OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 26 September 1996 *

Introduction

1. These cases arise from claims by the Italian customs authorities to recover unpaid customs duty on tuna fish in olive oil imported from Spain into Italy in 1991 and 1992. The question whether imports of fish products from Spain into the territory of the former Community of Ten should have been subject to customs duty during the relevant period turns on the interpretation of the Act of Accession of the Kingdom of Spain and the Portuguese Republic to the Communities and of a subsequent regulation lifting certain transitional duties. If duty should originally have been paid, the Court is invited to interpret the Community legislation on the post-clearance recovery of such customs debts.

Legal context

2. Council Regulation (EEC) No 3835/90 of 20 December 1990 amending Regulations (EEC) No 3831/90, (EEC) No 3832/90 and (EEC) No 3833/90 in respect of the system of generalized tariff preferences applied to certain products originating in Bolivia, Colombia, Ecuador and Peru [1] suspends totally Common Customs Tariff duties for products originating in those countries which are listed in the Annex to that Regulation. The Annex includes 'prepared or preserved fish' (CN code 16.04).

3. Commission Regulation (EEC) No 3416/91 of 25 November 1991 on certain residual duties applicable in 1991 in the framework of the successive reductions in accordance with the Act of Accession of Spain and Portugal (hereinafter 'the Regulation') [2] was adopted on the basis of Articles 75(4) and 243(4) of the Act of Accession of the Kingdom of Spain and the Portuguese Republic to the Communities (hereinafter 'the Act of Accession' or 'the Act'). [3] The third recital in the preamble to the Regulation states that 'agricultural products listed in the Annex

1 — OJ 1990 L 370, p. 126.
2 — OJ 1991 L 324, p. 11.
3 — OJ 1985 L 302, p. 23.

* Original language: English.

to Regulation (EEC) No 3835/90 and originating in Bolivia, Colombia, Ecuador and Peru [should not] be subject to more favourable treatment than the same products consigned from Spain and from Portugal'. Thus, Article 1 of that Regulation provides as follows:

'1. The residual duties applicable to imports of the agricultural products listed in the Annex to Regulation (EEC) No 3835/90 into the Community of Ten in accordance with Articles 75(1) and 243(1) of the Act of Accession are hereby totally suspended until 31 December 1991.

The suspension provided for in the first subparagraph shall not apply to the products in Chapter 15 of the Combined Nomenclature referred to in Article 94(1) of the Act of Accession.

2. Should the Common Customs Tariff duties on products originating in Bolivia, Colombia, Ecuador and Peru and listed in the Annex to Regulation (EEC) No 3835/90 be suspended again, the provisions of paragraph 1 shall apply *mutatis mutandis* during the duration of suspension.'

Chapter 15 of the Combined Nomenclature relates to animal, fish and vegetable oils and fats. The suspension of duties in respect of products originating in those countries was extended to 31 December 1992 by Council Regulation (EEC) No 3587/91 of 3 December 1991 extending into 1992 the application of Regulations (EEC) No 3831/90, (EEC) No 3832/90, (EEC) No 3833/90 and (EEC) No 3835/90 applying generalized tariff preferences for 1991 in respect of certain products originating in developing countries. [4]

4. Article 75(1) of the Act of Accession provides for the progressive abolition of customs duties on imports between the Community of Ten and Spain in accordance with timetables set out therein. Article 243(1) of the Act of Accession makes similar provision in respect of Portugal. Article 75(1) refers only to 'products the importation of which from third countries into the Community as at present constituted is subject to customs duties'. However, the Article is located in Chapter 3 of Part Four of the Act, entitled 'Agriculture', and Article 67(1), the first provision of the Chapter, states:

'This chapter concerns agricultural products with the exception of products falling within Regulation (EEC) No 3796/81 on the common organization of the market in fishery products.'

4 OJ 1991 L 341, p. 1.

Article 75(4) of the Act of Accession enables the Commission, acting, where necessary, in accordance with procedures laid down in 'Regulations setting up the common organization of agricultural markets', [5] to suspend in whole or in part the customs duties on products imported from Spain into the Community of Ten.

