OPINION OF ADVOCATE GENERAL GULMANN

delivered on 11 November 1992 *

Mr President,
Members of the Court,

1. Between 1982 and 1984 the two applicants, who operate as customs agents in the Netherlands, imported several consignments of honey originating in Jamaica. They presented the certificate provided for in the Lomé Convention to attest the Jamaican origin of these goods, so that the goods could be imported without payment of the normal customs duties.

2. Towards the end of 1984 the Commission conducted an investigation in Jamaica and discovered that certificates of origin had been drawn up incorrectly for several years. The Jamaican authorities themselves subsequently carried out an inquiry, at the end of which they informed the Commission on 5 December 1984, among other things, that the certificates of origin presented by the applicants had been issued improperly and that they had consequently been withdrawn.

As a result of the withdrawal of the certificates, in October 1985 the Netherlands authorities demanded that the applicants make retrospective payment of the normal ordinary customs duty on the honey which they had imported. The applicants then immediately applied to the Netherlands authorities for remission of the import duties under Article 13 of Council Regulation No 1430/79 on the repayment or remission of import or export duties (hereinafter the 'basic regulation'). [1] The customs administration rejected the applications. The applicants appealed against these decisions to the Tariefcommissie Amsterdam, which on 20 November 1989 annulled the decisions and ordered that the applications be submitted to the Commission on the ground that, under the Community rules applicable at that time, all applications for remission of import duties had to be submitted to the Commission pursuant to Article 13.

The Netherlands authorities then forwarded the applications to the Commission, which after approximately five months' examination of the file decided that remission of the import duties was not justified in the two cases. The Commission reached its decisions on the basis of Article 13 as amended by Regulation No 1672/82. [2] In this version, Article 13 was worded as follows:

'Import duties may be repaid or remitted in situations other than those mentioned in sections A to D which result from special

* Original language: Danish.

1 — OJ 1979 L 175, p. 1.
2 — OJ 1982 L 186, p. 1.

circumstances in which no negligence or deception may be attributed to the person concerned'. [3]

3. The applicants claim that the Court should annul the decisions and submit four pleas in support of their case.

The Commission, supported by the Netherlands Government, contends that the Court should discuss the actions.

The period allowed for the Commission to reach a decision

4. When the applicants lodged their applications for remission of duties with the Netherlands authorities in 1985, the implementing regulation in force was Commission Regulation No 1575/80 laying down provisions for the implementation of Article 13 of the basic regulation, last amended by Commission Regulation No 945/83 (hereinafter the '1980 implementing regulation'). [4] With regard to decisions to be taken by the Commission, Article 5(2) provided that:

'This decision shall be taken within four months of the date on which the application referred to in Article 3(1) is received by the Commission'.

Article 7 of the regulation stated that the national authority had to grant the application if the Commission had not reached its decision within the four-month period referred to in Article 5.

5. The 1980 implementing regulation was repealed with effect from 1 January 1987 and replaced by Commission Regulation No 3799/86 laying down provisions for the implementation of Articles 4a, 6a, 11a and 13 of the basic regulation (hereinafter the '1986 implementing regulation'). [5] The new regulation amended the previous rules in a number of respects. The most important amendment for the purposes of the present cases was that the period allowed to the Commission was extended to six months; see Article 8(2).

6. The applicants assert that the Commission was required to consider their applications for remission of duties on the basis of the time-limit rules that were in force when post-clearance recovery was carried out, in other words within the four-month period laid down in the 1980 implementing regulation. As the Commission had not reached a decision within that period, the Netherlands authorities were, in the opinion of the applicants, required to grant the applications and for that very reason the Commission's decision became superfluous and should therefore be annulled.

The Commission and the Netherlands Government, however, claim that it is the procedural rules of the 1986 implementing regulation that should be applied, since the

3 — Article 13 was amended by Council Regulation No 3069/86 (OJ 1986 L 286, p. 1). It is now worded as follows:
'Import duties may be repaid or remitted in special situations other than those referred to in sections A to D, which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned'.
It is common ground in these cases that the applications should be dealt with on the basis of Article 13, as worded in the 1982 regulation.

4 — OJ 1980 L 161, p. 13, and OJ 1983 L 104, p. 14.

5 — OJ 1986 L 352, p. 19.

applications for remission of duty were not lodged with the Commission until after the regulation came into force on 1 January 1987; this means that the Commission must reach a decision within six months as a result of the extension of the period allowed for the examination procedure.

