REPORT FOR THE HEARING
delivered in Case 148/87 *

I — Facts and written procedure

1. On 28 September 1984 Th. Frydendahl Pedersen A/S, a Danish company whose business is the supply of nets for fishing vessels, applied to the Holstebro Customs Office for a refund of sums paid during the period from 8 October 1980 to 14 June 1984 as import duties on fishing nets, amounting to DKR 1 756 932, together with interest thereon. In support of its application Pedersen claimed that during those four years the said customs office had misinterpreted the relevant Community provisions in force.

2. On 11 June 1986 the Danish authorities submitted to the Commission a request for the application of Article 13 of Council Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (Official Journal 1979, L 175, p. 1). That article provides that import duties may be repaid or remitted in situations resulting from special circumstances in which no negligence or deception may be attributed to the person concerned.

3. By a decision of 26 February 1987 addressed to the Danish authorities, the Commission stated that the request by the company concerned for repayment was not justified.

4. By application lodged at the Court Registry on 12 May 1987, Th. Frydendahl Pedersen A/S instituted the present proceedings since it considered that the said decision of the Commission infringed its rights. The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the view of the Advocate General, the Court decided to assign the case to the First Chamber and to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

declare invalid, pursuant to Article 173 of the EEC Treaty, the Commission's decision of 26 February 1987 finding that the repayment of import duties is not justified in a particular case, the final version of which was transmitted to the applicant by the Danish Ministry of Fiscal Affairs by letter of 13 March 1987;

order the Commission to pay the costs.

The *Commission* contends that the Court should:

dismiss the application;

order the applicant to pay the costs.

* Language of the Case: Danish.

III — Submissions and arguments of the parties

After recounting the facts at the origin of the dispute, the applicant makes four submissions.

Facts

It appears from the documents in the file that before the accession of Denmark to the EEC the regular supply of fishing nets to fishermen did not fall under the provisions concerning the repayment of customs duties for naval construction (Article 77 of the Danish Customs Law of 1970).

From 1 January 1973 the Danish version of Section II A of the Preliminary Provisions of the Common Customs Tariff differed from the French and other versions, which read as follows:

'*Goods for certain categories of ships, boats and other vessels*

Customs duties are suspended in respect of goods for use in the construction, repair, maintenance or conversion of the ships, boats or other vessels listed in the following schedule, or for fitting out or equipping such ships, boats or other vessels.'

The words 'maintenance' and 'fitting out' did not appear in the Danish version. After 1978 the Danish text was brought into line with the French text.

In its application Th. Frydendahl Pedersen states that in the course of the period from 1973 to 1984 it made several approaches to the Danish authorities in order to clarify the problem of the customs treatment of fishing nets which it imported into the Community in order to resell them to fishermen. It had in fact been informed by some of its competitors that in other Member States the importation of the goods in question was not subject to customs duties.

In particular the applicant states that in June 1984 its attention was drawn to the fact that the British customs authorities interpreted the relevant Community rules, namely Regulation No 1535/77 of 4 July 1977 determining the conditions under which certain goods are eligible upon importation for a favourable tariff arrangement by reason of their end use (Official Journal 1977, L 171, p. 1) as meaning that it was possible to import free of duty fishing nets intended for the routine supply of deep-sea vessels. After obtaining that information the applicant contacted the Danish authorities and, on 20 June 1984, submitted a request for grant of authorization pursuant to Regulation No 1535/77.

After obtaining the said authorization, on 28 September 1984 the applicant requested the Holstebro Customs Office to refund the customs duties paid during the period from 8 October 1980 to 16 June 1984. It is that request which forms the subject-matter of the present proceedings.

The Commission adds the following further details to the account of the facts given by the applicant.

Even the Danish version in force between 1973 and 1978, in which the words 'maintenance' and 'fitting out' did not appear, stated without the slightest possibility of doubt that customs duties were suspended in respect of goods intended for equipping the ships, boats and other vessels listed in the schedule and that that suspension was therefore not limited to goods used in their construction, conversion or repair. The omission of the words in question in the Danish version was of no significance in the Commission's view, since the fishing nets concerned qualified for suspension of customs duties as goods for 'equipping' purposes.