5. Chapter 4 of Part Four of the Act of Accession is entitled 'Fisheries'. Article 173 provides, by way of derogation from Article 31, for the progressive abolition, in accordance with timetables set out therein, of customs duties on imports between the Community of Ten and Spain of 'fisheries products falling within heading Nos 03.01, 03.02, 03.03, 16.04 and 16.05 and subheadings 05.15 A and 23.01 B of the Common Customs Tariff'. [6] Article 360 of the Act makes similar provision for Portugal. Chapter 4 does not provide for any suspensory power equivalent to that contained in Article 75(4) of the Act of Accession. However, Article 33 of the Act, in Chapter 1 of Part Four on 'Free movement of goods', provides, *inter alia*, that '[t]he Council, acting by a qualified majority on a proposal from the Commission, may suspend in whole or in part the levying of duties on products imported from Spain'.

6. Article 38(1) of the Treaty establishing the European Community (hereinafter 'the EC Treaty') states:

'The common market shall extend to agriculture and trade in agricultural products. "Agricultural products" means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to those products.'

7. Article 5 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 (hereinafter 'the Regulation on recovery') [7] states:

'1. No action may be taken by the competent authorities for recovery where the amount of the import duties or export duties

5 — The procedure laid down in Article 38 of Council Regulation (EEC) No 136/66 of 22 September 1966 on the establishment of a common organization of the market in oils and fats, OJ, English Special Edition 1965-1966 (I), p. 221, is cited as an example. This establishes a management committee procedure, by which the Council may, in certain circumstances, override the Commission's decision. The seventh recital in the preamble to Regulation No 3416/91 recites the approval of the relevant management committees of the concessions to Spain and Portugal contained in the Regulation.

6 — These are the products which fall within the material scope of Council Regulation No 3796/81 of 29 December 1981 on the common organization of the market in fishery products; OJ 1981 L 379, p. 1.

7 — OJ 1979 L 197, p. 1.

subsequently found to be lower than the amount legally due was calculated:

— either on the basis of information given by the competent authorities themselves which is binding on them,

— or on the basis of provisions of a general nature subsequently invalidated by a court decision.

2. The competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned.

The cases in which the first subparagraph can be applied shall be determined in accordance with the implementing provisions laid down in accordance with the procedure provided for in Article 10.'

8. Council Regulation (EEC) No 1715/90 of 20 June 1990 on the information provided by the customs authorities of the Member States concerning the classification of goods in the customs nomenclature [8] provides for the binding effect of such tariff information and is thus of relevance to Article 5(1) of the Regulation on recovery. The Regulation on recovery was replaced, with effect from 1 January 1994, by Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, [9] but was applicable during the period material to the present cases.

Factual and procedural context

9. Eight Italian companies, including Olasagasti & C. S. r. l., imported tuna fish in olive oil into Italy from Spain between 30 November 1991 and 31 December 1992. This product comes under heading No 16.04 of the Common Customs Tariff. They were not required at the time to pay customs duty on these imports, as the Italian customs authorities took the view that customs duties were totally suspended by the Regulation. This view was expressed in ministerial circular No 6507/UCTD of 29 November 1991. It seems that the Italian authorities initially entertained doubts about this position. Thus, pursuant to a further circular of 30 December 1991, imports were made subject to 'suspended clearance', a procedure established

8 — OJ 1990 L 160, p. 1.
9 — OJ 1992 L 302, p. 1.

by Article 164 of a royal decree of 13 February 1896, [10] whereby security was given for the unclaimed duty and the authorities retained the right to seek payment of the duty at a later stage. However, the total and unconditional suspension of duty was confirmed by a later circular, No 1014/UCTD of 22 February 1992.

10. An interpretative note of the Commission services (DG XXI, No 8836), dated 14 October 1992, led the Italian authorities to issue a further circular, No 1632/III of 27 October 1992, stating that the suspension regime did not apply to fishery products. This arose because Article 75(1) of the Act of Accession, to which Article 1 of Regulation No 3416/91 refers, appears to apply only to agricultural products other than fish. The customs authorities of Ventimiglia and Genoa [11] thereupon demanded in 1993 the payment of duty by the companies in question in respect of their imports, as well as interest on the unpaid duty.

