ORDER OF THE COURT
8 March 1993 *

In Case C-123/92,

Lezzi Pietro & C. Srl, a company incorporated under Italian law, established in Cerignola (Italy), represented by Wilma Viscardini Donà, of the Padua Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Antonio Aresu and Angela Bardenhewer, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision REC 4/91 of 24 October 1991 confirming that it is appropriate to effect post-clearance recovery of import duties in a particular case,

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco, P. J. G. Kapteyn and D. A. O. Edward, Judges,

Advocate General: M. Darmon,
Registrar: J.-G. Giraud,

after hearing the Opinion of the Advocate General,

* Language of the case: Italian.

makes the following

Order

1 By application lodged at the Court Registry on 16 April 1992 the Italian company Lezzi Pietro & C. Srl (hereinafter 'Lezzi Pietro') brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Commission Decision REC 4/91 of 24 October 1991 confirming that it is appropriate to effect post-clearance recovery of import duties in a particular case.

2 According to that decision, which was addressed to the Italian Republic, on 3 February 1988 Lezzi Pietro released for free circulation a batch of wild onions of the *Muscari Comusum* variety originating in Morocco, classifying them under Code 0703 of the Combined Nomenclature (hereinafter 'CN Code'), under which duty was payable the rate of 12%, rather than CN Code 0709, under which duty was payable at the rate of 16%, and that classification was accepted by the Italian customs authorities pursuant to the usual Italian tariff, which contained incorrect information regarding the products concerned, which itself was attributable to incorrect information contained in the Integrated Community Tariff (Taric).

3 In the contested decision, adopted under Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1), the Commission considered that the error made by the Italian customs administration was capable of detection by the importer and that, therefore, the unpaid import duties, amounting to ECU 1 496, should be recovered, on the grounds, first, that wild onions of the *Muscari Comusum* variety should be classified under CN Code 0709 of the Combined Nomenclature as set out in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and

statistical nomenclature and on the common customs tariff, which had been duly published in the *Official Journal of the European Communities* of 7 September 1987 (L 256, p. 1) and, secondly, that the information from the Taric had been presented in correct form before the entry into force of the Combined Nomenclature, on 1 January 1988.

4 In support of its application, the applicant put forward three pleas in law alleging, first, that the contested decision was based on the 'false premiss' that the products at issue were classified incorrectly under CN Code 0703, secondly, infringement of Article 5(2) of Regulation No 1697/79, and, thirdly, infringement of Article 190 of the EEC Treaty.

5 In its defence, the Commission submitted that the applicant's claims have no foundation. It also informed the Court that, by decision of 28 September 1992, it amended the contested decision to the effect that the import duties at issue were no longer to be recovered. It is apparent from the preamble to that decision that it had become apparent that the tariff situation, based on the information published in the *Official Journal of the European Communities*, was not clear and that it was not therefore possible to treat the error committed by the Italian authorities as reasonably capable of detection by the importer when it declared the goods for free circulation. In those circumstances, the Commission, considering that the proceedings are now devoid of purpose has asked the Court to order that there is no need for the case to proceed to judgment and to order that the costs be shared.

6 The applicant contended in its reply that, even if it is no longer under any obligation to pay the duties claimed from it, there is still a possibility that the Italian authorities might raise difficulties concerning the payment of interest and penalties for making an incorrect declaration. It therefore asks that the Court give a decision

on its first plea in law to the effect that the contested decision was based on the 'false premiss' that the products in question had been incorrectly classified under CN Code 0703. In the alternative, in the event of the Court ordering that it is unnecessary to give a decision, it asks that the Commission be ordered to pay the costs.

7 Considering the applicant's attitude to be dilatory and vexatious, the Commission, in its rejoinder, asks that the costs be shared up to the point of notification of the defence but that those incurred thereafter should be paid by the applicant.

8 It must be noted that, in its application, the applicant sought the annulment of the Commission decision of 24 October 1991, the operative part of which provides that the import duties at issue should be recovered. However, that decision was 'amended' by Commission decision of 28 September 1992, the operative part of which provides that the Commission decision of 24 October 1991 is amended to the effect that the duties concerned 'need not be recovered'. It is not contested that that amendment is tantamount to an annulment of the previous decision, as unequivocally indicated by the title of the decision of 28 September 1992.

9 It is true that, in the new decision, the statement that the product at issue falls within CN Code 0709 is unchanged, and Lezzi Pietro may have had an interest — in particular with a view to future imports — in obtaining a judgment that the product at issue falls within CN Code 0703, not CN Code 0709. It must be pointed out, however, that the purpose of the application is to secure the annulment of the decision of 24 October 1991, which no longer exists.

10 Moreover, as a result of the annulment of that decision, the applicant obtained the only result that its application could have secured for it, so that nothing remains

on which the Court can give a decision. In proceedings under the second paragraph of Article 173 of the Treaty, the Court can do no more than annul the measure at issue. Any problems concerning interest and penalties solely concern the relationship between the applicant and the Italian customs authorities and must therefore be resolved by the national court, which may, if necessary, seek guidance from the Court under Article 177 of the EEC Treaty.

11 It follows that the application had become devoid of purpose and that there is no need to give a decision.

Costs

12 Under Article 69 (6) of the Rules of Procedure, where a case does not proceed to judgment the costs are to be in the discretion of the Court.

13 It must be noted, first, that the Commission decision of 28 September 1992, annulling the previous decision of 24 October 1991, was adopted after Lezzi Pietro lodged its application.

14 Secondly, it is apparent from the preamble to the decision of 28 September 1992 that the Commission decided to annul and replace the contested decision on the basis of a different evaluation of the facts from that which initially led it to conclude that the error committed by the Italian administration could have been detected by the importer.

15 In those circumstances, it is appropriate to order that the Commission pay the costs in their entirety.

On those grounds,

THE COURT

hereby orders:

1. There is no need to give a decision.

2. The Commission is ordered to pay the costs.

Luxembourg, 8 March 1993.

J.-G. Giraud — O. Due

Registrar — President