionality and any possible violations of the applicant's rights of defence, I will confine my analysis, except where otherwise indicated, to compatibility of the overdue-clearance charge with these principles. My analysis is not intended to cover the compulsory sale of an importer's goods, though some reference to that procedure is unavoidable.

(a) Compliance of the overdue-clearance charge with the principle of proportionality

21. In Questions 2 (as regards compliance with the principle of proportionality) and 6 the national court essentially seeks to know if the levying of the overdue-clearance charge, without notifying the importer and without any account being taken of the degree of fault of the importer, is compatible with the principle of proportionality.

22. The applicant submits that the principle of proportionality, as well as constituting a general principle of Community law, is expressly included in Article 53 of the Customs Code, which speaks of all measures necessary. He argues that when goods have not been declared within the proper time-limits, the Portuguese system automatically puts them up for sale or obliges the importer to pay the overdue-clearance charge. It is claimed that both of these options constitute violations of the property rights of the importer, who is never asked whether or not sale or imposition of the charge is truly necessary.

23. The applicant contends that the proportionality of the entire Portuguese legislation should be examined. He claims that the national courts which have upheld the present system after the Siesse case merely examined the proportionality of the overdue-clearance charge when this is compared with the compulsory sale of the importer's goods and the possible appropriation of the proceeds of sale by the State. According to the applicant, a scheme which makes late declaration of goods conditional on payment of such a charge and which includes sums that are not necessary to assure the objectives of the procedure is disproportionate to this objective.

24. Finally, the applicant submits that since the amount of the overdue-clearance charge is determined ad valorem, at 5% of the customs value of the goods, it is disproportionate. In addition, Portuguese law normally makes allowance for the degree of fault of the defendant when setting a sanction. Thus the overdue-clearance charge is not levied under analogous conditions to equivalent national sanctions as the Court has stipulated.

25. Portugal argues that Article 53 of the Code leaves Member States a discretion as to how to regularise the situation of goods not cleared in time. Article 53 explicitly countenances sale of such

goods as one way of achieving this. The Portuguese system is an effective response to the need to encourage the respecting of time-limits. Yet it does provide some flexibility as it offers importers the opportunity of making a late declaration so long as they pay the overdue-clearance charge.

26. Portugal further contends that the reasonableness of the system is borne out by the possibility for an importer to request an extension of the deadline for assigning a customs-approved treatment or use.

27. Finally, Portugal relies on the finding of its Tribunal Constitucional, subsequent to this Court's judgment in Siesse, that imposition of an ad valorem sanction is compatible with the principle of proportionality.

28. The Commission agrees with the Portuguese authorities that Article 53 gives them a discretion as to what penalty they may impose. Any penalty must none the less be effective, dissuasive, and proportionate. Member States are obliged, under Article 10 EC, to punish breaches of Community law.

29. However, the Commission does not believe that the Portuguese legislation is proportionate to the aims which it pursues. Whereas in Siesse the Court stated that sale of an importer's goods was a solution of last resort, the Portuguese system establishes an absolute presumption that such sale is always necessary to regularise the situation of the goods in question.

30. The Commission also submits that a system of objective responsibility is inappropriate as the breach of the law in question is not a serious one and there should be a possibility for exoneration (e.g. in the case of force majeure). Further, the objective character of the sanction must be clear and unambiguous and this is not the case.

31. Lastly, the Commission considers that the fact the sanction is calculated ad valorem does not necessarily mean it is disproportionate. In the present case the application of such a sanction falls within the Member State's discretion. Moreover in Siesse, the Court did not rule that the 5% overdue-clearance charge was disproportionate. The Commission remarks that the 5% charge represents the entire liability of the importer to the customs authorities and no additional charge is made to cover administrative expenses or interest.

32. As I have already explained, my analysis is primarily, if not exclusively, confined to compatibility of the overdue-clearance charge with the principle of proportionality.

33. The principle of proportionality is a fundamental principle of law whose observance must be assured by the Court. To be proportionate to its objective, a measure must be necessary and appropriate to achieving its purpose, this purpose must not be attainable in a less restrictive manner, and the advantages pursued must not be disproportionate to the measure's onerous effects.