11. The importing companies commenced proceedings before the Tribunale di Genova against the demands for payment. They argued that the term 'agricultural products' should be read in accordance with Article 38 of the EC Treaty to include fishery products. They argued, in the alternative, that the conditions set out in Article 5(1) and (2) of Regulation No 1697/79 were fulfilled in their cases, and that they should not be obliged to pay the uncollected duty.

12. By separate orders issued between 26 January and 30 March 1995, the Tribunale di Genova suspended the various proceedings before it, and in each case referred the following questions to the Court for a preliminary ruling in accordance with Article 177 of the EC Treaty:

'1. Does the suspension of the residual customs duties applicable to imports from Spain into the Community of Ten in accordance with Article 75(1) of the Act of Accession of that country which was provided for in Article 1(1) of Regulation No 3416/91 of 25 November 1991 as regards "the agricultural products listed in the Annex to Regulation No 3835/90" also apply to imports from Spain of tuna in olive oil?

2. May the competent customs authorities, pursuant to Article 5(1) and (2) of Regulation No 1697/79 of 24 July 1979, as supple-

10 — *Gazzetta Ufficiale* No 64, 17 March 1896.

11 — The plaintiff in the main proceedings in Case C-148/95 *Igino Mazzola* indicated in its written pleadings that the case, like all the others to which it has been joined, involved the authorities of Ventimiglia, rather than, as stated in the order of reference, those of Genoa.

mented by Regulation No 1715/90 of 20 June 1990, and Article 2 of implementing Regulation No 2164/91 of 23 July 1991, initiate action for the recovery of customs duties which were not collected at the time of importation because they were regarded as having been totally suspended as a result of an erroneous interpretation of the Community legislation in force, but which subsequently proved to be due on the basis of a different interpretation of the same Community legislation provided by the Commission of the EEC after consulting its Legal Service, where the person liable observed all the provisions laid down by the rules in force as far as his customs declaration was concerned and it does not appear that that person was aware that the interpretation initially given to the Community legislation by the Italian authorities was erroneous?'

13. The eight cases were joined by order of the President of the Court, dated 16 June 1995. Written observations were submitted by the plaintiffs in the main proceedings (acting collectively, save for Igino Mazzola), the Italian Republic and the Commission. Italy and the Commission also presented oral observations at a hearing held on 11 July 1996.

Analysis

The first question

14. The plaintiffs in the main proceedings argued for a positive answer to the first question and Italy and the Commission for a negative answer. It is my view that this question should be answered in the negative, that is, that imports from Spain into the Community of Ten of tuna in olive oil in 1991/92 did not benefit from the suspension of customs duties established by Article 1(1) of the Regulation.

15. It is clear from Article 38 of the EC Treaty that agricultural products include the products of fisheries. Article 1(1) of the Regulation refers to 'the agricultural products listed in the Annex to Regulation (EEC) No 3835/90'. As Regulation No 3835/90 was adopted under the EC Treaty, fish products listed in that Annex should be classified as agricultural products in the absence of any contrary indication. [12] This is in no way

12 — Regulation No 3835/90 was adopted under Article 113 of the EC Treaty. While that Article does not expressly mention agricultural products, the inevitable interdependence of the Community's internal and external policies regarding such products should normally dictate that, where agricultural products require to be identified in external trade measures, the same definition is employed as operates under the Title of the EC Treaty on Agriculture.

contradicted by the Act of Accession, despite the apparently mutually exclusive titles of Chapters 3 and 4 of Part Four of the Act ('Agriculture' and 'Fisheries', respectively). Article 67(1) of the Act clearly employs the term 'agricultural products' in the same sense as does Article 38 of the EC Treaty, but establishes a separate regime in Chapter 3 of Part Four of the Act of Accession for a limited class of such products, that is, those other than fishery products. Agricultural products derived from fisheries are then made subject to a special regime in Chapter 4 of Part Four of the Act. [13]

16. It is the difference between the regimes so established by the Act of Accession for different types of agricultural products which is decisive in these cases. Article 75(1) of the Act sets out the residual duties applicable to imports from Spain into the Community of Ten of agricultural products other than fishery products. These are the duties which are suspended by Article 1(1) of the Regulation. It is immaterial that separate residual duties are imposed on other agricultural products listed in the Annex to Regulation No 3835/90 — those derived from fisheries — by Article 173 of the Act of Accession.