Commission Regulation No 2695/77 of 7 December 1977 determining the conditions under which goods for certain categories of aircraft and ships are eligible upon importation for a favourable tariff arrangement (Official Journal 1977, L 314, p. 14), the text of which is identical in all the language versions, in particular in English, Danish and French, provides that the provisions of the abovementioned Commission Regulation No 1535/77 are to apply to goods intended for 'fitting out or equipping' such ships, boats or other vessels.

Inclusion in the favourable tariff arrangement is subject to presentation of an authorization by the importer of the goods. As the applicant itself admits, it did not submit a request for the grant of authorization before 20 June 1984.

The four submissions made by the applicant

1. *Invalidity of Commission Regulation No 3799/86 on which the contested decision is based*

The decision at issue is based on Council Regulation No 3069/86 of 7 October 1986 amending Regulation No 1430/79 on the repayment or remission of import or export duties (Official Journal 1986, L 286, p. 1) and Commission Regulation No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4 a, 6 a, 11 a and 13 of Council Regulation No 1430/79 on the repayment or remission of import or export duties (Official Journal 1986, L 352, p. 19).

According to the applicant, Commission Regulation No 3799/86 is invalid because it had retroactive effect as regards all applications in respect of which decisions had not been adopted by 1 January 1987. Its invalidity resulted from the fact that Council Regulation No 3069/86 provides, in the second paragraph of Article 2, that the new provisions amending Regulation No 1430/79 are to apply 'to applications for repayment or remission of import or export duties submitted to the competent authorities on or after 1 January 1987'. Commission Regulation No 3799/86 provides, in Article 13, that 'this Regulation shall enter into force on 1 January 1987'. Hence it is applicable in its entirety to the requests submitted before 1 January 1987 because if that were not the case there would be a lacuna in the law since the preceding Commission regulation (Regulation No 1575/80 of 20 June 1980, Official Journal 1980, L 161, p. 13) was no longer in force at that date.

The applicant claims that the case-law of the Court has established the principle that Community measures may not be retroactive. In particular, in its judgment of 16 February 1982 in Case 258/80 (*Rumi* v *Commission* [1982] ECR 487), the Court specified two conditions under which a derogation from that principle was permissible, namely that the purpose to be achieved demands that the legal measure be given retroactive effect and, secondly, that the legitimate expectations of those concerned are duly respected. In the case in point neither of those conditions is satisfied and Regulation No 3799/86 is therefore invalid.

The Commission disputes first of all that Regulation No 3799/86 has retroactive effect. It maintains that the applicant has not indicated any provision of that regulation which has been used against it. It points out that as a whole the new regulation is more favourable to the applicant than the previous regulation and that, on the only point where there is a potentially significant difference in this case between the two Commission regulations, namely the time-limit for replying to requests for repayment, the Commission observed the strictest rule (the time-limit of four months).

2. (In the alternative) *The decision in question is founded on an incorrect legal basis*

The applicant claims that the Commission's decision, adopted on the basis of Council Regulation No 3069/86 and Commission Regulation No 3799/86, is founded on an incorrect legal basis because Council Regulation No 3069/86 was not applicable to requests submitted before 1 January 1987.

In that regard the Commission replies, in essence, that the decision in question makes it clear that the Commission examined the applicant's case in the light of the previous rules and that it even adopted the decision within the four-month period previously applicable. The reference to Council Regulation No 3069/86 serves merely to indicate the most recent amendment of Regulation No 1430/79. Council Regulation No 3069/86 was not applicable to the applicant's case and the Commission adopted its decision pursuant to Regulation No 1430/79 in the version preceding the amendments resulting from Regulation No 3069/86. According to the Commission, it was necessary for procedural reasons to refer to the new Commission regulation in the decision in question.

Finally, the Commission rejects the applicant's contention that the Danish text of the decision contains such serious errors of drafting that it is incomprehensible.

3. (In the further alternative) *The decision in question is unlawful because the time-limit laid down in the regulation was exceeded*

According to the applicant, the time-limit laid down in the second paragraph of Article 5 of Commission Regulation No 1575/80 of 20 June 1980 laying down provisions for the implementation of Article 13 of the abovementioned Council Regulation No 1430/79, as amended by Article 1 of Commission Regulation No 945/83 of 21 April 1983 (Official Journal 1983, L 104, p. 15), was exceeded by the Commission in this case. That time-limit, which is four months, must be regarded as having been set in order to give citizens the certainty of

receiving reasonably expeditious treatment, which rules out any possibility of its being extended. If the time-limit is exceeded before the Commission has adopted a decision, repayment must take place. In the present case, the request was sent by the Danish Ministry to the Commission on 11 June 1986. On 7 October 1986 the Commission asked the Danish authorities to withdraw their request and to supply additional information. The Danish authorities formally withdrew their request and sent it back to the Commission on 28 October 1986. That course of conduct of the Commission and the Danish authorities was improper and, in the applicant's view, the Commission's request and the Danish authorities' withdrawal of their request should be regarded as invalid administrative acts.