7. According to the case-law of the Court, substantive rules are usually interpreted as applying to situations existing before their entry into force only if there are sufficiently clear indications that that was indeed the effect sought, whereas the principle is exactly the reverse as regards procedural rules. Hence procedural rules are generally held to apply even to the examination of legal situations arising before they entered into force. [6]

The applicants contend that this principle does not apply in the present cases. They claim that the procedural and substantive rules relevant to those cases form an indivisible whole and that they cannot therefore be considered in isolation with regard to their effect in time. They cite in this regard the judgments of the Court in the *Salumi II* and *Reichelt* cases. [7]

The decisive questions in these two cases were whether new Community rules (in the *Reichelt* case, Regulation No 1430/79) which had replaced existing national rules could be applied to disputes arising before their entry into force. The Court ruled as follows in this regard:

'Replacing the relevant national provisions with Community provisions, that regulation contains both procedural and substantive rules, which form an indivisible whole and the individual provisions of which may not be considered in isolation, with regard to the time at which they take effect' (paragraph 11 of the *Salumi II* judgment).

Hence the Court refused to give new Community rules retroactive effect. That decision applied to both substantive and procedural rules. As regards substantive rules, the decision was consistent with the general premises set out by the Court, and it is not surprising that the procedural rules could not take legal effect before the substantive rules to which they related.

In my view, it is not possible to draw conclusions from those judgments as to the crucial issues arising in these cases, namely whether the Commission had to deal with applications for remission of duties on the basis of the procedural rules in force when the applications were submitted to it or on the basis of the rules applicable when the applications were lodged with the Netherlands authorities, it being agreed that it was the substantive rules in force when the applications were submitted to the Netherlands authorities that should apply.

6 — See, for example, the judgments in Joined Cases 212/80 to 217/80 *Amministrazione delle Finanze dello Stato* v *Salumi* [1981] ECR 2735 and in Case 154/84 *FKF* v *Hauptzollamt Berlin-Süd* [1985] ECR 3165.

7 — *Salumi II* judgment, cited in the preceding footnote, and Case 113/81 *Reichelt* v *Hauptzollamt Berlin-Süd* [1982] ECR 1957.

8. The question which arises in the present cases is whether there is a link between the relevant substantive and procedural rules such that the four-month rule laid down in the 1980 implementing regulation should apply. As to whether the relevant substantive and procedural rules 'form an indivisible whole', the question to be asked is not so much whether the relevant substantive and procedural rules are contained in different regulations or different sections of the same regulations but rather whether there is coherence between the substantive rules and the procedural rules, so that application of new procedural rules would have a direct or indirect impact on the content and scope of the substantive rules. There are no grounds for departing from the fundamental principle regarding the time at which procedural rules take effect unless it can be established that that principle is likely to have such an impact on the application of the substantive rules. The applicants have not demonstrated that this is so in the cases now before the Court. It is therefore necessary to apply the basic principle governing the time at which procedural rules take effect. [8]

The applicants' first plea should therefore be rejected.

8 — In my view, the applicants' reference to the Opinion of Advocate General Lenz in Case 148/87 *Frydendahl Pedersen* v *Commission* [1988] ECR 4993, which concerned the same rules as those at issue in the present cases, is irrelevant. The Court has not had occasion to rule on the question whether the 1986 implementing regulation had retrospective effect. This point had, however, been examined by the Commission and Advocate General Lenz. The *Frydendahl Pedersen* case differed in one essential respect from the present cases in that it related to an application lodged with the Commission before the entry into force of the 1986 implementing regulation. The applicant had maintained that the 1986 implementing regulation was illegal to the extent that it would apply retrospectively to all applications on which a decision had not been reached by 1 January 1987. The Commission and Advocate General Lenz agreed in principle with the applicant in considering that the new rules of the 1986 implementing regulation did not have retrospective effect in that case; they considered that the new rules did not affect the treatment of applications already lodged with the Commission before the regulation came into force.

The statement of reasons for the Commission's decisions

9. The applicants maintain that the decisions do not meet the requirement, laid down in Article 190 of the EEC Treaty, that the reasons on which they are based must be stated. In their view, reference to the judgment of the Court in Joined Cases *Van Gend & Loos and Bosman* [9] is insufficient for reasoning purposes and wrong in any event. The applicants consider that the Commission cannot simply refer to a judgment without indicating the reasons why that judgment is relevant and that in any case, on the actual substance, the Commission is wrong to consider that judgment relevant to the present case.