17. A counter-argument has been advanced by the plaintiffs in the main proceedings, based on the third recital in the preamble to the Regulation, which mentions the general policy objective of avoiding any disadvantage to Spain and Portugal relative to Bolivia, Colombia, Ecuador and Peru as regards imports into the Community of Ten of the agricultural products listed in the Annex to Regulation No 3835/90. I would caution, first of all, that the Court is insistent that customs legislation be interpreted very closely in accordance with its wording. Thus, the Court stated in *Ethicon* v *Hauptzollamt Itzehoe* [14] that 'the description of goods on which customs duties have been suspended must be interpreted according to objective criteria derived from their wording and ... they may not be applied contrary to their wording to other goods even if their properties and application are no different from those covered by the suspension'.

18. Even if it were tempting to rely on the policy statement in the third recital in the preamble to the Regulation, any broader

13 — These terms are used somewhat loosely. Some fishery products which are not subject to the common organization of the market established by Regulation No 3796/81, such as fish fats and oils and their fractions (CN code 15.03), are governed by the 'Agriculture' provisions of the Act of Accession. This reinforces my point that the Act establishes a merely functional distinction between two categories of agricultural products, rather than a distinction in principle between agricultural products, derived from the land, and fishery products.

14 — Case 58/85 [1986] ECR 1131, paragraph 13 of the judgment.

interpretation of Article 1(1) of the Regulation than that warranted by the text is precluded by the limitation of the Commission's competence to agricultural products other than fishery products. The Regulation was adopted on the basis of Article 75(4) of the Act of Accession (and of Article 243(4), its equivalent concerning Portugal). The fact that a procedure specific to the regime established in Chapter 3 of Part Four of the Act was employed would, on its own, be sufficient, in my view, to confirm the above textual analysis of Article 1(1) of the Regulation as being limited in scope to the residual duties established by that Chapter. However, this point is, I think, confirmed beyond doubt by the fact that the Commission possesses no equivalent competence to suspend duties under Chapter 4 of Part Four of the Act. The suspension of duties on imports of fish products from Spain into the Community of Ten would have required, at the material time, an act of the Council voting by qualified majority on a proposal from the Commission. An act of the Commission cannot be construed so as to encroach upon the competence of another institution, such as the Council, simply in order to give fuller effect to a policy which, in so far as it might relate to the products in question, the Commission was not itself competent to pursue. [15] Such an encroachment would be more than *de minimis*; it would entail, in the light of the general wording of Article 1(1) of the Regulation, applying provisions of one chapter of the Act of Accession to the entire category of agricultural products governed by another.

The second question

19. I will address in turn the applicability of the first and second paragraphs of Article 5 of the Regulation on recovery. With the exception of Igino Mazzola, which sought to rely only on Article 5(2), the plaintiffs in the main proceedings argued for the applicability of both provisions. The Commission and Italy submitted that the first paragraph was inapplicable, and that the Court should give guidance in accordance with its case-law on the application of the second paragraph, while Italy stressed some of the special features of these cases which might justify recovery.

20. In the circumstances of these cases, only the first indent of Article 5(1) of the Regulation on recovery need be examined. The Court stated in *Beirafrio* [16] that Regulation No 1715/90 [17] defines exhaustively the

15 — See Article 4(1), second indent, of the EC Treaty. Any competence on the part of the Commission to act in the place of the Council would have to be expressly conferred by the EC Treaty (or, in this case, the Act of Accession): see Case C-327/91 *France* v *Commission* [1994] ECR I-3641, paragraph 31 of the judgment.

16 — Case C-371/90 *Beirafrio* v *Alfândega do Porto* [1992] ECR I-2715, paragraph 15 of the judgment.