34. As the Commission has correctly submitted, it is necessary that a procedure exist in order to regularise the situation of goods when an importer has failed to observe the prescribed customs formalities. Keeping goods in temporary deposit represents a cost for a Member State and there is a risk that the goods will lose their commercial value or cause damage to the authorities' storage facilities. The imposition of a deadline for assigning a customs-approved treatment or use is therefore a rule of good administration which contributes to a more effective handling and processing of goods by the customs authorities.

35. In addition, the Commission is right to observe that sanctioning a failure to observe these time-limits may be beneficial. It dissuades subsequent repetitions of the same failure by the importer, encourages general observance of time-limits, puts an end to temporary storage or control of the goods by the customs authorities, and guarantees payment of customs duties if these have not

been paid already.

36. Seen in this context I consider that the word necessary in Article 53(1) of the Customs Code extends to the imposition of a sanction which generally dissuades failures to observe customs formalities.

37. The Court has already had the opportunity of considering the Portuguese legislation at issue in the present case. In Siesse, the Court decided that the predecessor to the Customs Code, 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, did not preclude the possibility that goods in respect of which the time-limits for clearance have not been obeyed, might have their situation regularised by acceptance of a declaration for free circulation. As regards any sanctions (the overdue-clearance charge) that Member States might impose on traders who do not comply with the aforementioned time-limits, the Court decided that, while the Member States enjoy a discretion in this field, they must ensure that infringements of Community law are penalised in a manner which is effective, proportionate, and dissuasive. Further, such penalties must comply with the general principles of Community law, in particular the principle of proportionality, and be determined under conditions which are analogous to those applicable to infringements of national law of the same nature and gravity. The Court stated that consistency with these general principles and conditions was a matter for the national court to determine.

38. The Court characterised the overdue-clearance charge as a safeguard measure intended to ensure the actual payment of the corresponding [customs] levy and the Advocate General considered that it was a means for the customs authorities to maintain their secured right to obtain satisfaction in respect of expenses which they had incurred.

39. In the present case, it appears from the order for reference that all customs duties owed in respect of the imported goods were paid on their release for free circulation and, as I have already noted, this date preceded commencement of the overdue-clearance proceedings by the authorities. Therefore imposition of the overdue-clearance charge in the present case cannot be said to pursue the aim of making sure that the importer settles any debt in the form of customs duties on the goods. Its imposition, as regards the relationship between the applicant and the authorities in respect of the goods in question, only seeks to penalise him for failure to observe the statutory time-limits and recover any expenses occasioned because of the prolonged storage of the goods, together with any interest for the late payment of the initial customs duties.

40. When making its assessment regarding the proportionality of the overdue-clearance charge the national court must take into account its purpose and it must also take into account the other reasons for imposing such a sanction as I have outlined them in paragraphs 34 and 35 above. The national court must make sure that the system under consideration complies with the principle of proportionality in the general sense and not only in its application to the individual case.

41. A calculation, ad valorem, has the merit of being proportional to the value of the goods. It is also objective and of a predictable amount.

42. It appears from both the order for reference and from the written observations that the imposition of the overdue-clearance charge is automatic in the sense that there is no provision for any exceptions. Naturally, if the national court were to find that the customs authorities had made a mistake either in imposing the charge or in calculating its amount, the importer would be, at least to the extent of such error, exonerated from paying the charge.