10. The statement of the grounds for the decisions contains a summary of the facts and law underlying the applications for remission of duties and concludes with the following considerations:

'whereas the declarant is a customs agent who completed the formalities for entry into free circulation on behalf of a third party but in his own name, himself assuming the obligation to pay any import duties that might be levied on the declared goods;

whereas he therefore assumed responsibility both for the payment of import duties and

9 — Joined Cases 98/83 and 230/83 *Van Gend & Loos and Expeditiebedrijf Wim Bosman* v *Commission* [1984] ECR 3763.

for the regularity of the documents which he presented to the customs authorities in support of the declaration of release into free circulation;

whereas the fact of having been furnished with invalid certificates or documents that were subsequently cancelled by the competent authorities cannot be considered a special circumstance in the meaning of Article 13 of Regulation (EEC) No 1430/79 that can justify the repayment of import duties legally due, as good faith concerning the validity of such certificates and the accuracy of their contents is not generally protected, as stated in the judgment of the Court in Joined Cases 98/83 and 230/83;

whereas it is therefore not justified in this case to grant the request for repayment of the import duties'.

In its statement of grounds, the Commission shows that the fact that recovery is effected against a customs agent cannot be a decisive factor for the purposes of remission of duties; the Commission then states that 'special circumstances' in the meaning of Article 13 are not present if duties are collected retrospectively because certificates proved to have been improperly issued.

The considerations set out above satisfy the requirements which may be applied to the statement of reasons on which decisions are based.

11. It is therefore necessary to examine whether, as the applicants contend, the reasons adduced are wrong in substance, in view of the existence of such great differences between the judgment in the *Van Gend & Loos and Bosman* cases and the present cases that that judgment cannot be cited in support of the argument that no 'special circumstances', within the meaning of Article 13, exist in the present cases.

In the judgment in the *Van Gend & Loos and Bosman* cases the Court stated that recourse to the concept of 'special circumstances' presupposes:

'that the external cause relied upon has irresistible and inevitable consequences to the point of making it objectively impossible for the persons concerned to meet their obligations'.

The Court then found that:

'In this case, since the applicants are competent professionals, the fact of having been furnished with invalid certificates of origin cannot be regarded as an unforeseeable and inevitable circumstance which occurred in spite of the exercise of all due care. A customs agent, by the very nature of his functions, renders himself liable for the payment of import duty and for the validity of the documents which he presents to the customs authorities. As regards the argument that the applicants were not able to recover their loss from their clients because the latter had gone into liquidation, it should be observed that Article 13 of Regulation No 1430/79 is manifestly not intended to protect customs

agents against the consequences of their clients going into liquidation.

The applicants' argument that the fact that the certificates of origin were issued by the customs authorities of the countries named in them constitutes a "special circumstance" within the meaning of the aforementioned Article 13 must also be rejected. The Commission did not exceed the discretion granted to it by Article 13 of Regulation No 1430/79 in deciding that that fact was one of the professional risks which a customs agent, by the very nature of his functions, runs.' (Paragraphs 16 and 17 of the judgment).

In my view, the applicants are wrong to claim that the Commission cannot base its reasons for the decisions in the present cases on that judgment. The differences alleged by the applicants between the facts underlying the present cases and those underlying that judgment do not exist. It seems obvious to me that no importance can be attached to the fact that customs agencies vary in size and experience. The decisive point is that the persons concerned act as approved customs agents. Furthermore, it is unimportant that the post-clearance recovery of duties was prompted by the discovery that the document which served as the basis for exemption from duties proved to be false or had been withdrawn because an investigation showed that the conditions for its issuance had not been fulfilled. The decisive point in both cases is that the conditions for exemption from customs duty were not met and that this possibility is a risk to be borne by importers, even those acting in good faith.

Moreover, it is clear from the judgment that the applicants' good faith regarding the correctness of the certificates of origin is not relevant in determining whether 'special circumstances' exist.

No significance can be attached to the fact that it was not shown that the imported honey did not actually originate in Jamaica or another ACP State, if only because remission of duties can be obtained only if the importer has established that the imported goods originated in an ACP State. Moreover, this question concerns the legality of the withdrawal of the certificates of origin and cannot therefore be adduced in support of the claim that the Commission's decisions concerning the applications for remission of duty are illegal; see, in this regard, the judgment of the Court in the *Italgrani* case [10] concerning the application of Article 13 of the basic regulation, in which the Court held:

'It follows from the foregoing that the applicants may only properly rely, in relation to the contested decision, on arguments seeking to show the existence in this case of special circumstances and the absence of negligence or deception on their part, and not on arguments seeking to show that the decision subjecting them to payment of the duty at issue was unlawful' (paragraph 13 of the judgment).

12. The applicants' plea of insufficient reasoning must therefore be rejected.

10 — Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani* v *Commission* [1987] ECR 1303.