The Commission points out that because it received only very limited information about the case from the Danish authorities it had to ask for supplementary information. The period should accordingly be regarded as beginning to run from 28 October 1986. In that connection the Commission states that the request, which had been received on 19 June 1986, was examined by the Committee on Duty-Free Arrangements on 12 September 1986. On that date Commission Regulation No 1575/80, which was applicable at the time, provided that the Commission's decision pursuant to Article 13 of Council Regulation No 1430/79 was to be taken at the latest within a period of four months from the date on which the request was received. Since experience had shown that the application of that strict rule gave rise, in certain cases, to an unsatisfactory legal situation, the provision in question was amended by Commission Regulation No 3799/86, which lays down a time-limit of six months and states that 'where the Commission has found it necessary to request additional information from the Member State in order to give a ruling, the period of six months shall be extended by a period equivalent to that between the date the Commission sent the request for additional information and the date it received that information'. Before the new rules came into force any difficulties encountered were overcome by the applicant Member State's withdrawing its request and re-submitting the case. Although no mention was made of that method in the relevant regulation, it was contrary neither to its letter nor its spirit, because a Member State is always entitled to withdraw a request. Moreover, that method had been used in only two or three cases over a period of seven years.

Finally, the Commission points out that on 9 December 1986, in order to clarify the facts of the case which were extremely complicated, it requested the applicant to submit any additional documents that it considered might be helpful and that the applicant replied in a letter of 7 January 1987. If the Commission does not have sufficient information available, it is obliged to reject an application. Its request for additional information from the applicant and the Danish authorities was made in order to ascertain the facts of the case and to avoid giving a negative decision which could lead to an immediate action before the Court when the facts would be examined for the first time in their entirety.

The applicant replies that the real question is whether the Commission or a Member State may depart from a clear rule imposing a time-limit when that rule confers rights on third parties and that departure occurs without any previous consultation with those third parties.

4. (In the final alternative) *The decision should be annulled because the conditions laid down for repayment are fulfilled in this case*

The applicant claims that the two conditions specified in Article 13 of Council Regulation No 1430/79, namely the existence of special circumstances and the absence of negligence or deception attributable to the person concerned, are fulfilled in this case.

Special circumstances

Referring to its extensive account of the facts, the applicant maintains, in substance, that the payment of the customs duties in respect of which it is requesting a refund was the consequence of a misinterpretation on the part of the Danish authorities of the relevant Community rules. That erroneous interpretation was embodied not only in an administrative practice but also in the national Danish rules (notices and communications to the public). The misinterpretation was due to an error of translation by the Commission contained in both the Common Customs Tariff and Commission Regulation No 1535/77 of 4 July 1977 determining the conditions under which certain goods are eligible upon importation for a favourable tariff arrangement by reason of their end use (Official Journal 1977, L 171, p. 1).

The Commission challenges the significance of the translation error and considers that, even though the Danish authorities supplied incomplete information regarding the legal situation, that does not amount to special circumstances because the legal situation was not so ambiguous as to prevent individuals from exercising their rights. The same solution as was adopted in Regulation No 1697/79 on post-clearance recovery should be applied and repayment excluded if the error could have been detected.

Absence of negligence or deception

The applicant claims that it had no reason to doubt the Danish authorities' interpretation of the rules concerning the favourable tariff arrangement. The applicant, an undertaking which examines the customs rules meticulously, was not therefore guilty of negligence in relying on the interpretation given by the Danish customs authorities, which, if they themselves had not made an error of law, should have informed the applicant of its rights.

The Commission comments on this point that the applicant did not apply for authorization before 1984 or formally and clearly ask the Danish authorities to provide it with general information. A specific benefit provided for by Community legislation can be granted only at the express request of the person concerned. While pointing out that the two conditions must be satisfied cumulatively, it therefore considers that in the present case the condition concerning the absence of negligence on the part of the applicant is not satisfied either.

G. Bosco
Judge-Rapporteur