43. Although the Commission criticises the absence of alleviation of the charge in circumstances of force majeure, I do not think it is possible to reach any conclusions on this element in the present case. The case-law shows that the Court assesses the issue of force majeure in the context of the particular regulatory framework of the individual case. As it stated in its judgment in

First City Trading, it is settled case-law that, since the concept of force majeure does not have the same scope in various spheres of application of Community law, its meaning must be determined by reference to the legal context in which it is to operate. Article 53 of the Customs Code only permits the authorities to take measures which are necessary to regularise the situation of goods. In the present case we are concerned with a Member State implementing Community law in its national order. It is established that Member States are bound to respect fundamental rights and proportionality, as these principles are interpreted by the Court, when they implement Community law. It seems to follow, at least in the presence of circumstances amounting to force majeure, that a compulsory sale of the importer's goods, since it is a direct interference with a property right, is unlikely to be a proportionate measure. But the applicant has failed to provide any evidence of circumstances claimed to amount to force majeure which may have affected his own failure to clear the goods in time. In fact, the goods were cleared, though late, and the normal customs duties were then paid. Where the issue is limited to the recovery of a financial penalty, as in the present case, I do not think it is appropriate to engage in speculation by attempting to outline the scope of the application of the concept of force majeure in the absence of any evidence to justify it.

44. I am aware that the applicant has alleged that the overdue-clearance charge is not levied under conditions which are analogous to those applicable to infringements of national law of a similar nature and importance. However, in the absence of information on this point in the order for reference, I cannot make any detailed assessment of this claim. It must be remembered that in Siesse, the Court did stipulate, as a condition of validity of the sanction, that it be governed by conditions both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance. I believe that the Court in Siesse was concerned with ensuring that the violation be penalised in conditions which are at least as strict as those applicable under national law. If the sanction is proportionate to its aim, it may not be necessary that it be identical to its national equivalent; in other words, it may be a stricter sanction.

(b) Compliance with rights of the defence

45. In Questions 1, 2 (as regards possible infringement of taxpayers' rights of defence), 3 and 4, the national court seeks, in essence, to know if the fact that the Portuguese overdue-clearance proceeding operates automatically and without prior notice infringes Articles 6(3), 53(1) or 243 of the Customs Code.

46. The applicant reiterates that any procedure initiated in respect of goods which have not been assigned a customs-approved treatment or use must be necessary. He considers that unless the importer is notified on initiation of this procedure, he cannot possibly show that sale or imposition of the overdue-clearance charge is unnecessary in respect of his goods. The absence of notification also results in him being unable to exercise his fundamental rights of defence. In his opinion such a procedure must be adversarial.

47. The applicant further submits that the initiation of overdue-clearance proceedings is a decision in the sense of Article 4(5) of the Customs Code. Further, it is a detrimental decision, so that, under Article 6(3) of the Code, it must set out the grounds on which it is based and refer to the right of appeal contained in Article 243.

48. Portugal, however, maintains that no decision is required to initiate the overdue-clearance proceedings. Their commencement is a direct legal consequence of the breach of Article 49 of the Customs Code and, under Article 53 thereof, the authorities are obliged to regularise the situation of goods. Therefore neither Article 6(3) nor Article 243 of the Code applies. In any event, it contends that the importer has the right to lodge appeals during the procedure and that Article 243 cannot therefore have been infringed.

49. The Commission submits that it is not necessary to notify importers pursuant to Article 6(3) of the Code. The text of Article 53 of the Code obliges the customs authorities to act without delay. To impose an extra condition of notifying importers would slow down the procedure and postpone fulfilment of the authority's duty.

50. The Commission argues that Article 6(3) of the Code is not applicable. It is not necessary that the authorities adopt a written decision to initiate the proceedings. The decision may well be detrimental to its addressee but not all detrimental decisions need be in writing. It is only when individuals themselves make requests in writing that written decisions need be made. Finally, operation of Article 6(3) assumes that a decision taken thereunder be addressed to an identified individual. This is not always the case in respect of overdue-clearance proceedings as the authorities are not in all cases in a position to identify the importer at the relevant time.