17 — Cited in footnote 8 above.

category of acts of the competent authorities of the Member States which fall within the first indent of Article 5(1) of the Regulation on recovery. As the present cases concern the position taken by the Italian authorities as regards the applicability of a suspension of import duties, rather than a question of the classification of goods, the first indent of Article 5(1) cannot apply.

21. Even if the Court were to accept the argument of certain of the plaintiff companies that Article 5(1), first indent should be applicable in other circumstances, in which national law deems the competent authorities to be bound by customs information given by them, [18] this would not appear to permit the application of that provision in the circumstances of the present cases. Although the plaintiffs in the main proceedings and Italy disagreed in their observations about the binding quality of the circulars which stated that duties were suspended on fish products from Spain by virtue of the Regulation, it appears that those circulars were of general application and were not directly addressed to individual traders. In *Behn Verpackungsbedarf*, [19] the Court observed that there was a material difference in the terminology used in the first and second indents of Article 5(1) of the Regulation on recovery:

> 'By thus making a distinction between the "information" referred to in the first indent of Article 5(1) and the "provisions of a general nature" referred to in the second indent of Article 5(1), the Community legislature clearly indicated that the word "information" did not include indications given in a document of a general nature addressed to unspecified persons but covered indications given by the competent authority to a particular trader in a specific case.
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> ...
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> [The] principle of legal certainty may be relied on by a person liable to pay duty with respect to concrete information obtained from an authority which he has consulted in order to deal with a specific case, but not by a person who relies on an administrative directive of a general nature which, like the

18 — This was the test employed in the application of Article 5(1) of the Regulation on recovery before the coming into force of Regulation No 1715/90; see *Beirafrio*, cited in footnote 16 above, paragraphs 16 and 17 of the judgment.

19 — Case C-80/89 [1990] ECR I-2659, paragraphs 21 to 24 of the judgment.

customs tariff manual involved in this case, is merely informational.' [20]

22. As regards Article 5(2) of the Regulation on recovery, the constant case-law of the Court shows that it is for the national court to apply its provisions in the light of the facts of these cases. [21] The competent authorities are not entitled to take action after customs clearance to recover duties which have not been collected if the three conditions set out in Article 5(2) are satisfied. [22]

23. The second question referred by the Tribunale di Genova presupposes that the traders in question had observed all the provisions laid down by the rules in force as far as their customs declarations were concerned; thus this condition need not detain us further.

24. Italy argued that the complexity of the legislation in question meant that this was more a case of uncertainty about the scope of the customs rules in question than of error as such on the part of the authorities. In this regard, it emphasized the initial use of the suspended clearance procedure. If the result of the operation of the procedure was that the affected traders were on notice that duty might be collectable during some reasonable period after provisional clearance, upon the resolution of the moot point, Italy's argument would have some merit, as legitimate expectations would not be prejudiced thereby. However, if the circular of 22 February 1992 had the effect of ending suspended clearance and of confirming to the traders in question that the authorities would not seek to recover duty in respect of past or future imports of tuna in oil from Spain, during the period of applicability of the Regulation, the authorities must be deemed to have been in error within the meaning of Article 5(2) of the Regulation on recovery. Ultimately, of course, it is only the national court that can assess the manner in which the procedure operates.

25. The question whether any error on the part of the customs authorities could reasonably have been detected by the person liable, acting in good faith, requires the national court to have regard to 'the nature of the error, the professional experience of the traders concerned and the degree of care which they exercised'. [23] A number of observations may be made about the nature of the error in question. The term 'agricultural products' normally includes fishery products in Community law. The statement of policy in the third recital in the preamble to the Regulation is expressed, without qualification, to extend to agricultural products listed in the Annex to Regulation No 3835/90, which list includes products such as prepared and

20 — Paragraphs 22 and 24 of the judgment.

21 — See, for example, Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535; *Beirafrio*, cited in footnote 16 above; Case C-187/91 *Belgian State* v *Belovo* [1992] ECR I-4937.