Illegality of the decisions resulting from verifications carried out by the Commission in Jamaica

13. The applicants contend that the withdrawal of the certificates of origin is illegal in that it came about as a result of Commission investigations in Jamaica which were themselves illegal because they were conducted in breach of the rules of the Second Lomé Convention, and especially Article 25 of Protocol 1. [11]

This plea must clearly be rejected. Concerning as it does the legality of the decision by the Netherlands authorities to effect post-clearance recovery of import duties, it cannot be adduced in the present cases; see the *Italgrani* judgment, cited above. Furthermore, this plea does not withstand analysis. It is true that the Commission does not deny that it did not follow the procedure indicated in Article 25 of Protocol 1, but the applicants have not in any way established that the Commission acted in breach of the rules of the Second Lomé Convention by carrying out checks in an ACP State in order to discover possible irregularities in the issuance of certificates of origin. Such checks are, of course, carried out with the agreement of the authorities of the ACP State concerned.

Breach of the rights of the defence

14. The applicants maintain that the procedure followed for the adoption of the disputed decisions did not comply with the guarantees established in this regard by Community law, considered *inter alia* in the light of Article 6 of the European Convention on Human Rights. The applicants observe that they did not have an opportunity to express their point of view directly to the Commission and that they did not have all the information of importance in the adoption of the disputed decisions.

In the *Control Data* judgment [12] as well as in the *Van Gend & Loos and Bosman* judgment, the Court has already had occasion to rule on such pleas. The Court considered that the Commission had followed the procedure laid down in the relevant regulations. Like the present cases, these were cases in which

— the traders had lodged applications with the national authorities for the remission of import duties,

— the applications contained the applicants' arguments, together with the required documentation, to support their claim that the conditions for obtaining remission of the duty were met, and

— the applications had been submitted to the Commission; before reaching its decision, the latter had consulted a committee composed of representatives from Member States.

11 — OJ 1980 L 347, p. 73.

12 — Case 294/81 *Control Data* v *Commission* [1983] ECR 911.

In these judgments the Court considered that the procedure indicated had enabled the applicants to present to the national authorities all the arguments they wished to use. The Court therefore concluded that 'in those circumstances, the complaint based on a breach of the procedural requirements must be dismissed'. [13]

The applicants in the present cases do not dispute in principle that the procedure laid down in the relevant Community rules was followed and that the judgments in the *Van Gend & Loos and Bosman* cases and in the *Control Data* case contain rulings on pleas similar to those put forward in the present cases. They consider, however, that the Court should reconsider those judgments in the light, *inter alia*, of its more recent case-law concerning the importance to be attached to respect for the rights of the defence. They cite a series of judgments in this regard, especially the judgments in the case of *Al-Jubail Fertilizer* v *Commission* and in the case of *Netherlands and Others* v *Commission*. [14]

The applicants have not adduced any grounds for amending the case-law of the Court as laid down in the judgments in the *Van Gend & Loos and Bosman* cases and the *Control Data* case. There is no contradiction between those judgments and the case-law of the Court, particularly with regard to anti-dumping duties and competition, to which the applicants have also referred. The Court has consistently emphasized the requirement of Community law for respect for the principle of *audi alteram partem*, but it is clear that the principle does not have the same importance in all types of case. The principle of *audi alteram partem* assumes particular importance in cases in which Community institutions consider that traders have infringed Community law and in which action may be taken to their detriment. Where, however, traders themselves make application for the remission of duties, no requirements can be imposed beyond those ensuing from the relevant Community rules and found to be appropriate by the Court.

15. It must be assumed that in the applications they lodged with the national authorities the applicants stated all the arguments that can be made for remission of the duties. The way in which those applications were subsequently treated was not such that the applicants need to be given an opportunity to advance fresh arguments. Indeed, during the oral procedure the applicants conceded that in the period between the submission of the applications and their processing by the Commission no new element emerged which could have been added to their arguments for the remission of duty. Moreover, there would have been no objection to the applicants' adding to the arguments contained in the applications, which they knew had been forwarded to the Commission. Such additional arguments might well have been justified, given the very long period between the

13 — See paragraph 9 in the *Van Gend & Loos and Bosman* judgment and paragraph 17 in the *Control Data* judgment.

14 — The first judgment was delivered in Case 49/88 [1991] ECR I-3187 and the second in Joined Cases 48/90 and 66/90 [1992] ECR I-565.

lodging of the applications with the Netherlands authorities and their forwarding to the Commission.

16. In the light of the foregoing considerations, I consider that there are no grounds for upholding this plea of the applicants.

Conclusion

17. I therefore propose that the Court should dismiss the applications and order the applicants to pay the costs, the Kingdom of the Netherlands bearing its own costs.