51. Concerning the right of appeal contained in Article 243 of the Code, the Commission distinguishes between imposition of the overdue-clearance charge and the compulsory sale of goods. It is not necessary to inform importers of imposition of a fine as they will discover this when payment thereof is sought. As regards sale of the goods, the Commission believes that when sale is urgent importers need not be informed immediately but that, even in this case, they should be informed as soon as possible. The obligations incumbent on the authorities are somewhat alleviated by the compulsory publication, under Article 659 of the Portuguese customs law, of a list of the goods placed for sale pursuant to overdue-clearance proceedings. Otherwise the Commission draws a further distinction according to whether or not the importer is known to the authorities: if importers are unknown it may be very costly to locate them so no notification will be required but where they are known, they should be informed of their right to appeal. If importers who are known to the authorities are not informed of their right to appeal, they will be unable to prove lack of necessity or error by the customs authorities and there will be a real risk of irreparable damage ensuing. This risk is compounded by the very limited powers of review of the national judge in this procedure.

52. It must be borne in mind that observance of the rights of the defence is a fundamental principle of Community law, according to which addressees of decisions of public authorities which, as in this case, perceptibly affect their interests must be enabled to express their views effectively.

53. The Customs Code makes provision for the exercise of this right to a fair hearing in Article 6(3) and Article 243. Article 243 does not itself stipulate that an importer be informed of his right to appeal. On the other hand, Article 6(3) does provide that an importer be notified both of the reasons for which a decision has been taken and of his right to appeal. The applicability of Article 6(3) is subject to certain conditions; first a decision (as defined in Article 4(5) of the Code) must have been taken, second the decision must be in writing, and, finally, the decision must reject requests of or be detrimental to its addressee.

54. Portugal insists that, under Portuguese law, initiation of overdue-clearance proceedings is an automatic legal consequence of failure to obey Article 49 of the Customs Code. However, I believe that the concept of a decision must receive a uniform Community interpretation. Whether or not a decision has been taken cannot be dependent on the manner in which the different Member States interpret their obligations under Article 53 of the Code.

55. I would consider that a decision is an act manifesting the exercise of a judgment or of a discretion. It is an act taken after consideration of various factors and, under Community law, such an act would have to set out the grounds or reasons which led to that exercise of discretion in order that its addressee be in a position to mount an effective challenge to its validity.

56. In Portugal, as soon as the importer exercises his right to make a late declaration under Article 639 of the Customs Regulation, the 5% overdue-clearance charge becomes payable. As I outlined

above, to be in conformity with Community law the charge must comply with certain principles. I will assume, for present purposes, that the charge is proportionate and that it is applied in conditions which are analogous to those applicable to infringements of national law of the same nature and gravity, as the question of a possible violation of the importer's rights of defence only arises if this is the case. Presuming this to be so, the application of the overdue-clearance charge is indeed automatic as has been argued by Portugal, in the sense that its application is not dependent on an exercise of judgment or of discretion. Therefore, I do not think that imposition of the charge is a decision under Community law.

57. The act of notifying the importer of his liability for the overdue-clearance charge would not require extensive reasoning. As the applicant and the interveners have explained in their written observations, the amount of the charge is always determined ad valorem at 5% of the value of the goods, which can be simply stated.

58. Since I do not believe that any decision was taken in the present case, the authorities were not under an obligation to notify the applicant or to mention the possibility of an appeal under Article 243 of the Customs Code. However, the applicant does retain the right to dispute the imposition of the overdue-clearance charge in his particular case. He may, for example, allege mistake by the authorities or, as in the present proceedings, question the proportionality of the charge. In the present case, it would appear to me that, by bringing his case before the Tribunal Fiscal Aduaneiro, the applicant has shown that, even when Articles 6(3) and 243 of the Code are not applicable, an importer is not deprived of the right to a judicial ruling on the validity of the imposition of the overdue-clearance charge.