22 — Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199; Case 378/87 *Top Hit Holzvertrieb* v *Commission* [1989] ECR 1359.

23 — See, for example, Joined Cases C-153/94 and C-204/94 *The Queen* v *Commissioners of Customs and Excise*, ex parte *Faroe Seafood* [1996] ECR I-2465, paragraph 99 of the judgment; *Deutsche Fernsprecher*, cited in footnote 21 above, paragraph 24; Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 22.

preserved fish. Article 1(1) of the Regulation is similarly phrased. It is only when one turns to Article 75 of the Act of Accession that the limited effect of the Regulation becomes clear. However, the fact that the sliding scale of residual duties established in Article 75(1) of the Act of Accession is the same as that applied by Article 173 of the Act could have suggested to the lay reader, even if an experienced trader, that they established, in effect, a common regime, which was suspended by the Regulation. In my view, the legal provisions in question in the present cases are only marginally less complex than those at issue in *Weis* v *Hauptzollamt Würzburg*, in which the Court stated that the error on the part of the authorities was far from being detectable. [24]

26. The complexity of the issue is further evidenced by circumstantial features of these cases. The Tribunale di Genova spoke in its order for reference of the 'objective ambiguity of the relevant legislation'; while I think the meaning of Article 1(1) of the Regulation is clear, I accept that it requires close examination and that the reference to 'agricultural products listed in the Annex to Regulation (EEC) No 3835/90' could have given rise to misunderstandings about its material scope. Indeed, the plaintiffs in the main proceedings mention a judgment of the Tribunal di Genova, issued after the making of the order for reference, which concluded that Spanish fish products did indeed benefit from the suspension of duty during the material period. This was also the provisional and, later, definitive view of the Italian authorities over a period of about a year. The fact that the Italian authorities, having first reserved their position, confirmed the suspension of duties by the circular of February 1992 could have allayed any doubts entertained in good faith by traders about the customs regime applicable to Spanish fish products. While the precise legal effect of these circulars in Italian law is a matter of dispute, the order for reference states that they were binding on local customs offices.

27. It also appears from the pleadings that a number of other Member States raised their concerns with the Commission, which required the preparation of an interpretative note which was sent to the competent authorities of all the Member States. This further supports the view that the error committed by the Italian authorities was not reasonably detectable by the plaintiffs in the main proceedings. [25]

28. In the light of the foregoing, I am of the opinion that the complexity of the legal provisions at issue and the factual circumstances of the present cases provide the national court with adequate grounds, contingent on its ultimate findings of fact, to decide that the error of the authorities was not reasonably detectable by experienced and careful traders.

24 — Case C-292/91 [1993] ECR I-2219, paragraph 17 of the judgment.

25 — See *Hewlett Packard France*, cited in footnote 23 above, paragraph 23 of the judgment. Although the Commission adopted a regulation, rather than an interpretative note, in order to resolve the divergences among the Member States regarding the customs classification at issue in that case, the two situations are, in my view, comparable.

Conclusion

29. In accordance with the above analysis, I recommend that the Court answer the questions referred by the Tribunale di Genova as follows:

(1) The suspension of residual customs duties applicable to imports from Spain into the Community of Ten in accordance with Article 75(1) of the Act of Accession of that country which was provided for in Article 1(1) of Council Regulation (EEC) No 3416/91 of 25 November 1991 as regards 'the agricultural products listed in the Annex to Regulation (EEC) No 3835/90' does not apply to imports from Spain of tuna in olive oil.

(2) Article 5(1) of Council Regulation (EEC) No 1697/79 of 24 July 1979 does not apply to cases such as the present. It is for the national court to establish whether the criteria for the application of Article 5(2) of that Regulation are fulfilled. In order to determine whether an error on the part of the authorities could not reasonably have been detected by the person liable, account must be taken, in particular, of the nature of the error, the professional experience of the trader concerned and the degree of care which he exercised. Relevant considerations include the complexity of the legislation, the generality with which the underlying policy objective is expressed, the confirmation of the error in question by acts of the Member State in question, and divergence of views among the Member States concerning the proper interpretation of the relevant legal provisions.