59. I think, however, it appropriate to give two examples of situations in which I feel a decision within the meaning of Article 4(5) of the Customs Code would have been taken so that Article 6(3) would be applicable. First, there is little doubt that when, under Article 49 of the Code, a customs authority decides to set a shorter period for assignment of a customs-approved treatment or use or decides not to extend the deadline when this has been requested, it thereby exercises a discretion and thus takes a decision. Secondly, I believe that when a compulsory sale of the importer's goods is organised pursuant to Article 638 of the Portuguese Customs Regulation, this likewise constitutes a decision. A sale pursuant to Article 638 is based on Article 53 of the Code, under which, however, it is not obligatory. Reliance on the option contained in Article 53 involves exercise of discretion or judgment by the customs authorities. They must, in particular, judge that sale of the goods, as distinct from any other remedy, is necessary. Further, while such a sale is certainly permissible, in principle, under Article 53, it does constitute a substantial infringement of the importer's property rights, especially when one considers that, under certain conditions enumerated in Article 675 of the Portuguese Customs Regulation, the Member State may appropriate the proceeds of the sale. The importer's fundamental rights to property must be observed. Consequently, I consider that importers whose goods are to be put up for sale should, as soon as possible and in sufficient time, be notified of this decision. Unless they are so notified, their property rights will be infringed without the possibility of their exercising the right under Article 639 of the Portuguese Customs Regulation to pay the overdue-clearance charge.

(c) Free movement of goods

60. In Question 2 the national court asks if the levying of the overdue-clearance charge is constitutive of an obstacle to the free movement of goods.

61. The overdue-clearance charge is certainly not a measure of equivalent effect to a customs duty under Article 25 EC as it is only applied to goods originating outside the Community.

62. Nevertheless, the applicant contends that the charge is a distortion of the principle of unified treatment by all the Member States of goods coming from third countries. It is argued that this principle follows from the creation of a customs union in Article 23 EC. The fact that VAT is

calculated on the amount of the charge confirms its true nature as an obstacle to the free movement of goods.

63. The Commission agrees that since the establishment of the Common Customs Tariff Member States cannot unilaterally introduce new customs duties on goods imported from third countries nor raise existing ones. However, it also observes, and I agree, that the overdue-clearance charge is not applied across the board to all importers but only to those who have failed to respect the time-limits for assigning a customs-approved treatment or use. Therefore, the charge is not an obstacle to the free movement of goods.

(d) VAT

64. In Questions 5 and 7, the national court asks if the customs authorities may impose VAT on the amount of the overdue-clearance charge.

65. The applicant, Portugal, and the Commission are all in agreement that the overdue-clearance charge is a procedural administrative penalty and should not be subject to VAT. I agree with this analysis in so far as when imposing the charge the customs authorities are acting as a public authority and are therefore, under Article 4 of the Sixth VAT Directive, not a taxable person. Thus, no VAT is payable.

66. The Commission is correct to state that no distortion of competition can arise when the customs authorities exercise this power of sanction. The authorities have no potential competitors in this area and thus the important VAT principle of neutrality cannot be infringed.

67. If, in the alternative, a warehousing service was provided by the customs authorities, it could be subject to VAT. Warehousing is listed in point 9 of Annex D to the Sixth VAT Directive so according to the third indent of Article 4(5) such authorities would constitute taxable persons once the service they provide is not carried out on such a small scale as to be negligible.

V Conclusion

68. I am accordingly of the opinion that the questions submitted by the Tribunal Fiscal Aduaneiro do Porto should be answered as follows:

Community law does not preclude the competent customs authority from requiring the payment of a penalty, determined ad valorem at 5% of the customs value of goods, for accepting a declaration for their release for free circulation after the expiry of the periods provided for in Article 49 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, provided that the amount of that penalty 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 penalty in issue in the main proceedings is consistent with those principles.

When an importer becomes liable for the penalty for making a declaration for free circulation after expiry of the periods provided for in Article 49 of Regulation No 2913/92, no decision within the meaning of Article 4(5) of the same Regulation is taken by the customs authorities and neither Article 6(3) nor Article 243 of that Regulation is applicable.

The penalty for making a declaration for free circulation after expiry of the periods provided for in Article 49 of Regulation No 2913/92 does not constitute an obstacle to the free movement of goods.

The penalty for making a declaration for free circulation after expiry of the periods provided for in Article 49 of Regulation No 2913/92 is a procedural administrative penalty and is, therefore, not subject to VAT under the Sixth Council Directive 77/388/EEC of 17 May 1977 on the

harmonisation of the laws of the Member States relating to turnover taxes Common system of value added tax: uniform basis of assessment.